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United States v. City of Chicago: Impact Standard Applicable to State and Local Governments Under Title VII

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COMMENTS

UNITED STATES v. CITY OF CHICAGO: IMPACT STANDARD APPLICABLE TO STATE AND LOCAL GOVERNMENTS UNDER TITLE VII

Title VII of the Civil Rights Act of 1964¹ prohibits employment practices that discriminate because of race, color, religion, sex, or national origin.² As originally enacted, Title VII exempted state and local governments from the provisions of the Act.³ The United States Commission on Civil Rights, finding that state and local government employment was characterized by many discriminatory procedures, criticized the denial of this federal remedy to employees of those governments.⁴ Congress recognized the anomaly of extend-

1. 42 U.S.C., tit. VII, §§ 2000e to 2000e-17 (1970 & Supp. V 1975).

2. Civil Rights Act of 1964, tit. VII, 42 U.S.C. §§ 2000e to 2000e-17 (1970 & Supp. V 1975). Section 2000e(b) defined employer as "a person engaged in an industry affecting commerce who has twenty-five or more employees . . ." *Id.* § 2000e(b) (1970). Section 2000e-2 provided:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees 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.

Id. § 2000e-2. Section 2000e-2(h), interpreted by the Supreme Court to permit tests that are job related, provided:

Notwithstanding any other provision of this subchapter, 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 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.

Id. § 2000e-2(h).

3. Section 2000e(b)(1) reads in pertinent part: "The term 'employer' means a person engaged in an industry affecting commerce . . . but such term does not include (1) . . . a State or political subdivision thereof . . ." *Id.* § 2000e(b)(1).

4. UNITED STATES COMM'N ON CIVIL RIGHTS, FOR ALL THE PEOPLE . . . BY ALL THE PEOPLE 121 (1969) [hereinafter cited as FOR ALL THE PEOPLE]. The Commission found that "[m]inority group members are denied equal access to State and local government jobs." *Id.* at 118. This exclusion is accomplished, the Commission explained, "by overt discrimination in personnel actions and hiring decisions, a lack of positive action by governments to redress the consequences of past discrimination, and discriminatory and biased treatment on the job." *Id.* at 119. Particularly relevant to the subject of this Comment, the Commission

ing federal assistance to private employees injured by discriminatory practices while denying assistance to similarly aggrieved public employees⁵ and responded by adopting the Equal Employment Opportunity Act of 1972,⁶ thereby amending Title VII to include state and local government employees.⁷

Congress ostensibly intended that legal principles defined in pre-1972 Title VII litigation would apply equally to cases involving state and local governments under the 1972 amendments.⁸ Nevertheless, whether the Supreme Court will acknowledge this congressional in-

suggested that the "[b]arriers to equal employment are greater in police and fire departments than in any other area of State and local government." *Id.* Concluding that enforcement of the fourteenth amendment's prohibition against discriminatory state action had been sporadic and burdensome, the Commission recommended eliminating the exemption of state and local governments from the coverage of Title VII. *Id.* at 128.

5. The report accompanying the Senate bill, S. 2515, containing a provision expanding the jurisdiction of the Civil Rights Act of 1964 to include state and local governments, interpreted the findings of *FOR ALL THE PEOPLE*, *supra* note 4, to indicate that "employment discrimination in State and local governments is more pervasive than in the private sector." S. REP. NO. 415, 92d Cong., 1st Sess. 10 (1971) [hereinafter cited as S. REP. NO. 415]. The report accompanying the analogous House bill, H.R. 1746, emphasized the injustice of withholding federal remedies from the victims of constitutionally prohibited discrimination because of their peculiar employment status. H.R. REP. NO. 238, 92d Cong., 1st Sess. 17-19 [hereinafter cited as H.R. REP. NO. 238], *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2137, 2152-54 [hereinafter cited as AD. NEWS].

6. Pub. L. No. 92-261, 86 Stat. 103 (amending 42 U.S.C. § 2000e (1970) [hereinafter cited as the 1972 amendments]).

For discussion and analysis of the Equal Employment Opportunity Act of 1972 and its legislative history, see Sape and Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824 (1972).

7. The definition of "person" found in § 2000e(a) of the Civil Rights Act of 1964 was amended to include "governments, governmental agencies, [and] political subdivisions." 42 U.S.C. § 2000e(a) (Supp. V 1975). Section 2000e(b), defining "employer" was amended to include persons employing fifteen or more employees, and the "State or political subdivision thereof" exemption was deleted. *Id.* § 2000e(b).

One commentator has described the expansion of Title VII to state and local government employees as "the most significant change in the scope of the Act." Mitchell, *An Advocate's View of the 1972 Amendments to Title VII*, 5 COLUM. HUMAN RIGHTS L. REV. 311, 322 (1973).

8. Congressman Carl Perkins and Senator Harrison Williams, speaking for the House and Senate conferees, set forth the consensus: "In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII." 118 CONG. REC. 7166 (1972) (remarks of Senator Williams); *id.* at 7564 (remarks of Congressman Perkins).

The Supreme Court, apparently recognizing this intent, stated in *Morton v. Mancari*, 417 U.S. 535 (1974): "In general, it may be said that the substantive anti-discrimination law embraced in Title VII [prior to the 1972 amendments] was carried over and applied to the Federal Government [under the 1972 amendments]." *Id.* at 547. See also *Chandler v. Roudeshush*, 425 U.S. 840, 841 (1976).

tent is uncertain. This irresolution is manifested most clearly in the current controversy over the standard of proof necessary to establish a Title VII violation.

In 1971, the Supreme Court held in *Griggs v. Duke Power Co.*⁹ that employment practices, procedures, or tests, though facially neutral and innocent in intent, are unlawful under Title VII if they operate to exclude a protected group at a disproportionate rate.¹⁰ Under *Griggs*, statistical evidence that minority applicants are unsuccessful disproportionately by itself shifts the burden to the defendants to prove that their tests or practices are related directly to job performance.¹¹ If pre-1972 case law has been incorporated into post-1972 decisions, the "impact or effect" standard established in *Griggs* should govern Title VII cases brought under the 1972 amendments.¹²

In contrast to *Griggs*, in 1976, the Supreme Court held in *Washington v. Davis*¹³ that a plaintiff alleging governmental employment discrimination under the fifth¹⁴ or fourteenth amend-

9. 401 U.S. 424 (1971). The *Griggs* decision has been described as "the most important court decision in employment discrimination law." B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 5 (1976).

10. 401 U.S. 424, 430 (1971). The Fifth Circuit commented on *Griggs* as follows:

In *Griggs*, . . . the Supreme Court reshaped the statutory concept of discrimination in terms of consequence rather than motive, effect rather than purpose, to make clear that Title VII requires more of an employer who has discriminated in the past than present and future equal treatment of similarly situated employees regardless of their race. Under the mandate of Title VII, such an employer must scrutinize even the steps he now takes with neutral or benevolent motives to determine if they operated as 'built-in headwinds' for minority groups and are unrelated to job performance. If they have that operative effect, they contravene Title VII.

Peters v. Mo.-Pac. R.R., 483 F.2d 490, 498 (5th Cir.), cert. denied, 414 U.S. 1002 (1973) (footnotes omitted).

11. 401 U.S. at 432. The district and appellate courts in *Griggs* concluded that a showing of racial purpose or invidious intent to discriminate was necessary under Title VII. *Id.* at 428-29. The Supreme Court reversed, holding that Title VII abolished tests and practices that discriminate, even if no intentional discrimination is shown. *Id.* at 430. "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance," the Court said, "the practice is prohibited." *Id.* at 431.

12. See note 8 *supra* & accompanying text.

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

14. The due process clause of the fifth amendment provides in pertinent part:

No person shall be . . . deprived of life, liberty, or property, without due process of law; . . .

U.S. CONST. AMEND. V.

ments¹⁵ must prove that an employer intentionally discriminated against him. Refusing to use the impact test to establish an equal protection violation of the fourteenth amendment, the Court instead followed a line of cases holding that if no discriminatory intent is shown, a racially disproportionate effect alone will not demonstrate the unconstitutionality of a law or official act.¹⁶

Because *Griggs* was a Title VII case and *Davis* a fourteenth amendment case, the cases may be distinguished easily; however, dicta in a 1976 Supreme Court case, *General Electric Co. v. Gilbert*,¹⁷ suggests that discrimination has the same meaning under both the fourteenth amendment and Title VII.¹⁸ The issue raised, then, is whether the constitutional standard of intent should govern interpretations of the amendments to Title VII enacted pursuant to Congress' power under section 5 of the fourteenth amendment.¹⁹

15. The fourteenth amendment provides in pertinent part:

Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . . .

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. AMEND. XIV.

Plaintiffs suing under the due process clause of the fifth amendment or the due process or equal protection clauses of the fourteenth amendment usually invoke the 1871 Act implementing the fourteenth amendment, which Act states:

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

42 U.S.C. § 1983 (1970).

16. 426 U.S. at 239. The Court said that an examination that ignores discriminatory purpose and focuses "solely on the racially differential impact" of the practices "is not the constitutional rule." *Id.* at 238-39.

17. 429 U.S. 125 (1976).

18. *Id.* at 133.

19. *Id.* at 133, 145. *Gilbert* questioned the legality of an employer's sickness and accident insurance plan excluding temporary disability resulting from pregnancy. The plaintiffs argued that the exclusion constituted sex discrimination under Title VII. The Court ruled that if the benefits of the plan to men and women were weighed, no gender-based discriminatory effect existed.

Language in the majority opinion limited the effects test of *Griggs* to "some circumstances" and emphasized that the Court was only "assuming that it [was] not necessary in this case to prove intent to establish a prima facie violation of § 703(a)(1)." *Id.* at 137. This language

Although the Supreme Court has not decided the issue,²⁰ the Court of Appeals for the Seventh Circuit, in *United States v. City of Chicago*,²¹ held that proof of intentional discrimination is unnecessary to establish a prima facie case of employment discrimination against racial minorities under Title VII.²² In addition, the court stated that a statistical showing of a disproportionate, adverse impact on minority groups will shift the burden to the employer to prove that the challenged tests or practices are related directly to the job in question.²³ By refusing to demand proof of purposeful discrimination, the court rejected the defendant's arguments that the less stringent constitutional test of *Washington v. Davis*²⁴ is the proper Title VII standard for public employers. Instead, the court held that employment practices of public employers are to be judged by the same impact standards applied to private employers by the Supreme Court under the original Title VII.²⁵ Few district

prompted two concurring justices to refuse to join in any implication that *Griggs* was no longer good law. 429 U.S. at 146 (Stewart and Blackmun, JJ., concurring separately). Justice Brennan, in his dissenting opinion declared, "Notwithstanding unexplained and inexplicable implications to the contrary in the majority opinion, this Court . . . and every Court of Appeals now have firmly settled that a prima facie violation of Title VII, . . . , is established by demonstrating that a facially neutral classification has the effect of discriminating against members of a defined class." *Id.* at 153-55 (Brennan, J., dissenting) (footnotes omitted).

To circumvent the majority opinion's suggestion that discrimination has the same meaning under the fourteenth amendment and Title VII, one could argue that the commerce clause, rather than the fourteenth amendment, is the source of congressional power under which discrimination by state and local governments was proscribed. This alternative theory is undermined, however, by the Supreme Court's decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976). *Usery* held that the doctrine of federalism protected state and local governments from congressional regulation of the wages and hours of state and local employees under the commerce clause. *Usery*, then, may require that the 1972 amendments to Title VII derive their validity, if any, from Congress's power under the fourteenth amendment, which in turn may dictate that the constitutional intent standard govern Title VII law as applied to the states. *Accord*, *Fitzpatrick v. Bitzer*, 427 U.S. 445, 447 (1976). For a more detailed discussion of *Usery*, see notes 168-73 *infra* & accompanying text.

20. In *United States v. South Carolina*, 445 F. Supp. 1094 (D.S.C. 1977), *aff'd per curiam*, 434 U.S. 1026 (1978), the Supreme Court merely affirmed without comment the lower court's ruling that the government employer did not discriminate. Although the lower court held the defendant state government to the impact standard on the Title VII claims, it also found for the defendant using the intent standard on the constitutional claims. Thus, had the lower court determined that intent was the applicable standard for the Title VII challenge, the result would have been the same. Therefore, the Court's affirmation provides little guidance on the impact versus intent issue. See notes 181-99 *infra* & accompanying text.

21. 573 F.2d 416 (7th Cir. 1978).

22. *Id.* at 421.

23. *Id.*

24. 426 U.S. 229 (1976).

25. The Seventh Circuit stated: "Having determined that no showing of intentional dis-

courts have ruled on the issue, and the *Chicago* decision is one of the first holdings by a circuit court declaring the necessary standard of proof to establish racial discrimination by a public employer under Title VII.²⁶ This Comment submits that although the court

crimination is required, it is necessary to consider whether the . . . exams and . . . ratings . . . are violative of Title VII under the discriminatory impact standard of *Griggs* and *Albemarle*." 573 F.2d at 424.

26. See *Scott v. City of Anniston*, 430 F. Supp. 508 (N.D. Ala. 1977) (constitutional standard of intent applicable to local governments under Title VII); *Harrington v. Vandalia-Butler Bd. of Educ.*, 418 F. Supp. 603 (S.D. Ohio 1976) (impact standard applicable to public employers under Title VII).

In *United States v. South Carolina*, 445 F. Supp. 1094 (D.S.C. 1977), *aff'd per curiam*, 434 U.S. 1026 (1978), a three-judge district court applied the impact and job-relatedness tests to a state government employer. The court's ruling that the defendant state government did not racially discriminate in its employment practices in violation of Title VII was affirmed by the Supreme Court without comment in a per curiam opinion. 434 U.S. 1026 (1978); see notes 180-97 *infra* & accompanying text.

In a case similar to *Chicago*, the Eighth Circuit employed the disproportionate impact standard in a pattern or practice suit brought by the United States against the city of St. Louis. The city used a written test as one of three measurements of the qualifications of incumbent fire department employees seeking promotion to the fire captain's position. Performance on the examination was the primary factor determining rank on the eligibility list. The district court concluded that the test had a disparate impact on blacks. Using this finding, the court of appeals stated as follows:

It is a distinguishing feature of a Title VII cause of action that discriminatory impact suffices to establish a prima facie showing of discrimination. The recent case of *Washington v. Davis* establishes that a law or other official act is not unconstitutional solely because it has a racially disproportionate impact regardless of whether it reflects a racially discriminatory purpose. However, Congress' statutory standard for Title VII, where discriminatory purpose need not be proved, is unshaken by the *Washington* decision.

United States v. City of St. Louis, 549 F.2d 506, 510 (8th Cir. 1977) (citations omitted), *cert. denied*, 434 U.S. 819 (1978).

All circuit courts of appeals have adopted the principle that the discriminatory effect of a facially neutral criterion establishes a prima facie violation of Title VII by a private employer; a few have found the impact standard applicable to public employers under the Title VII amendments. *E.g.*, *Kinsey v. First Regional Sec., Inc.*, 557 F.2d 830, 839 (D.C. Cir. 1977); *Richardson v. Pennsylvania Dep't of Health*, 561 F.2d 489, 491 (3d Cir. 1977) (impact standard applicable to public employer); *Robinson v. City of Dallas*, 514 F.2d 1271, 1272-73 (5th Cir. 1975) (impact standard applicable to public employer); *Muller v. United States Steel Corp.*, 509 F.2d 923, 927 (10th Cir.), *cert. denied*, 423 U.S. 825 (1975); *Boston Chapter, NAACP, Inc. v. Beecher*, 504 F.2d 1017, 1021 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975) (impact standard applicable to public employer); *United States v. Masonry Contractors Ass'n of Memphis, Inc.*, 497 F.2d 871, 875 (6th Cir. 1974); *United States v. Wood, Wire & Metal Lathers, Local 46*, 471 F.2d 408, 414 n.11 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); *United States v. N.L. Indus., Inc.*, 479 F.2d 354, 368 (8th Cir. 1973); *United States v. Chesapeake & Ohio Ry.*, 471 F.2d 582, 586 (4th Cir. 1972), *cert. denied*, 411 U.S. 939 (1973); *United States v. United Bhd. of Carpenters Local 169*, 457 F.2d 210, 214 (7th Cir.), *cert. denied*, 409 U.S. 851 (1972); *United States v. Ironworkers Local 86*, 443 F.2d 544, 550-51 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971).

in *United States v. City of Chicago*²⁷ correctly applied the impact standard to state and local governments, it perhaps misread the Supreme Court's intention to require less strict scrutiny of job-relatedness in suits brought against state and local governments than is mandated by *Griggs v. Duke Power Co.*²⁸

ORIGINAL TITLE VII: LEGISLATIVE PURPOSE

Title VII does not specify the conduct prohibited or the standards against which the courts must measure the employers' actions. From 1964 until the *Griggs* decision in 1971, courts relied upon the terms of the statute and its legislative history to determine the congressional purpose underlying Title VII,²⁹ but failed to find precise guides.

Senator Dirksen, who was primarily responsible for passage of the bill that became Title VII,³⁰ urged the Senate to consider carefully the wording of Title VII: "The courts will take a look at the language in the bill, and out of it they will finally come to a conclusion as to what was the intent."³¹ Title VII as finally approved by both houses of Congress³² did not define discrimination; it simply prohibited it.³³ The importance of the employer's intent or purpose in proof of discrimination was discussed initially during the 1964 Title VII de-

27. 573 F.2d 416 (7th Cir. 1978).

28. 401 U.S. 424 (1971).

29. See, e.g., *Griggs v. Duke Power Co.*, 420 F.2d 1225 (4th Cir. 1970), *rev'd*, 401 U.S. 424 (1971); *Quarles v. Phillip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968).

30. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 444 (1966).

31. 110 CONG. REC. 6445 (1964).

32. See note 2 *supra*.

33. Senators Clark and Case, floor managers of Title VII, defined discrimination thusly: "To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section 704 are those which are based on any five [sic] of the forbidden criteria: race, color, religion, sex, and national origin." 110 CONG. REC. 7213 (1964).

The Senators' concept of discrimination emphasized different treatment, not disparate impact. Congress, however, did consider the relation between the adverse effect of employment testing on culturally disadvantaged groups and the legitimate efficiency and productivity concerns of businessmen. The result was the Tower amendment:

[I]t 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 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.

42 U.S.C. § 2000e-2(h) (1970).

bates.³⁴ The consensus was that Title VII afforded relief only if the court found that an employer had intentionally perpetrated an unlawful employment practice.³⁵ The Tower amendment excluded bona fide ability tests from the definition of such a practice.³⁶

Early scholarly treatments of discrimination concentrated on subjective discriminatory intent or prejudice and the dissimilar treatment of members of a similarly situated group.³⁷ Initially, a finding of intentional discrimination by the lower courts, as required by section 2000e-5(g) of Title VII, was predicated upon the existence of mental elements of prejudice or purpose to discriminate.³⁸ At least one court, however, modified the necessary finding of intent by focusing on the post-Title VII consequences of pre-Title VII discrimination.³⁹ Nevertheless, prior to the *Griggs* decision, lower courts reasoned that, absent an intent to discriminate and in the presence of a genuine business purpose, facially neutral selection criteria perpetuating the effects of past discrimination did not vio-

34. Mr. Case. What is an unlawful employment practice?

Mr. Ervin. It is the contents of a man's mind. It is the intent he has in mind.

Mr. Case. No.

.....

Mr. Case. The man [the employer] must do or fail to do something in regard to employment. There must be a specific external act, more than a mental act. Only if he does the act because of the grounds stated in the bill would there be any legal consequences.

.....

Mr. Ervin. But we do not judge a man on the ground of his employing somebody or his failing to employ somebody. These are acts which are external. They have no influence whatever on the decision. The only decision is made on the state of mind which accompanied the act or the omission to act.

Mr. Case. The only way a state of mind can be proved is by an external act, or by a pattern of acts, of a man, or by a treatment that was given. The burden of proof is on the plaintiff. The only finding the court can make is one for the purpose of injunctive or preventive relief.

110 CONG. REC. 7253-55 (1964).

35. See 42 U.S.C. § 2000e-5(g) (1970).

36. See note 29 *supra*.

37. Belton, *Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Developments*, 20 ST. LOUIS U. L. REV. 225, 240 (1976).

38. *Dobbins v. Local 212, Int'l Bhd. of Elec. Workers*, 292 F. Supp. 413, 443-44 (S.D. Ohio 1968). The court in *Dobbins* stated, however, that an intent to discriminate could be "inferred from the operation and effect of the statute or rule or from the conduct itself." *Id.* at 448.

39. *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505, 516 (E.D. Va. 1968). The court in *Quarles* held that absence of intent to discriminate after the adoption of Title VII was irrelevant in the context of a seniority system that perpetuated pre-Title VII intentional discrimination. *Id.* The court commented: "It is also apparent that Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed prior to the act." *Id.*

late Title VII.⁴⁰ Plaintiffs had the burden of showing that no conceivable business purpose justified the adverse impact on minorities, but employer-defendants were not required to demonstrate job-relatedness.⁴¹

ORIGINAL TITLE VII: SUPREME COURT TREATMENT

The Supreme Court established Title VII standards for private employers in *Griggs v. Duke Power Co.*,⁴² seven years after the passage of Title VII. In *Griggs*, black employees challenged the company's hiring and transfer requirements of a high school diploma and a passing score on a general intelligence test.⁴³ The Court concluded that, absent proof by the employer that its tests were job-

40. See, e.g., *Griggs v. Duke Power Co.*, 420 F.2d 1225, 1232 (1970), *rev'd*, 401 U.S. 424 (1971). In *Griggs* the Fourth Circuit held that a test or educational requirement sustaining the effects of past discrimination may not violate the Title VII rights of employees hired subsequent to the enactment of the requirement if it is justified by a legitimate business purpose. *Id.*; see Note, *Business Necessity under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L.J. 98, 100 (1976).

41. 420 F.2d 1225, 1235 (4th Cir. 1970). Prior to the Fourth Circuit's decision, however, erosion of the intent requirement had already begun. The Fifth Circuit rejected the doctrine that Title VII required a showing of subjective intent to discriminate. *Local 189, United Papermakers v. United States*, 416 F.2d 980, 996-97 (5th Cir. 1969). The court held that persistence in conduct with known discriminatory effects raised an inference of intent sufficient to satisfy the wording of 42 U.S.C. § 2000e-5(g) and that the intent requirement was satisfied if the discriminatory employment practice was not merely accidental. *Id.* at 996; *accord*, *Kober v. Westinghouse Elec. Corp.*, 480 F.2d 240, 246 (3d Cir. 1973); *Spurlock v. United Airlines, Inc.*, 475 F.2d 216, 218 (10th Cir. 1972). The Seventh Circuit, analyzing § 2000e-5(g), held that the intent requirement limited the relief available but did not define the standard of liability. Title VII is violated if the employer simply engages in an unlawful employment practice; discriminatory intent is not required. *Williams v. General Foods Corp.*, 492 F.2d 399, 403-04 (7th Cir. 1974).

42. 401 U.S. 424 (1971).

43. *Id.* at 427-28. The class action suit alleged that the company's requirements of a high school diploma and a satisfactory score on a standardized intelligence test for promotion to positions previously held exclusively by white employees violated Title VII. After the district court dismissed the complaint, *Griggs v. Duke Power Co.*, 292 F. Supp. 243 (M.D.N.C. 1968), the United States Court of Appeals for the Fourth Circuit reversed in part. *Griggs v. Duke Power Co.*, 420 F.2d 1225 (4th Cir. 1970). The Fourth Circuit upheld the right to injunctive relief of six employees hired before the implementation of the high school diploma requirement, but agreed with the district court that a test need not be job-related to survive Title VII's prohibition of ability tests "designed, intended or used to discriminate because of race, color, religion, sex or national origin." 420 F.2d at 1235 (quoting 42 U.S.C. § 2000e-2(h) (1970)). A strong dissent foreshadowed the Supreme Court's reversal of *Griggs*, by interpreting Title VII to condemn practices fair in form but discriminatory in substance unless justified by their demonstrated relation to job performance. *Id.* at 1237 (Sobeloff, J., dissenting). To hold otherwise, the dissent commented, would reduce Title VII "to mellifluous but hollow rhetoric." *Id.* at 1238.

related,⁴⁴ a violation of Title VII could be proved by discriminatory effect alone. Considering the plain language of the statute and the congressional debate, the Court found that Congress' purpose was to remove barriers to equal employment favoring white employees.⁴⁵ Although the Court reasoned that Title VII did not require the hiring of an employee simply because he was the member of a minority or was the object of past discrimination, it held that Title VII prohibits procedures or tests that are facially neutral or innocent in intent, if such tests perpetuated the effect of previous discriminatory practices.⁴⁶ The standard, therefore, required only a showing of a disparate impact on minority groups and lack of job-relatedness, regardless of the employer's motive.⁴⁷ The Court interpreted discriminatory impact as the conduct prohibited by Title VII because it believed that Congress was concerned primarily with the consequences of discriminatory practices, not with the employer's motivation.⁴⁸ After *Griggs*, a plaintiff need not prove the defendant's discriminatory intent; conversely, nor is the defendant's subjective good faith a defense.

According to *Griggs*, the employer must meet stringent standards of job-relatedness to justify practices discriminatory in effect.⁴⁹ The tests in *Griggs* violated Title VII because they reflected educational and cultural deprivation more accurately than ability to perform job-related tasks.⁵⁰ The Court believed that the guidelines announced by the Equal Employment Opportunity Commission (EEOC), the agency established to enforce Title VII, should be considered carefully, for they expressed congressional intent.⁵¹ The

44. 401 U.S. at 431. The Court held that "[t]he Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Id.*

45. *Id.* at 429-30.

46. *Id.* at 430-31.

47. *Id.* at 432. The Court explained that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Id.*

48. *Id.*

49. *Id.* at 436.

50. *Id.* at 430-31.

51. *Id.* at 433-34. The EEOC *Guidelines on Employment Testing Procedures*, issued August 24, 1966, provided in pertinent part:

The Commission accordingly interprets 'professionally developed ability test' to mean a test which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords

Court concluded that an employment test must be related specifically to the tasks to be performed on the job or to the criteria necessary for performing the job; a test that merely measured a person's general abilities and capacities, some of which might not

the employer a chance to measure the applicant's ability to perform a particular job or class of jobs. The fact that a test was prepared by an individual or organization claiming expertise in test preparation does not, without more, justify its use within the meaning of Title VII.

Id., quoted in *Griggs*, 401 U.S. at 433 n.9.

Recognizing the need for a uniform set of guidelines on the use of tests and other selection procedures, the Equal Employment Opportunity Commission, the Civil Service Commission, the Department of Labor, and the Department of Justice adopted the *Uniform Guidelines on Employee Selection Procedures* on August 25, 1978. These guidelines supercede those previously issued and provide in pertinent part:

. . . The use of any selection procedure which has an adverse impact on the hiring, promotion, or other employment or membership opportunities of members of any race, sex, or ethnic group will be considered to be discriminatory and inconsistent with these guidelines, unless the procedure has been validated in accordance with these guidelines, or the provisions of section 6 below [involving use of alternative selection procedures] are satisfied.

. . . .
A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact

. . . .
SEC. 16. *Definitions.* The following definitions shall apply throughout these guidelines:

. . . .
B. *Adverse impact.* A substantially different rate of selection in hiring, promotion, or other employment decision which works to the disadvantage of members of a race, sex, or ethnic group.

C. *Compliance with these guidelines.* Use of a selection procedure is in compliance with these guidelines if such use has been validated in accord with these guidelines (as defined below), or if such use does not result in adverse impact on any race, sex, or ethnic group . . . , or, in unusual circumstances, if use of the procedure is otherwise justified in accord with Federal law.

D. *Content validity.* Demonstrated by data showing that the content of a selection procedure is representative of important aspects of performance on the job.

E. *Construct validity.* Demonstrated by data showing that the selection procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important for successful job performance.

F. *Criterion-related validity.* Demonstrated by empirical data showing that the selection procedure is predictive of or significantly correlated with important elements of work behavior.

be required to perform a particular job, was not sufficiently job-related.⁵²

In 1975, in *Albemarle Paper Co. v. Moody*,⁵³ the Court reaffirmed the private employer's heavy burden of proof. The plaintiffs alleged that the defendant's use of a general intelligence test for employment discriminated against black applicants in violation of Title VII.⁵⁴ The district court found a discriminatory effect, but denied backpay because the employer had not used the test in bad faith⁵⁵ and refused to enjoin further use of the tests because they were found to be job-related.⁵⁶ The Supreme Court reversed; the tests, measured against the EEOC Guidelines, were not job-related.⁵⁷ *Griggs*, the Court reminded the parties, commanded that a test specifically measure abilities to perform a particular job; therefore, the defendant must show both that such tests are related manifestly to the job in question⁵⁸ and that they are a business necessity.⁵⁹ The Court awarded backpay, explaining that *Griggs* had held that intent was not a necessary element of a Title VII violation.⁶⁰ Thus, to make bad faith, or discriminatory intent, a prerequisite of receiving a remedy for such violation would not comport with Title VII's purpose of fully compensating victims of employment discrimination.⁶¹

Albemarle summarized the procedure for suing under Title VII. The complaining party may establish a prima facie case of discrimination by showing that the test "select[s] applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants."⁶² Once discriminatory effect is shown, the em-

52. 401 U.S. at 436. "What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract." *Id.*

53. 422 U.S. 405 (1975).

54. *Id.* at 409-10.

55. *Id.* at 410.

56. *Id.* at 410-11.

57. *Id.* at 435-36.

58. *Id.* at 425 (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971)).

59. *Id.*

60. *Id.* at 422 (citing *Griggs*, 401 U.S. at 432).

61. *Id.*

62. *Id.* at 425. During the Title VII debate in 1964, Senator Hubert Humphrey defined a pattern or practice of discrimination in the following manner:

[A] pattern or practice would be present only when the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature. . . . The point is that single, 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).

employer must prove that the questioned tests or procedures are job-related and a business necessity.⁶³ If the employer succeeds, the plaintiff may still prevail by showing that other, equally useful tests, which do not discriminate on a racial basis, could be used.⁶⁴ Such a showing would be evidence that the defendant's test was simply a pretext used to perpetuate discrimination.⁶⁵

TITLE VII AMENDMENTS: LEGISLATIVE PURPOSE

Aware of the *Griggs*' standards, Congress considered the changed meaning of discrimination in drafting the 1972 amendments. The House and Senate reports on the proposed amendments record the failure of the Civil Rights Act of 1964, including Title VII, to stem employment discrimination. By 1972, legislators no longer defined discrimination as "a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization,"⁶⁶ but instead believed it to be the result of complex and pervasive "'systems' and 'effects' rather than simply intentional wrongs."⁶⁷ Analysis in terms of systems and effects revealed previously obscured discrimination.⁶⁸ Because Congress intended to reach all racism, even that in the guise of superficially

63. The employer must show a correlation between the challenged tests or practices and the job being sought by means of a validation study. Such a study determines whether a test actually and reliably measures what has been previously defined as adequate job performance. "A test is valid and job-related if it measures the person against important elements of the job necessary for successful job performance." Note, *Employment Testing And The Federal Executive Agency Guidelines On Employee Selection Procedures: One Step Forward And Two Steps Backward For Equal Employment Opportunity*, 26 CATH. U. L. REV. 852, 861 (1977).

64. 422 U.S. at 425.

65. *Id.*

66. S. REP. NO. 415, *supra* note 5, at 5; H.R. REP. NO. 238, *supra* note 5, at 7, reprinted in AD. NEWS, *supra* note 5, at 2144.

67. *Id.*

68. The Senate report commanded the U.S. Civil Service Commission "to undertake a thorough re-examination of its entire testing and qualification program to ensure that the standards enunciated in the *Griggs* case are fully met." S. REP. NO. 415, *supra* note 5, at 14-15.

The House version of the Equal Employment Opportunity Act would have amended the testing section of Title VII, 42 U.S.C. § 2000e-2(h) (1970), to stipulate that employment tests be directly related to the determination of bona fide occupational qualifications reasonably necessary to perform the normal duties of the particular position. H.R. REP. NO. 238, *supra* note 5, reprinted in AD. NEWS, *supra* note 5, at 2157, 2165. The amendment failed in the House-Senate conference. Nevertheless, the House report revealed the legislators' support for the effects test.

objective requirements, it applied to local government employers the substantive portion of Title VII case law holding that any conduct having an adverse impact on a minority class and not shown to predict job performance was discriminatory.⁶⁹

Several policy objectives favor an interpretation that Congress intended to adopt the *Griggs* formula. The difficulty, if not impossibility, of proving specific discriminatory intent underlying facially neutral criteria or conduct denies the employee an effective remedy. The use of facially neutral criteria may allow an employer to discriminate, yet conceal a motive: the criteria are applied equally to all employees but operate to exclude disproportionately more blacks than whites.⁷⁰ Allowing the employee to establish a *prima facie* case by proving discriminatory effect necessitates the use of statistical and other objective evidence, thus removing the speculative element of intent from the court's consideration.⁷¹ The use of the impact standard for judging employment discrimination thus helps implement the national policy of eradicating employment discrimination.

The effects test also may redress employment practices that perpetuate past discrimination. The present effects of these practices may not originate from a present intent to discriminate, but, if uncorrected, past discrimination may continue to limit the employment opportunities of minorities.⁷² Furthermore, placing the onus on the employer to justify the discriminatory effects, rather than on the excluded applicants, is a more equitable distribution of the burden of proof. The employer, with greater knowledge of its organization, easier access to information, and familiarity with the interests served by the allegedly discriminatory practice, can rebut more readily an inference of discrimination than can the applicant disprove every reasonable explanation.⁷³

A court's most critical consideration in determining whether to apply the intent or impact standard to government employers will be which standard is in accord with the legislative intent of the Title

69. See note 8 *supra* & accompanying text.

70. As the Eighth Circuit stated in a Title VII case alleging housing discrimination, "[C]lever men may easily conceal their motivations . . ." *United States v. City of Black Jack*, 508 F.2d 1179, 1185 (8th Cir. 1974).

71. See *United States v. City of Chicago*, 385 F. Supp. 543 (N.D. Ill. 1974).

72. See *Quarles v. Phillip Morris, Inc.*, 279 F. Supp. 505, 516 (E.D. Va. 1968).

73. See *id.* at 553.

VII amendments. Unless Congress has exceeded its authority by imposing certain standards on the states,⁷⁴ the court's role is limited to ascertaining the congressional will and determining that the legislation is rationally related to a legitimate, non-racially based goal.⁷⁵

Congress' original purpose in enacting Title VII was to eradicate employment discrimination.⁷⁶ By extending this Act to public employers, Congress chose to give state, local, and federal employees the same protections enjoyed by private employees.⁷⁷ The standards Congress intended to apply should include Supreme Court interpretations of the original Title VII, particularly the *Griggs* holding requiring only impact and job-relatedness.⁷⁸ Any other interpretation would nullify the will of Congress in extending Title VII to protect public employees.⁷⁹

TITLE VII AMENDMENTS: THE SUPREME COURT DECISIONS

Although its intent is clear, whether Congress may oversee state and local governments to the same extent it regulates private em-

74. See note 19 *supra*; notes 168-73 *infra* & accompanying text.

75. See *Ozawa v. United States*, 260 U.S. 178, 194, 198 (1922).

76. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975).

77. See H.R. REP. NO. 238, *supra* note 5, at 1, *reprinted in* AD. NEWS, *supra* note 5, at 2137.

78. See note 8 *supra*.

79. The House report found that tests "often operate unreasonably and unnecessarily to the disadvantage of minority individuals." H.R. REP. NO. 238, *supra* note 5, at 20, *reprinted in* AD. NEWS, *supra* note 5, at 2156. The House report continues:

"Such tests are often irrelevant to the job to be performed by the individual being treated An aptitude test that fails to predict job performance in the same way for both minorities and whites, or fails to predict job performance at all is an invalid test. In . . . [*Griggs*], the court held that employment tests, even if valid on their face and applied in a non-discriminatory manner, were invalid if they tended to discriminate against minorities and the company could not show an overriding reason why such tests were necessary. . . . The provisions of the bill are fully in accord with the decision of the Court and with the testing guidelines established by the Commission [EEOC]. The addition of the requirement for a bona fide occupational qualification which is reasonably necessary to perform the normal duties of the position to which it is applied requires that employers, who use employment tests as determinants for qualifications of employees for a particular job, must determine whether the test is necessary for the particular position to which it is applied. Even after such determination, if the use of the test acts to maintain existing or past discriminatory imbalances in the job, or tends to discriminate against applicants on the basis of race, color, religion, sex, or national origin, the employer must show an overriding business necessity to justify use of the test.

Id. at 21-22, *reprinted in* AD. NEWS, *supra* note 5, at 2156-57.

ployers is questionable. In 1976, the Supreme Court, in *Fitzpatrick v. Bitzer*,⁸⁰ affirmed Congress' power to control discrimination by public bodies but did not address whether Congress could impose the *Griggs* impact standard on those entities. The holding that Congress could enact the 1972 amendments and thereby subject government employers to the proscriptions of the antidiscriminatory strictures of Title VII⁸¹ unequivocally confirmed that Congress could so act under its powers to enforce the fourteenth amendment,⁸² interpreted in the broadest possible terms.⁸³

80. 427 U.S. 445 (1976). The plaintiffs in *Fitzpatrick*, male employees of the State of Connecticut, protested that state scheme for retirement benefits discriminated against them in violation of Title VII because of their sex. *Id.* at 448. The Supreme Court agreed, thus upholding congressional authority to regulate the employment practices of state governments. *Id.* at 456.

81. The defendant in *Fitzpatrick* argued specifically that the eleventh amendment prohibits Congress from authorizing suits against states and state officials, as are permitted by the 1972 amendments to Title VII. The Court held, "[T]he Eleventh Amendment, and the principle of sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment." *Id.* at 456.

For decisions upholding the extension of Congress' Title VII power to the states under § 5 of the fourteenth amendment, see *United States v. New Hampshire*, 539 F.2d 277 (1st Cir. 1976), *cert. denied*, 429 U.S. 1023 (1977); *Curran v. Portland School Comm.*, 435 F. Supp. 1063 (D. Me. 1977); *United States v. City of Milwaukee*, 395 F. Supp. 725 (E.D. Wis. 1975).

82. 427 U.S. 445, 447 (1976). The Senate and House reports clearly reflect Congress' use of its fourteenth amendment power to extend Title VII. S. REP. No. 415, *supra* note 5, at 11; H.R. REP. No. 238, *supra* note 5, at 19, *reprinted in* AD. NEWS, *supra* note 5, at 2154.

83. Although the Court did not discuss whether federalism might limit congressional power to affect the operation of state governments, the Court implied that Congress has almost unlimited powers to act under § 5 of the fourteenth amendment. "When Congress acts pursuant to § 5, . . . the Court said, 'not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a Constitutional Amendment whose other sections by their own terms embody limitations on State authority.'" 427 U.S. at 456. The Court historically has interpreted the enforcement powers of Congress broadly. In *Virginia v. Rives*, 100 U.S. 313 (1880), the manner of enforcing the fourteenth amendment was held to be within the discretion of Congress. *Id.* at 318. The Court elaborated on the mode of enforcement in *Ex parte Virginia*, 100 U.S. 339 (1880):

All of the Amendments derive much of their force from this latter provision [§ 5 of the fourteenth amendment]. It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they

The assumption fostered by *Fitzpatrick* that public employers could be held to the same standard as private employers is undermined, however, by the Court's decision in *Washington v. Davis*,⁸⁴ decided shortly before *Fitzpatrick*. The plaintiffs in *Davis* were two black applicants rejected by the District of Columbia Metropolitan Police Department.⁸⁵ The plaintiffs alleged that the defendant's use of a general literacy test for employment screening violated the due process clause of the fifth amendment,⁸⁶ section 1981 of the Civil Rights Act of 1866,⁸⁷ and the District of Columbia Code.⁸⁸ The plaintiffs did not sue under Title VII,⁸⁹ rather, they based their motion for summary judgment solely on constitutional grounds.⁹⁰ The Supreme Court, however, after ruling on the constitutional claims, also ruled on the statutory grounds.⁹¹

Holding that discriminatory effect was insufficient to sustain a constitutional challenge of an employment practice⁹² and that proof of intent was necessary to establish a violation of the plaintiffs' constitutional rights,⁹³ the Court reversed the court of appeals on the

contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Id. at 345-46.

84. 426 U.S. 229 (1976).

85. *Id.* at 232-33.

86. See note 15 *supra*.

87. 42 U.S.C. § 1981 (1970) provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

88. Section 1-320 of the District of Columbia Code provides:

In any program of recruitment or hiring of individuals to fill positions in the government of the District of Columbia, no officer or employee of the government of the District of Columbia shall exclude or give preference to the residents of the District of Columbia or any State of the United States on the basis of residence, religion, race, color, or national origin.

D.C. CODE ANN. § 1-320 (1973).

89. *Washington v. Davis*, 426 U.S. 229, 238 n.10 (1976).

90. *Id.*

91. *Id.* at 248. It should be noted that the Court ruled on the statutory claims despite the fact that plaintiffs had not raised those grounds on appeal.

92. *Id.* at 239.

93. *Id.* After tracing cases involving discrimination in schools, jury lists, and other situations, the Court concluded, "Disproportionate impact is not irrelevant, but it is not the sole

constitutional issues. In dicta, however, the Court reaffirmed the applicability of the impact standard to Title VII litigation. Moreover, in reaching the statutory claims, the Court applied standards similar to those of Title VII, implying that Title VII's mandate was almost identical to those of the two statutes invoked by the plaintiffs.⁹⁵ The district court had found discriminatory effect using Title VII standards,⁹⁶ but held that the tests were job-related.⁹⁷ The court of appeals reversed, finding no direct relationship between the intelligence test and job performance,⁹⁸ although a validation study did show a correlation with success in the police training course. The Supreme Court reversed on the issue of job-relatedness, finding the correlation between the test and success in the training course sufficient to justify the test even though it was not shown to predict actual job performance.⁹⁹

Thus, in determining whether the test scores were related to success in the job training program, the Court apparently chose not to apply the strict scrutiny used in *Griggs* and *Albemarle*.¹⁰⁰ Although the Court in *Davis* asserted that their current decision was not foreclosed by those earlier cases,¹⁰¹ the dissenting opinion strongly disputed¹⁰² this statement. Dicta in *Davis* indicated that the holding

touchstone of an invidious racial discrimination forbidden by the Constitution." *Id.* at 243.

One reason for the Court's holding in *Davis* was a fear that many state and federal statutes having unequal effects on the affluent and the poor would be vulnerable to challenge. *Id.* at 248. Application of the impact standard to the limited area of employment, however, would not lead to widespread invalidation of state and federal laws; nor would it unduly burden state and local governments because they are given the opportunity to prove the job-relatedness and business necessity of their practices, thereby successfully defending against such challenges. Comment, *The Constitutionality of the Extension of Title VII "Disparate Impact Discrimination" to State and Local Governments*, 32 ARK. L. REV. 68, 82 (1978).

94. *Id.* at 247-48.

95. *Id.* at 250. A concurring opinion commented that since Title VII was not at issue, Title VII standards were not applicable to the statutory claims. *Id.* at 255-56 (Stevens, J., concurring). The dissent criticized the Court for reaching the statutory issues at all. *Id.* at 257-58 (Brennan, J., dissenting). The dissent also complained that the Court did not state explicitly which standards were being applied to the statutory claims. *Id.* at 258. Because the language of the District of Columbia Code, see note 87 *supra*, is so similar to that of Title VII, the argument that the Court was implying that a similar result would occur under Title VII is even more persuasive.

96. *Davis v. Washington*, 348 F. Supp. 15, 16 (D.D.C. 1972).

97. *Id.* at 17.

98. *Davis v. Washington*, 512 F.2d 956, 964-65 (D.C. Cir. 1975).

99. *Washington v. Davis*, 426 U.S. 229, 251-53 (1976).

100. *Id.* at 251-52.

101. *Id.*

102. *Id.* at 260 (Brennan, J., dissenting).

in *Griggs*, mandating the impact standard and strict scrutiny of job-relatedness, still governs Title VII cases; the Court's decision that the intelligence test was job-related, however, renders this aside questionable. In particular, *Davis* suggests that the employment practices of public employers will not be as strictly examined for job-relatedness as those of private employers.¹⁰³

Further confusing the question, dicta in *General Electric Co. v. Gilbert*,¹⁰⁴ a Title VII case also decided in 1976, suggests that the constitutional intent standard applies to state and local governments. The Supreme Court in *Gilbert* rejected the contention of female employees that the defendant corporation practiced sex discrimination by excluding pregnancy benefits from its employee disability plan.¹⁰⁵ Failure to include these benefits was not gender-based, said the Court, because it merely removed one physical condition from coverage for all employees.¹⁰⁶ Although the Court failed to find discriminatory effect, it reaffirmed the *Griggs* reasoning that a showing of discriminatory impact without proof of purposeful discrimination often is sufficient to establish a violation under Title VII in a suit against a private employer.¹⁰⁷ Nevertheless, the Court suggested that because the language used by Congress in the Title VII amendments was similar to language in earlier Court decisions on discrimination under the fourteenth amendment, the same standards might apply to both situations.¹⁰⁸ This suggestion is surpris-

103. Alternatively, one might argue that the Court has decided that a correlation with a training program is acceptable to prove job-relatedness by both public and private employers. This decision may indicate the Court's desire to lighten the employer's heavy burden of proof, apparently mandated by *Griggs*. Moreover, because validation against a training program was not at issue in *Griggs*, *Griggs* did not foreclose the use of a correlation with a training program. See Balog, *Employment Testing and Proof of Job Relatedness: A Tale of Unreasonable Constraints*, 52 NOTRE DAME LAW. 95, 104 (1976); Lerner, *Washington v. Davis: Quality and Equality in Employment Testing*, 1976 SUP. CT. REV. 263, 268; Comment, *Employment Discrimination—Washington v. Davis: Splitting the Causes of Action Against Racial Discrimination in Employment*, 8 LOY. CHI. L.J. 225, 227 (1976).

104. 429 U.S. 125 (1976).

105. *Id.* at 136.

106. *Id.*

107. *Id.* at 136-37.

108. *Id.* at 133. The Court explained:

While there is no necessary inference that Congress, in choosing this language, intended to incorporate into Title VII the concepts of discrimination which have evolved from court decisions construing the Equal Protection Clause of the Fourteenth Amendment, the similarities between the congressional language and some of those decisions surely indicate that the latter are a useful starting

ing, for the same language in the original Title VII was interpreted as establishing a far stricter test than the constitutional test of purposeful discrimination, a distinction clearly acknowledged in *Davis*.¹⁰⁹

UNITED STATES V. CITY OF CHICAGO

Lacking clear Supreme Court guidance, lower courts must determine two major issues in suits brought under the 1972 amendments: whether to judge government employers by the Title VII impact standards of *Griggs* or by the constitutional intent standard of *Davis*; and how strictly to apply the requirement of job-relatedness to the challenged tests or criteria. To answer these questions, lower courts first must decide if Congress can expand the substantive guarantees of the fourteenth amendment through legislation passed under its section 5 power, and to what degree, if any, federalism insulates state and local governments from congressional regulation of their employment practices.

In *United States v. City of Chicago*,¹¹⁰ the Court of Appeals for the Seventh Circuit addressed these issues and held that discrimi-

point in interpreting the former. Particularly in the case of defining the term 'discrimination,' which Congress has nowhere in Title VII defined, those cases afford an existing body of law analyzing and discussing that term in a legal context not wholly dissimilar to the concerns which Congress manifested in enacting Title VII.

Id. The Court continued:

The concept of "discrimination," of course, was well known at the time of the enactment of Title VII, having been associated with the Fourteenth Amendment for nearly a century, and carrying with it a long history of judicial construction. When Congress makes it unlawful for an employer to "discriminate . . . because of . . . sex . . .," without further explanation of its meaning, we should not readily infer that it meant something different from what the concept of discrimination has traditionally meant.

Id. at 145 (citations omitted).

109. *Washington v. Davis*, 426 U.S. 229, 239-40 (1976). The Court, distinguishing between constitutional and statutory standards, wrote:

As the Court of Appeals understood Title VII, employees or applicants proceeding under it need not concern themselves with the employer's possibly discriminatory purpose but instead may focus solely on the racially differential impact of the challenged hiring or promotion practices. This is not the constitutional rule. We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today.

Id. (footnote omitted).

110. 573 F.2d 416 (7th Cir. 1978).

natory effect is enough, even without proof of intent to discriminate, to constitute a prima facie violation of Title VII by a local government and that the government can defend only by demonstrating a direct relationship to the job itself.¹¹¹

The *Chicago* case began on March 15, 1973, when the United States sued to enjoin a pattern or practice of discriminatory employment by the Chicago Fire Department and the Chicago Civil Service Commission. The complaint alleged that the defendants had discriminated against black and Hispanic incumbents and applicants for employment in their recruitment, hiring, promotion, transfer, and assignment practices.¹¹² After trial on the merits, the district court found that although the promotional examinations used by the defendants had an adverse impact on blacks, they were job-related and therefore did not violate Title VII.¹¹³ In addition, the court held that neither the efficiency ratings used by defendants in formulating promotion lists nor their transfer and assignment policies offended Title VII.¹¹⁴ Therefore, the lower court refused to grant the relief sought by the United States, including a permanent injunction prohibiting further promotions based on current eligibility lists.¹¹⁵

On appeal, the United States challenged the district court's finding that the tests and rating were job-related as required by *Griggs*.¹¹⁶ *Griggs* and *Davis* also were cited for the assertion that the

111. *Id.* at 419.

112. *Id.* at 420-24, 428.

113. *Id.* at 420.

114. *Id.*

116. *Id.* The eligibility lists used by the Chicago Fire Department ranked candidates according to composite scores consisting of performances on a written promotional examination administered by the Chicago Civil Service Commission (weighted 60%), efficiency ratings given by supervisory personnel (weighted 30%), and seniority (weighted 10%). *Id.* at 419. The Commission placed only those candidates with a composite score of 70 or higher on the eligibility lists. *Id.* As vacancies occurred, individuals received promotions in accordance with their respective composite scores. *Id.*

Although the district court refused to enjoin the use of the scores, it ordered the defendants to comply with the EEOC guidelines on efficiency ratings, to provide the United States with a competent validation study of any contemplated promotional examination at least thirty days prior to its use, and to post all vacancies in each firehouse at least thirty days before they were filled and post transfer orders in each fire station giving relevant background information on each transferee. *Id.* at 420.

While the United States' appeal was pending, the court of appeals granted its motion for an injunction against promotions planned by the defendants. *Id.*

116. Brief for Appellant at 48, *United States v. City of Chicago*, 573 F.2d 416 (7th Cir. 1978).

district court erred in its belief that the appellant's failure to establish intentional discrimination was legally significant. The Seventh Circuit reversed and remanded for further findings,¹¹⁸ holding that no showing of intentional discrimination was necessary in Title VII cases against local governments in which a disproportionate impact was shown.¹¹⁹ The court's summary of the approach for successfully suing a governmental employer followed the procedure announced in *Albemarle* for suing a private employer.¹²⁰ On remand, the court further directed that a strict scrutiny of job-relatedness, similar to that conducted in *Griggs* and *Albemarle*, be undertaken by the district court.¹²¹ This strict scrutiny requirement, stressing the EEOC guidelines, contrasts dramatically with the rather superficial examination of job-relatedness undertaken in *Davis*.¹²²

The Intent Requirement

The City of Chicago contended that the entire promotional process, not just its component testing procedures, must be shown to have a statistically adverse impact on a protected class, and thus appellant failed to show a sufficiently disproportionate impact to establish a prima facie case of Title VII violations.¹²³ Furthermore, in an argument not pursued below, the appellees used the district court's finding of good faith and conscientiousness in eliminating race as a factor in promoting and transferring employees to maintain that absent a showing of intentional discrimination, an employer has not engaged in an unlawful employment practice.¹²⁴

117. *Id.*

118. *United States v. City of Chicago*, 573 F.2d 416, 427 (7th Cir. 1978). In addition, the parties and the district court were ordered to consider whether the decision in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), applied to presently posted eligibility lists based on promotional examinations given before the effective date of the 1972 amendments. 573 F.2d at 424.

In *Teamsters*, the Court held that, absent an intent to discriminate, a seniority system perpetuating pre-Title VII discrimination was not an unlawful employment practice. 431 U.S. at 353-54. The Court interpreted Title VII and its legislative history as immunizing a bona fide seniority system even if the employer's pre-Act discrimination resulted in whites having greater existing seniority rights than blacks. *Id.*

119. *United States v. City of Chicago*, 573 F.2d 416, 424 (7th Cir. 1978).

120. See notes 58-60 *supra* & accompanying text.

121. 573 F.2d at 427.

122. *Washington v. Davis*, 426 U.S. 229, 249-53 (1976).

123. Brief for Appellee at 11-12, 14, *United States v. City of Chicago*, 573 F.2d 416 (7th Cir. 1978).

124. *Id.* at 5-7.

Chicago's claim that a showing of intentional discrimination is necessary under the Title VII amendments was supported by three arguments. The appellees asserted that the Supreme Court in *Gilbert* indicated that concepts of discrimination under Title VII and the fourteenth amendment may be equivalent.¹²⁵ Therefore, the fourteenth amendment rule, as defined in *Davis*, would require tracing the invidious quality of official action to a racially discriminatory purpose.¹²⁶ The appellees' second argument was that a statute can be no broader than its constitutional basis, which, in the case of the Title VII amendments, is the fourteenth amendment with its intentional discrimination test.¹²⁷ Finally, the appellees contended, the Supreme Court's interpretation of the concept of federalism, as embodied in the tenth amendment,¹²⁸ limited Congress' power to regulate state and local governments under the commerce clause and eliminated that clause as a possible alternative source of congressional authority for extending Title VII to local governmental bodies.¹²⁹

Standards Under Title VII and The Fourteenth Amendment Not Identical

The Seventh Circuit rejected the appellees' contention that recent Supreme Court decisions had modified the standard for establishing a prima facie case of discrimination under Title VII.¹³⁰ The court emphasized the language in *Davis* expressly refuting the application of the constitutional requirement of discriminatory purpose to Title VII litigation.¹³¹ In reply to the appellees' reliance on the dicta in *Gilbert*¹³² the court countered any inference that the standards of proof are identical under Title VII and the fourteenth

125. *Id.* at 8.

126. *Id.* at 8-9; see *Washington v. Davis*, 426 U.S. at 239-40.

127. Brief for Appellee at 9, *United States v. City of Chicago*, 573 F.2d 416 (7th Cir. 1978).

128. The tenth amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, or to the people." U.S. CONST. AMEND. X.

129. Brief for Appellee at 9, *United States v. City of Chicago*, 573 F.2d 416 (7th Cir. 1978) (citing *National League of Cities v. Usery*, 426 U.S. 833 (1976)).

130. *United States v. City of Chicago*, 573 F.2d 416, 422 (7th Cir. 1978). The Seventh Circuit recently applied the effects test to an analogous employment discrimination claim asserted by the United States against the Chicago Police Department. *United States v. City of Chicago*, 549 F.2d 415 (7th Cir. 1977).

131. *United States v. City of Chicago*, 573 F.2d at 421.

132. See notes 17-18, 104-08 *supra* & accompanying text.

amendment by citing the Supreme Court's reaffirmation in *Gilbert* of the impact standard of *Griggs* for Title VII cases.¹³³ In *Gilbert*, the court of appeals reiterated, because a showing of discriminatory impact had not been made, the question of whether intent or mere impact was required to prove discrimination was not reached.¹³⁴ To buttress its adherence to the *Griggs* test of disparate impact plus absence of job-relatedness, the court cited Supreme Court cases subsequent to both *Davis* and *Gilbert* that reaffirmed *Griggs*.¹³⁵

In reply to the appellees' second argument, that a statute can be no broader than its constitutional basis, the Seventh Circuit agreed that the 1972 amendments were enacted pursuant to Congress' power under section 5 of the fourteenth amendment.¹³⁶ The court contended, however, that the legislative history of that Act documented congressional intent to confer on government employees protection equivalent to that accorded private employees as defined

133. 573 F.2d at 421.

134. *Id.*

135. Among the Title VII cases cited by the court was *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977). In *Nashville*, an employer denied accumulated seniority to employees returning from pregnancy leave. The policy forced women to suffer a hardship that male employees did not, thereby depriving them of employment opportunities in a job-bidding system based on seniority. The Court held that the policy violated Title VII. The Court emphasized that it was not deciding whether intent was necessary to establish a violation of § 703(a)(1) of Title VII if a facially neutral plan was at issue. *Id.* at 144. On the facts of the case, however, the Court held that proof of discriminatory effect was sufficient to establish a Title VII violation. *Id.*

Dothard v. Rawlinson, 433 U.S. 321 (1977), was also cited by the Court. In *Dothard*, female plaintiffs charged that Alabama's statutory minimum height and weight requirements for employment in the State's correctional system and gender criteria for the assignment of correctional counselors discriminated against them on the basis of sex in violation of Title VII and other federal statutes. Plaintiffs demonstrated statistically the grossly discriminatory impact of the job requirements on women. A three-judge federal district court found in the plaintiffs' favor. The Supreme Court affirmed the district court's holding that Title VII, as amended in 1972, prohibited the State of Alabama from applying its statutory height and weight requirements to the claimants. The Court, however, did find sex a bona fide occupational qualification in assigning employees to certain positions in a maximum security male prison. Justices Marshall and Brennan dissented, arguing that in the absence of evidence proving the disruptive effect on discipline of female security guards, the State could not deprive women of job opportunities just because they were women. Such deprivation, they continued, only served to perpetuate stereotypical assumptions about men and women. *Id.* at 2734.

The Court in *Dothard* said of *Griggs* and *Albemarle*, "Those cases make clear that to establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern." *Id.* at 2726.

136. 573 F.2d at 422; accord, *Fitzpatrick v. Bitzer*, 427 U.S. 445, 447 (1976).

in *Griggs*.¹³⁷ As the court defined it, the relevant issue was "whether the 1972 amendments with their authorization of the *Griggs* rationale is appropriate legislation within the meaning of § 5 of the Fourteenth Amendment to enforce that Amendment's prohibition against discrimination."¹³⁸ The court concluded that Congress had ample authority under section 5 to demand that employers meet a more stringent standard under Title VII than is required by the fourteenth amendment.¹³⁹

The Seventh Circuit's conclusion that Congress can establish by statute a higher standard than is demanded by that statute's constitutional authority relied heavily on an analogy to the Supreme Court's treatment of literacy tests prior and subsequent to the enactment of the Voting Rights Act of 1965.¹⁴⁰ In *Katzenbach v. Morgan*,¹⁴¹ the Supreme Court upheld the constitutionality of the Voting Rights Act,¹⁴² enacted under the fourteenth and fifteenth amendments, although the Act required that literacy tests meet a stricter standard of nondiscrimination than was demanded by the fourteenth amendment.¹⁴³ By allowing Congress to abolish discriminatory literacy tests similar to ones that had been found constitutional, the Court in effect upheld Congress' power under section 5 of the fourteenth amendment to legislate a standard more stringent than was required by the constitutional basis of the legislation itself.¹⁴⁴ The court reasoned that if Congress had the power under the

137. 573 F.2d at 422. See also S. REP. NO. 415, *supra* note 5, at 5 n.1; H.R. REP. NO. 238, *supra* note 5, at 8, reprinted in AD. NEWS, *supra* note 5, at 2144 (citing *Griggs* as illustrative of one form of discrimination, that is, tests having a discriminatory effect and not justified by overriding business necessity).

138. *Id.*

139. *Id.* at 423-24.

140. *Id.* at 422-23.

141. 384 U.S. 641 (1966).

142. When *Katzenbach* was decided, the Voting Rights Act provided in pertinent part: Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

42 U.S.C. § 1973b(e) (Supp. I 1964). See also *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (upholding the Voting Rights Act of 1965).

143. In 1959, the Supreme Court held that a North Carolina English literacy test was not violative of the fourteenth or fifteenth amendments. *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959).

144. *United States v. City of Chicago*, 573 F.2d at 423.

fourteenth amendment to declare illegal a state law of a type previously viewed as constitutional, then surely it could enforce the fourteenth amendment by approving, as applicable to state and local governments, a judicial construction of discrimination derived from a statutory proscription.¹⁴⁵

The Court in *Katzenbach*, echoing *McCulloch v. Maryland*,¹⁴⁶ stated that the standard for determining whether legislation is appropriate under section 5 of the fourteenth amendment is whether the end is legitimate and the means appropriate.¹⁴⁷ "Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."¹⁴⁸ The issue then is not whether the *Davis* decision precluded congressional attempts to require impact rather than intent as the standard of proof, but whether the legislation passed was appropriate within the meaning of the fourteenth amendment.¹⁴⁹

Applying this test, the Seventh Circuit determined that the 1972 amendments were passed under section 5 to enforce the antidiscrimination proscriptions of the fourteenth amendment's equal protection clause¹⁵⁰ and that they were appropriate means to fulfill the purpose of that clause.¹⁵¹ Congress possessed the authority to balance the opposing policy considerations and to grant public employers protection equal to that received by private employees under the *Griggs* standard.¹⁵² The court of appeals thus adopted an expansive

145. *Id.*

146. 17 U.S. (4 Wheat.) 316 (1819). The Court wrote, "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.* at 421 (footnote omitted).

147. 384 U.S. at 649-50.

148. *Id.* at 651.

149. *Id.*

150. The legislative history of the 1972 Amendments clearly supports the court's view:

The Constitution is imperative in its prohibition of discrimination by State and local governments. The Fourteenth Amendment guarantees equal treatment of all citizens by States and their political subdivisions, and the Supreme Court has reinforced this directive by holding that State action which denies equal protection of the laws to any person, even if only indirectly, is in violation of the Fourteenth Amendment. It is clear that the guarantee of equal protection must also extend to such direct action as discriminatory employment practices.

S. REP. NO. 415, *supra* note 5, at 10 (footnote omitted). See also H.R. REP. NO. 238, *supra* note 5, at 8; reprinted in AD. NEWS, *supra* note 5, at 2153.

151. *United States v. City of Chicago*, 573 F.2d at 423.

152. *Id.*

reading of Congress' power under the fourteenth amendment. The test announced in *Katzenbach* and followed by the Seventh Circuit in *Chicago* is similar to that applied to legislation under the commerce clause, which has been interpreted as giving Congress almost unlimited power to legislate against discrimination.¹⁵³ Accordingly, Congress could supplant the fourteenth amendment standard of intent with the more rigorous impact standard of *Griggs* in the Title VII amendments provided that the court could perceive a rational basis for Congress' legislative judgment.

Not all courts and scholars agree that Congress can establish a more stringent standard by statute than is imposed by the statute's constitutional foundation. The dissent in *Katzenbach* argued that such a rationale gave Congress, not the Court, the power to decide whether the fourteenth amendment had been violated.¹⁵⁴ Congress, the dissent insisted, could only remedy judicially determined violations of the fourteenth amendment, not declare the substance of those violations.¹⁵⁵ Under the dissent's reasoning, the Court would not sustain a congressional determination merely because the extension of Title VII was appropriate legislation plainly adapted to the elimination of pervasive discrimination.¹⁵⁶ Therefore, the congressional determination that discriminatory impact violates Title VII should not be upheld since this standard does not comport with the Court's conclusion that proof of intentional discrimination is re-

153. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); see, e.g., *Katzenbach v. McClung*, 379 U.S. 294 (1964). In *McClung*, the Court upheld sections of the Civil Rights Act of 1964, outlawing racial discrimination against customers by any restaurant, as a lawful extension of congressional authority under the commerce clause, if the restaurant's customers include interstate travelers or if a substantial portion of the food served has moved in interstate commerce. *Id.* at 304. Commenting on the breadth of Congress' power to legislate under the commerce clause, the Court wrote: "The power of Congress in this field is broad and sweeping; where it keeps within its sphere and violates no express constitutional limitation it has been the rule of this Court, going back almost to the founding days of the Republic, not to interfere." *Id.* at 305.

Justice Douglas, believing that Congress' power to enact legislation prohibiting discrimination under the fourteenth amendment was as broad or broader than its power under the tenth amendment would have preferred that the legislation had been upheld under the fourteenth amendment. *Id.* at 279 (Douglas, J., concurring). As Justice Douglas explained, "It is rather my belief that the right of people to be free of state action that discriminates against them because of race . . . occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines." *Id.* (quoting *Edwards v. California*, 314 U.S. 160, 177 (1941)).

154. 384 U.S. at 667-68 (Harlan, J., dissenting).

155. *Id.* at 666.

156. *Id.* at 668.

quired to constitute a violation of the fourteenth amendment's anti-discriminatory strictures.

Analogous to the dissent's reasoning in *Katzenbach* is the holding of *Scott v. City of Anniston*,¹⁵⁷ decided in 1977. The district court in *Scott* interpreted *Davis* as requiring that the intent standard be applied to state and local governments sued under Title VII.¹⁵⁸ Repeating the appellees' argument in *Chicago* and the dissent in *Katzenbach*, the court in *Scott* held that the constitutional intent standard was applicable because a statute can be only as broad as its constitutional source.¹⁵⁹ Thus, in amending Title VII by use of its authority under the fourteenth amendment, Congress could not require employers to meet a more stringent standard than the Supreme Court established in *Davis* for employment discrimination under the fourteenth amendment.¹⁶⁰

The Supreme Court's decision in *Oregon v. Mitchell*¹⁶¹ also may bolster the argument that Congress is not empowered to define discrimination as broadly as it may believe necessary. In *Mitchell*, the Court ruled that Congress lacked authority under the fourteenth or fifteenth amendments to lower the voting age in state elections to eighteen under the Voting Rights Amendments of 1970.¹⁶² The Court, however, did uphold the power of Congress to abolish literacy tests for voting because the tests historically have been used to discriminate against racial minorities.¹⁶³ One possible explanation for this discrepancy in the Court's treatment of literacy tests and the age requirement is that states could articulate more easily a plausible defense for laws setting a minimum voting age over eighteen than it could rationalize laws limiting the electorate to those who can read and write, especially when such rationalizations have been used in the past to justify preventing racial minorities from voting. Another reason for the discrepancy could be that eradicating racial discrimination has a higher priority than eliminating age dis-

157. 430 F. Supp. 508 (N.D. Ala. 1977). In *Scott*, black employees in the public works department of the City of Anniston brought a class action suit against the city and others alleging that the defendants engaged in racially discriminatory employment practices. *Id.* at 510-11.

158. *Id.* at 515.

159. *Id.*

160. *Id.* *Scott* is now on appeal to the Fifth Circuit Court of Appeals.

161. 400 U.S. 112 (1970).

162. *Id.* at 118.

163. *Id.* at 132-33.

crimination. If this is true, then *Mitchell* actually may support the argument that Congress may define discrimination broadly; Title VII, like the statute banning literacy tests, seeks to abolish laws and practices without rational support that historically have discriminated against certain minorities.

Furthermore, the majority opinion in *Katzenbach* supports the view that Congress can expand the antidiscriminatory guarantees secured by the fourteenth amendment.¹⁶⁴ One commentator, after studying the fourteenth amendment's legislative history, believes that the drafters of the amendment clearly intended to give Congress the power under section 5 to exceed the substantive rights guaranteed by that amendment and that even the concept of federalism does not limit Congress' power to act against the states in expanding the guarantees of that amendment.¹⁶⁵ Another observer has written that "it is clear that congressional enactments pursuant to section 5 of the fourteenth amendment may properly proscribe discriminatory conduct which is not reached by the broad terms of the fourteenth amendment prohibition."¹⁶⁶ Therefore, if Congress' power to enact antidiscriminatory legislation under section 5 of the fourteenth amendment is interpreted broadly by the Court, Congress may have the power to promulgate a more stringent standard for the limited area of employment discrimination than is imposed by the substantive provisions of the fourteenth amendment.

RESTRAINTS IMPOSED BY FEDERALISM

The problem remains, however, of determining what limits, if any, federalism imposes on congressional action against the states. The appellees in *Chicago* cited *National League of Cities v. Usery*¹⁶⁷ to support their argument that federalism prohibits Congress from regulating state and local government employers to the same degree it regulates private employers. The Court in *Usery* held that federalism limited Congress' authority to regulate the wages and hours of state government employees under the commerce clause.¹⁶⁸ One rea-

164. 384 U.S. at 651 n.10.

165. Nowak, *The Scope of Congressional Power to Create Causes of Action against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413, 1463 (1975).

166. Note, *Applying the Title VII Prima Facie Case to Title VIII Litigation*, 11 HARV. C.R.-C.L. L. REV. 128, 141 (1976) (footnote omitted).

167. 426 U.S. 833 (1976).

168. In *Usery*, the Court held that Congress exceeded its authority under the commerce

son given for the Court's holding was that state and local governmental officials should be allowed to exercise administrative control over their own governments so that necessary services could be provided to residents in the most efficient and orderly manner.¹⁶⁹ Arguably, this rationale would not apply to the facts of *Chicago* because the discrimination Title VII seeks to eliminate is neither a necessary element of orderly administration nor a worthwhile goal of state and local governments; thus, it may not merit the same protection from congressional regulation as the freedom of local governments to determine the wages and hours of their employees.¹⁷⁰

As the Seventh Circuit recognized in *Chicago*, the analogy to *Usery* is imperfect because *Usery* involved the commerce clause, whereas the Title VII amendments were issued under the fourteenth amendment.¹⁷¹ Congressional power to legislate under section 5 of the fourteenth amendment to eliminate discrimination by state governments always has been interpreted broadly, often in clear derogation of state sovereignty.¹⁷² Calling such power plenary, the Court

clause by extending the Fair Labor Standards Act to state and local governments in an attempt to regulate the wages and hours of state and local governmental employees. *Id.* at 838.

Because of the four-one-four split in *Usery* and the vehemence of the dissenting opinions, whether *Usery* will be extended in the future is doubtful. Justice Blackmun's concurrence indicates that, although he believed that the Court's opinion was correct with respect to the statute in question, he was troubled by certain aspects of the majority opinion. *Id.* at 856 (Blackmun, J., concurring). Although admitting that he might be interpreting the majority opinion incorrectly, Justice Blackmun suggested that the Court had adopted a balancing approach and would not prohibit federal regulation in areas "where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential." *Id.*

169. *Id.* at 840-52.

170. *Id.* at 846-48. That the Court in *Usery* distinguished "between federal legislation enacted to regulate commerce and similar legislation enacted to enforce rights under § 5 of the Fourteenth Amendment" has been suggested. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 313 (1978).

171. The Court in *Usery* stated specifically that it expressed no view on whether the same outcome would result if federal legislation regulating state governmental actions is enacted under § 5 of the fourteenth amendment. 426 U.S. at 852 n.17.

172. The suggestion has been made that "[t]he drafters of the fourteenth amendment would . . . not have tolerated a position which denied Congress the power to create private causes of action enforceable in federal courts against states which refused to extend protection to the rights embodied in section one of the amendment." Nowak, *supra* note 165, at 1463. Opponents of the amendment concentrated their attack on the extensive power granted to Congress by the amendment to supplant state laws. *Id.* at 1461. The amendment's proponents, however, did not attempt to refute this argument. They simply responded that Congress must possess such broad powers to guarantee that the natural rights of citizens would be protected. *Id.* As Mr. Novak commented:

in *Fitzpatrick v. Bitzer*¹⁷³ perhaps implied that the tenth amendment does not limit Congress' power to act under section 5 if its purpose is to end discrimination by appropriate and reasonable legislation.¹⁷⁴ The Court referred to the Civil War amendments as "an important part of the basic alteration in our *federal* system As a result of the new structure of law that emerged in the post Civil War era—and especially of the Fourteenth Amendment, which was its centerpiece—the role of the Federal Government as a guarantor of basic federal rights *against state power* was clearly established."¹⁷⁵

Refusing to decide the issue of the possible restraints imposed upon Congress by the doctrine of federalism, the court of appeals in *Chicago* stated that the appellees' argument was not pertinent since Congress had relied upon section 5 of the fourteenth amendment rather than on the commerce clause in enacting the 1972 amendments to Title VII.¹⁷⁶ In addition, the court commented that its holding that the *Griggs* standards could be incorporated into the 1972 amendments under section 5 rendered the determination whether the same outcome could have been accomplished under the commerce clause unnecessary.¹⁷⁷

[T]he statements of both the proponents and the opponents of the amendment were based on the assumption that the Congress would have virtually uncontrolled power to enforce the substance of the amendment. Whatever else may be said of the fourteenth amendment debates, it cannot be claimed that the power of Congress to enforce the substantive provisions of the amendment was not understood at the time. Indeed, most of the debate concerning the substantive provisions related to the great power that they would give Congress to supersede state laws and the resulting modifications of the principles of federalism as they had been understood in pre-war times.

Id. at 1460-61.

173. 427 U.S. 445 (1976).

174. *Id.* at 456. One commentator emphasizes that the Court in *Fitzpatrick* did not mention any constraints imposed by federalism on Congress' authority to regulate racial or sexual discrimination under the fourteenth amendment. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 313 (1978). Tribe interprets *Fitzpatrick* as indicating that despite the restraints placed on congressional action in *Usery*, such action undertaken to enforce fourteenth amendment rights may not be challenged successfully, although the action violates traditional concepts of state sovereignty. *Id.* at 272-73 n.61.

175. *Mitchum v. Foster*, 407 U.S. 225, 238-39 (1972) (footnote omitted and emphasis supplied).

176. 573 F.2d at 424.

177. *Id.* In *Scott v. City of Anniston*, 430 F. Supp. 508 (N.D. Ala. 1977), the court, echoing the appellees' arguments in *Chicago* and quoting from *Usery*, held that in a Title VII action federalism prohibits Congress from regulating state and local governments to the same degree it regulates the private sector. *Id.* at 514-17.

JOB-RELATEDNESS

In *Chicago*, the Seventh Circuit arguably was correct in concluding that a statute can embody a more stringent standard than its constitutional source. In addition, a valid argument can be made that federalism does not limit Congress' power to legislate against discrimination if Congress acts under the fourteenth amendment. The court correctly surmised that by enacting the Title VII amendments Congress meant to extend the strict *Griggs* standard of impact to state and local governments.¹⁷⁸ The court, however, in imposing the stringent *Griggs* job-relatedness test on a public employer, may have misread the tenor of recent Supreme Court decisions. In *Washington v. Davis*, the Supreme Court accepted as proof of job-relatedness a correlation between the employment test and performance in a training program rather than demanding a correlation with actual job performance. This failure to require a correlation with job performance may indicate the Court's reluctance to demand that a public employer meet the strict standards of job-relatedness imposed by *Griggs*. Nevertheless, the court in *Chicago* followed *Griggs* and *Albemarle* in its deference to the EEOC Guidelines and in its demand that employment tests administered by public employers be directly related to the actual tasks to be performed on the job.¹⁷⁹

Change in the Job-Relatedness Test

Given the sharp divisions of the Court in *Davis* and that Title VII was not directly at issue, confusion over *Davis*' impact on Title VII litigation against state and local governments is understandable. At least one district court, in *United States v. South Carolina*,¹⁸⁰ arguably interpreted *Davis* as imposing a more lenient job-relatedness standard on public employers than was held applicable to private employers by the Supreme Court in *Griggs* and *Albemarle*.

In *South Carolina*, the plaintiffs sued the state of South Carolina, alleging that its use of the National Teacher's Examination (NTE)

178. See note 8 *supra* & accompanying text.

179. At least two Justices have expressed doubt as to whether strict compliance with the EEOC Guidelines is required. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 449 (1975) (Blackmun, J., concurring); *id.* at 451 (Burger, C.J., concurring in part and dissenting in part).

180. 445 F. Supp. 1094 (D.S.C. 1977), *aff'd*, 434 U.S. 1026 (1978).

to determine the hiring and pay classification of teachers violated the fourteenth amendment and Title VII.¹⁸¹ The plaintiffs statistically proved the test's discriminatory impact, but failed to prove discriminatory intent.¹⁸² To justify the use of the NTE, the state demonstrated a correlation between results on the NTE and performance in teacher-training programs at the state's colleges and universities.¹⁸³ Seeking guidance from *Davis* on both the constitutional and Title VII claims, the court held the impact standard applicable to state and local governments sued under Title VII.¹⁸⁴ Moreover, finding that validation against a training program had been approved by the Court in *Davis*, the court also held that the defendants' evidence of a correlation between scores on the NTE and success in teacher-training programs was sufficient to prove job-relatedness.¹⁸⁵ The Supreme Court upheld, without comment, the district court's decision in *South Carolina*.¹⁸⁶

Justice White's dissenting opinion, joined by Justice Brennan, objected to the Supreme Court's affirmation of the decision because of the lower court's use of training program correlation as a test for determining job-relatedness.¹⁸⁷ The dissenters argued that the validation study showed no relationship to job performance, as demanded by *Griggs* for cases arising under Title VII.¹⁸⁸ At best, the study measured familiarity with courses given before the pre-employment test.¹⁸⁹ The test in *Davis* at least was related to specific training given after employment to prepare the employee for the particular job for which he was applying.¹⁹⁰ The dissenters also questioned whether the lower court was "legally correct in holding that the N.T.E. need not be validated against job performance and that the validation requirement was satisfied by a study which demonstrated only that a trained person could pass the test."¹⁹¹

The Court's affirmance does not signify that impact is the ac-

181. *Id.* at 1097.

182. *Id.* at 1102.

183. *Id.* at 1113.

184. *Id.* at 1111.

185. *Id.* at 1113-14.

186. 434 U.S. 1026 (1978).

187. *Id.* at 1027 (White, J., dissenting).

188. *Id.* at 1026-27.

189. *Id.* at 1027.

190. *Id.*

191. *Id.* at 1028.

cepted standard for determining the liability of a state government challenged under Title VII because the lower court also found for the defendant on the constitutional grounds using the intent standard; therefore, the result on the Title VII claims would have been the same had the intent standard been applied. The affirmance, however, does suggest that, even if use of the impact standard is correct, correlation with a training program does prove job-relatedness. The Court, using the strict guidelines of *Griggs* and *Albemarle*, otherwise might have remanded for a determination whether the NTE was related directly to the teaching jobs themselves.

The burden of proving job-relatedness announced in *Griggs* and *Albemarle* is significantly more difficult to satisfy than the job-relatedness standard used in *Davis*. The examination of job-relatedness in *Davis* was cursory, did not rely on the EEOC *Guidelines*,¹⁹² accepted evidence of a correlation with a training program as sufficient to prove job-relatedness,¹⁹³ and did not demand that the challenged test measure specific aptitudes or capabilities for the particular job at issue. One important argument against the *Davis* treatment of the issue and its acceptance of a correlation with a training program is that a training program could be established that bears little, if any, resemblance to the actual job denied unsuccessful applicants. To meet the *Griggs* and *Albemarle* burden of proving job-relatedness, however, the test must demonstrate a direct relationship to the job itself.¹⁹⁴ Congress intended to prohibit the use of general ability tests that do not predict the employee's ability to perform the particular job in question, such as the literacy test approved in *Davis*. The Court in *Davis*, however, was not enforcing Title VII; therefore, it was not obliged to follow the congressional intent underlying the enactment of Title VII. For that reason, the statutory ruling in *Davis* should not be followed by courts ruling on Title VII, as was done by the lower court in *South Carolina*.¹⁹⁵ Nevertheless, because *South Carolina* was affirmed, although with-

192. *Washington v. Davis*, 426 U.S. at 263 (Brennan, J., dissenting).

193. *Id.* at 250.

194. *Albemarle Paper Co. v. Moody*, 422 U.S. at 431; *Griggs v. Duke Power Co.*, 401 U.S. at 431.

195. 426 U.S. at 269-70 (Brennan, J., dissenting). The majority in *Davis*, defending its approval of a general intelligence test for hiring policemen, remarked: "It is also apparent to us, as it was to the District Judge, that some minimum verbal and communicative skill would be very useful, if not essential, to satisfactory progress in the training regimen." *Id.* at 250.

196. 445 F. Supp. at 1113.

out comment, other courts also may follow *Davis* in deciding the job-relatedness issue for local or state governments under Title VII.¹⁹⁷

CONCLUSION

The Supreme Court recently has reaffirmed impact as the standard for measuring discrimination in Title VII suits against private employers.¹⁹⁸ The Court, however, has not yet considered whether the extension by Congress to state and local governments of the substantive provisions of Title VII, including the case law establishing the impact standard, is a proper exercise of its enforcement powers under the fourteenth amendment. Congress arguably has the power under section 5 of the fourteenth amendment to require public employers to meet the same antidiscriminatory standards as private employers, and in extending Title VII, Congress certainly intended to require governmental employers to meet the *Griggs* test of impact and job-relatedness.¹⁹⁹ Thus, the Seventh Circuit's conclusion in *Chicago* is persuasive: Congress, by enacting the 1972 amendments, could and did extend the case law of *Griggs* and *Albamarle* on impact and job-relatedness to state and local governments.

The decision of the Seventh Circuit in *Chicago* affirms the power of Congress to legislate effectively against discrimination, regardless of the status of the employer, and thus grants to public employees the alternative statutory remedy Congress intended to create. Nevertheless, the Supreme Court's holding in *Usery* that the doctrine

197. Until *Davis* was decided, courts determining how closely job-relatedness should be scrutinized used *Griggs* and *Albamarle* as a gauge. As the dissent in *Davis* indicates, all other federal courts deciding Title VII cases under identical proof had reached an opposite result on the job-relatedness issue. 426 U.S. at 269-70 (Brennan, J., dissenting). To support this conclusion, the dissent cited *United States v. City of Chicago*, 385 F. Supp. 543, 555-56 (N.D. Ill. 1974); *Officers for Justice v. C.S.C.*, 371 F. Supp. 1328, 1337 (N.D. Cal. 1973); *Smith v. City of East Cleveland*, 363 F. Supp. 1131, 1148-49 (N.D. Ohio 1973); *aff'd in part and rev'd in part on other grounds*, 520 F.2d 492 (6th Cir. 1975); *Harper v. Mayor of Baltimore*, 359 F. Supp. 1187, 1202-03 (D. Md.), *modified and aff'd*, 486 F.2d 1134 (4th Cir. 1973); *Pennsylvania v. O'Neill*, 348 F. Supp. 1084, 1090-91 (E.D. Pa. 1972), *aff'd in pertinent part and vacated in part*, 473 F.2d 1029 (3d Cir. 1973).

198. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336 n.15 (1977). In *Teamsters*, the Court explained that Title VII plaintiffs could claim discrimination under either disparate treatment or disparate impact theories. *Id.* On a disparate impact theory a plaintiff is not required to prove intent. *Id.*

199. See note 8 *supra* & accompanying text.

of federalism may restrain congressional action, its recognition of intent as the constitutional standard in *Davis*, and the acceptance of a training program correlation as proof of job-relatedness may portend a different result if a similar case receives a full hearing before the Supreme Court.²⁰⁰ Under such circumstances, the Court could demand a showing of intentional discrimination or it could find a showing of discriminatory effect sufficient but allow the governmental employer to meet a less stringent burden in proving job-relatedness.

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200. If the Supreme Court holds that plaintiffs must prove intentional discrimination to sustain a Title VII challenge against state and local governments, plaintiffs still may be able to sue using the impact standard if the suit is brought under 42 U.S.C. § 1981. See note 87 *supra*. In *Davis*, the Supreme Court applied the impact standard to an employer against whom a § 1981 suit was brought. 426 U.S. at 249. The defendant in *Davis*, however, was a branch of the federal government, and the Court may determine that federalism insulates state and local governments from the application of the impact standard. The Supreme Court has granted certiorari to hear *Davis v. County of Los Angeles*, 566 F.2d 1334 (9th Cir. 1977), a § 1981 employment suit; therefore, this question may be answered shortly. In *Davis v. County of Los Angeles*, the court applied the impact standard to the county government and indicated its belief that impact also should apply in Title VII suits. *Id.* at 1340. To justify the imposition of a stricter standard under § 1981 than under Title VII, it could be argued that the thirteenth amendment upon which § 1981 is based enjoys greater freedom from the restraints of federalism than does the fourteenth amendment, the basis of Title VII. As the court in *Davis v. County of Los Angeles* remarked, however, Title VII and § 1981 traditionally have been interpreted to impose the same standards. *Id.* Accordingly, that the Supreme Court would distinguish between the two statutes in determining which standard must be met is somewhat doubtful.