Finding Intent in School Segregation Constitutional Violations

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FINDING INTENT IN SCHOOL SEGREGATION
CONSTITUTIONAL VIOLATIONS

Recent Supreme Court decisions have established that only intentional discrimination violates the equal protection clause of the fourteenth amendment, but the appropriate standard to be employed in finding the requisite intent is still not clear. The author demonstrates that in school desegregation cases the lower courts have applied a variety of subjective and objective tests and concludes that because of uncertainty over the proper standard to apply, the lower courts, in order to avoid reversal, may apply a more rigorous standard than the Supreme Court would actually require. As a consequence, they may deny minority school children the full measure of protection afforded by the equal protection clause.

I. INTRODUCTION

In the latter half of 1976 and early 1977, the Supreme Court decided four cases that have an impact on school segregation litigation. The issue tying these four cases together is to what extent must segregative intent be shown in order to establish an equal protection violation involving racial discrimination by the state? Washington v. Davis, \(^1\) an employment discrimination case, held that disproportionate racial impact alone is not sufficient to prove unconstitutional discrimination. Austin Independent School District v. United States, \(^2\) a school case in which the court of appeals had found unconstitutional segregation, \(^3\) was vacated and remanded by the Supreme Court for reconsideration in light of Davis. In Village of Arlington Heights v. Metropolitan Housing Development Corp., \(^4\) where blacks were disproportionately affected by a refusal to rezone for low income housing, the Supreme Court did not find the intent required to establish a constitutional violation. Dealing with state segregative action in both housing and schools, the Supreme Court in Metropolitan School District v. Buckley, \(^5\) vacated the court of appeals finding of a constitutional violation. The case was remanded for reconsideration in light of Arlington Heights and Davis.

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In these cases, the Court has said that a finding of segregative intent is required. This is surprising because "intent" is a concept that courts have tended to avoid or to objectify in civil cases. Where the purpose of a suit is to correct the denial of a constitutional right rather than to punish the one who caused the denial, the emphasis has been on finding a violation without dealing with the subjective intent of the actors. The four cases here analyzed deal with the requirement of segregative intent as an element of a constitutional violation. Until these cases were decided it was unclear that such a constitutional requirement existed.

The Supreme Court has not explained what is required to find segregative or discriminatory intent. Must a specific purpose to discriminate be found? Or, is it possible to infer that the state intended the natural, foreseeable consequences of its actions? Who has the burden to prove the state's intent in the situations being litigated? This Note takes the position that the Supreme Court, in a pair of earlier decisions, gave at least implicit approval to the method of inferring intent which had been employed by the lower courts. Recent Supreme Court decisions, however, may cause the lower courts to find constitutional violations only when the level of discriminatory intent is greater than that actually required by the Constitution. The focus throughout this analysis will be solely on discriminatory intent, as an essential element of an equal protection violation, in the context of public school segregation. This Note is intended to clarify various aspects of the intent requirement as it has been highlighted by the Supreme Court's recent pronouncements. The vehicle for this analysis is public school litigation because the case law is sufficiently developed to provide a complete picture of this area of the law without resort to other fact patterns. In addition, the school situation is sufficiently unique that use of law developed in other racial discrimination contexts is of limited assistance to an understanding of school segregation law.

To put these issues in better perspective, this Note will consider first the historical background of school segregation litigation against which the recent decisions were made. It will then analyze in some depth the parameters of intent spelled out by the four cases. Questions unanswered by these cases will be considered in light of various lower
court decisions relating to segregative intent. From this discussion, some conclusions will be drawn as to the effect of the four decisions on school segregation litigation.

II. BACKGROUND: EVOLUTION OF THE REQUIREMENT OF INTENT

A. Schools with State Mandated Segregation: Emphasis on Remedy

1. The Basic Law

The landmark case finding violation of the equal protection clause of the fourteenth amendment in public schools was Brown v. Board of Education. The Supreme Court held that "segregation [in public education] is a denial of the equal protection of the laws." Prior to this, Plessy v. Ferguson and its "separate but equal" doctrine had constitutionalized states' operation of segregated school systems and other facilities.

The context of the Brown holding is important to an understanding of the subsequent development of school segregation law. The unanimous decision was rendered in response to four appeals from four different states, each of which either explicitly permitted or required public school segregation by race. All the plaintiffs were black students in schools which were required by state agencies to be segregated by race. The Supreme Court ruled that "[s]eparate educational facilities are inherently unequal" and, if unequal, in violation of the equal protection clause of the fourteenth amendment. The Court then easily found, from the facts, a condition offensive to the Constitution: absolute segregation by race and segregation that was explicitly required by the state.

10. Id. at 495.
11. 163 U.S. 537 (1896).
12. The four cases were: (1) Brown v. Board of Educ., 98 F. Supp. 797 (D. Kan. 1961) (Topeka, Kansas), where segregation was permitted, but not required, by state statute and the Topeka school board had chosen to establish segregated elementary schools; (2) Briggs v. Elliott, 103 F. Supp. 920 (E.D.S.C. 1952) (Clarendon County, S.C.), where racial segregation in public schools was required by state statute and constitution; (3) Davis v. County School Bd., 103 F. Supp. 337 (E.D. Va. 1952) (Prince Edward County, Va.), where state statute and constitution required segregated public schools; (4) Gebhart v. Belton, 33 Del. Ch. 144, 91 A.2d 137 (1952) (New Castle County, Del.), where blacks and whites were required by state statute and constitution to be segregated in public schools.
13. 347 U.S. at 495.
The only question remaining was what relief should be granted. *Brown II*\(^{14}\) dealt with this issue, and gave guidelines to establish an equitable remedy for the constitutional wrong. Formulating the appropriate remedy has continued to occupy the greatest proportion of the federal courts' time in public school segregation suits.\(^{15}\) Nevertheless, it is axiomatic that courts do not shape remedies for constitutional or any other violations, until a violation is established. In fact "as with any equity case, the nature of the violation determines the scope of the remedy."\(^{16}\) Thus, the finding of the violation is a prerequisite to any remedy.

The *Brown* decision, and decisions about schools where segregation had been state mandated, did little to define the elements of an equal protection violation. Segregation was present and it was imposed by the state. No mention was made of intent to discriminate or whether that was a necessary part of the violation. Dealing with school systems where schools were statutorily segregated, the intent to discriminate by race was too obvious to require comment. Therefore, cases that the Supreme Court considered throughout the 1950's and 1960's tended to deal primarily with what was necessary to correct the violation of the plaintiff's rights;\(^{18}\) the finding of the violation was not questioned.

2. More Recent Cases

Recent cases, dealing with school systems that had had statutory segregation at the time of *Brown* but no longer had a written policy requiring racial segregation, began to speak of intent. In a trio of cases decided in the early 1970's, the Supreme Court purported not to base its decisions on the degree of discriminatory intent present; yet in dictum and in dissenting and concurring opinions, Chief Justice Burger frequently discussed the purpose and motivation of the defendants.\(^{19}\)

The decision in *Swann v. Charlotte-Mecklenburg Board of Education*\(^{20}\) related to the adequacy of the desegregation plan, but a question

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16. 402 U.S. at 16.
20. 402 U.S. at 16 (Burger, C.J.).
of the extent of the constitutional harm arose. The defendant was the school system covering the metropolitan area of Charlotte, North Carolina; the population was substantially segregated by residence, and the schools within the system were statutorily segregated in 1954 (when Brown was decided). But at the time the case arose there was no longer a written requirement of segregation. Nevertheless, the presumption was that the obvious segregation in the schools was a result of the previous segregation requirement.\textsuperscript{21} Evaluating the adequacy of the desegregation remedy, the Court’s emphasis was on the elimination of the “continuing effects of past school segregation . . . .”\textsuperscript{22} The burden was on the school authorities to show that the racial composition of the schools was not the result of discriminatory actions.

The Court did not say whether state action that had the effect of discriminating established intent to discriminate. The illegal state action was the statutory segregation, and the segregative intent was obvious in the law requiring segregation in the schools. Therefore, the school system had a duty to “eliminate from the public schools all vestiges of state-imposed segregation.”\textsuperscript{23}

However, in the majority opinion, Chief Justice Burger went on to elaborate the duties of the school board, beyond its responsibility for the present plan. Once the school system had become unitary, that is, desegregation had been accomplished and racial discrimination through official action had been eliminated, additional adjustments of racial composition were not required.

[I]n the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary.\textsuperscript{24}

This statement appears to indicate that violations of equal protection guarantees require an intent to effect the wrong—that a violation will not be found in the future unless the racial composition of the schools becomes segregated as a result of the state’s deliberate and intentional actions.\textsuperscript{25}

\textsuperscript{21. Id. at 26, 28.}
\textsuperscript{22. Id. at 28.}
\textsuperscript{23. Id. at 15.}
\textsuperscript{24. Id. at 32 (emphasis added).}
\textsuperscript{25. The decision in Swann has been the subject of conflicting interpretations. In a separate opinion in Keyes v. School Dist. No. 1, 413 U.S. 189 (1973), Justice Powell argued that the progression from Brown I through Swann logically required that the de jure/de facto distinction and the intent requirement be eliminated. “In imposing on metropolitan southern school districts an affirmative duty, entailing large-scale transpor-}
Since this conclusion did not relate to the remedial plan on which the Court based its decision, it may be regarded as dictum. Nevertheless, the statement was prophetic of what might follow. The Court has since held that, once a system is in compliance with the constitutional mandate, the school authorities need not continue to make adjustments for racial factors not caused by the school.\(^{26}\)

In the next year, Chief Justice Burger again raised the issue of motivation, this time more directly.\(^{27}\) Wright v. Council of The City of Emporia\(^ {28}\) and United States v. Scotland Neck Board of Education\(^ {29}\) were companion cases from Virginia and North Carolina. The school systems were required to desegregate as a result of constitutional violations. In both cases the Court held that part of a county-wide school system could not remove itself, and establish its own separate school system, when it would impede the effectiveness of the desegregation plans. Chief Justice Burger concurred in Scotland Neck and dissented in Wright, partially because of the difference in motivation of the school authorities in the two fact situations.\(^ {30}\)

The Chief Justice gave three basic reasons for his divergence from the majority. The first involved the degree to which the separation of the schools from the county-wide system was "the fulfillment of its destiny as an independent governmental entity."\(^ {31}\) A second factor

\(^{26}\) In Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976), Justice Rehnquist ruled that where school officials had complied fully with the provisions of the original desegregation decree, and where subsequent changes in racial composition apparently resulted from random demographic movement and unchanged geographic boundaries, then segregative action could not be charged to school officials. Id. at 431-40.


\(^{29}\) 407 U.S. 484 (1972).

\(^{30}\) In both instances Chief Justice Burger was joined by Justices Blackmun, Powell, and Rehnquist. Because all four Justices are still on the Court, their alignment and statements here may be important to future cases.

\(^{31}\) 407 U.S. at 492. This concept relating to the historic boundaries of local governments is also important in Milliken v. Bradley, 418 U.S. 417 (1974).
was the effect of the withdrawal from the county-wide system. The discriminatory consequences of the withdrawal in Scotland Neck would be "dramatically different from the effect which could be anticipated in Emporia." This second point had evidentiary significance bearing upon the third factor—that the motivation for the separation was to create a predominantly white school system in Scotland Neck, while that motivation was lacking in Wright. These cases foreshadowed more detailed analyses of intent in later school segregation cases. While the discussions had no effect on the holding of the cases in which they appeared, at least they raised the intent issue which would gain significance as the courts began to deal with school segregation in different contexts.

B. Schools Without State Mandated Segregation: Finding the Violation

1. Keyes v. School District No. 1

Keyes v. School District No. 1 was the first Supreme Court decision in which school segregation had not been overtly imposed by law. The case arose in Denver, Colorado, where a statutory dual system had never existed. The Keyes Court was clearly aware of the significance of the case in this regard, for it referred to its previous decisions that were based on different facts:

[W]here plaintiffs prove that a current condition of segregated schooling exists within a school district where a dual system was compelled or authorized by statute at the time of our decision in [Brown I], the State automatically assumes an affirmative duty "to effectuate a transition to a racially non-discriminatory school system." The Court also described what the plaintiffs had to prove for the Court to find a constitutional violation in the context of the Denver school system. "Petitioners apparently concede for the purposes of this case . . . [that] plaintiffs must prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action."

32. 407 U.S. at 492.
33. Id.
34. In contrast to Scotland Neck, Justice Burger did not find in Wright any evidence of "awkward gerrymandering or striking shift in racial proportions" which might afford the "basis for an inference of racial motivation." Id. at 483.
36. Id. at 200.
37. Id. at 198 (emphasis added).
Interestingly, although the issue had never been officially decided, even the plaintiffs assumed that intent was a required element of the violation, and it was on the basis of this assumption that the case was decided. In fact, Justice Brennan's majority opinion stated that "the differentiating factor between de jure segregation and so-called de facto segregation . . . is purpose or intent to segregate." In other words, in order to find unconstitutional segregation, there must be purpose or intent to segregate.

The Court in Keyes made proof of intent easier for the plaintiffs by recognizing that certain circumstances would shift the burden to defendants. The Court held that "[i]ntentionally segregative actions in a meaningful portion of a school system," created a presumption "that other segregated schooling within the system is not adventitious." Finding intentional segregation on the part of the school authorities in one part of the system was highly probative in assessing the intent behind their actions in other parts of the same system. Drawing on authorities in the field of evidence as well as from case law, the Court created a presumption in plaintiff's favor. In addition, the Court found it unnecessary for the plaintiffs to prove "the elements of de jure segregation as to each and every school or each and every student within the school system." The Court looked at the system as a whole; violations in important parts of the district resulted in liability for the entire district.

38. Justice Douglas in a separate opinion, and Justice Powell in a concurring opinion, both objected to the distinction between de facto and de jure segregation, in which the differentiating factor was intent. These opinions indicate that a finding of intent to segregate was not yet constitutionally required, even though the plaintiffs in Keyes conceded that it was.

39. 413 U.S. at 208 (emphasis in original). Joining the majority opinion were Justices Stewart, Marshall, Douglas, and Blackmun. Justice Douglas also filed a separate opinion. Chief Justice Burger concurred in the result. Justice Powell filed an opinion concurring in part and dissenting in part. Justice Rehnquist filed a dissenting opinion, while Justice White took no part in the decision.

40. Id.

41. Id. at 207-08. The use of the presumption has come under strong attack. One commentator has criticized the assumption underlying Keyes—that localized de jure segregative actions are always relevant in subsequent litigation challenging school board practices elsewhere in a school district. First, localized de jure practices may be too remote in time to have any probative value as to other practices; second, rapid turnover in school board membership may undermine the relevance of a de jure finding. These are issues deserving careful scrutiny before the presumption is raised and the burden of proof shifted. Case Comment, supra note 25, at 138-42.

42. Id. at 200.

43. Id. at 200.
The Court noted a number of lower court findings which would be significant when the presumption of segregative intent was applied on remand. The district court had found that, with respect to about 40 percent of Denver's black student population, the board's actions showed an undeviating purpose to isolate Negro students in segregated schools while preserving the Anglo character of other schools. The intentional segregative conduct included rescission of a voluntary plan to desegregate schools in the area, as well as segregative attendance districts and use of classrooms. Noting that the purpose of the school authorities was not "malicious or odious intent," the district court inferred segregative intent from the fact that "it was action which was taken with knowledge of the consequences, and the consequences were not merely possible, they were substantially certain. Under such conditions the action is unquestionably wilful." This district court used a tort test of foreseeability to find the intent required for a constitutional violation. The district court also found "uncontroverted evidence" of racial assignment of teachers and staff—"a minority teacher to a minority school throughout the school system."

In his concurring opinion, Justice Powell eloquently decried the finding of intent henceforth required in school desegregation cases. In the progression of cases from Brown I through Swann, Powell saw the development of an "affirmative-duty rule" which required school districts "to alleviate conditions which in large part did not result from historic, state-imposed de jure segregation." Fearing the unpredictable and capricious resolution of the intent issue, Justice Powell explained that he would neither "perpetrate the de jure/de facto distinction nor . . . leave to petitioners the initial tortuous effort of identifying 'segregative acts' and deducing 'segregative intent.' " As this Note suggests, Justice Powell's fear may have been realized. The courts' findings of intent may be as capricious, and therefore as unfair, as he predicted.

44. Id. at 198–99.
46. Id.
47. Id. The acceptance of the lower court findings in Keyes apparently marked the Court's first recognition of the objective standard of segregative intent. This "foreseeability test" has, however, followed a tortured path in recent Supreme Court decisions, and its acceptability as a constitutional standard is somewhat doubtful.
48. 413 U.S. at 200.
49. Id. at 217.
50. Id. at 222 (emphasis in original).
51. Id. at 224.
52. See notes 194–244 infra and accompanying text.
2. Milliken v. Bradley

The next major "northern" case decided by the Supreme Court involved school segregation in Detroit. In *Milliken v. Bradley,* the Court was concerned primarily with determining the scope of the remedy for the violation. Nevertheless, the case has some relevance to the intent issue. The district court inferred the requisite intent from actions taken by the Detroit Board of Education: the creation of optional attendance zones, and the manner in which the board established school attendance districts had the "natural, probable, foreseeable, and actual effect" of creating and perpetuating school segregation in Detroit. Thus, the lower court here, as in *Keyes,* employed the objective standard of foreseeable consequences to find segregative intent. In addition, the school board's practices in school construction had a segregative effect, and the school transportation program was racially discriminatory.

The Supreme Court did not analyze in depth the finding of the constitutional violation. Error in the lower court's findings of segregation was an issue raised in briefs but it was not among the issues presented to the Supreme Court for review. In a footnote, the Court stated that the Detroit violation findings were not plain error and that "under our decision last Term in *Keyes* . . . , the findings appear to be correct." In another footnote, the Court presaged future decisions such as *Washington v. Davis* and *Village of Arlington Heights v. Metropolitan Housing Development Corporation.* A finding of racial imbalance among pupils in a district may be used "as a signal which operates simply to shift the burden of proof, . . . [but that] is a very different matter from equating racial imbalance with a constitutional violation calling for a remedy."

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55. See note 47 supra and accompanying text.
56. 338 F. Supp. at 588.
57. 418 U.S. at 738 n.18.
58. Id.
60. 418 U.S. at 741 n.19.
C. Summary: Intent in Unconstitutional School Segregation before 1976

In a series of decisions from 1954 to 1972, the Supreme Court dealt with school segregation cases in factual situations where the segregation had been mandated by state or local law. In this context the Court focused upon the appropriate remedy for the acknowledged constitutional violation. Little emphasis needed to be placed on the elements of the violation itself since segregation explicitly compelled by state law was prohibited after Brown.61

In some of the later cases, however, the issue of defendants' intent or purpose began to arise. While intent was never the deciding factor in these cases, in Swann,62 Wright,63 and Scotland Neck64 Chief Justice Burger spoke for himself, and others, about the importance of the parties' intent in situations of actual segregation.

Swann raised the issue.65 But in Swann de facto school segregation existed against a backdrop of residential segregation and a past history of statutory segregation, and it was found that the school system had not taken the affirmative action necessary to purge itself of the effects of the statutory segregation.66 Dictum indicated that school segregation without deliberate attempts to segregate by school authorities might not be a constitutional offense.67 Wright68 held that intent to cause or maintain segregation was not necessary for a court to prevent action that would deleteriously affect a constitutionally required desegregation plan. But four members of the Court dissented on the intent issue.69 While the cases were primarily concerned with remedy, their facts bore a resemblance to the situation existing in school districts across the country where segregation had not been state-mandated, suggesting a "constitutional doctrine requiring affirmative state action to desegregate school systems."70

64. 407 U.S. 484 (1972).
65. 402 U.S. at 16.
66. See notes 21–23 supra and accompanying text.
67. 402 U.S. at 11, 28, 32.
69. See notes 28–34 supra and accompanying text.
70. 413 U.S. at 220–21.
Until *Keyes*, whenever the Supreme Court had found racially segregated schools, it had ordered desegregation, but it had always been able to trace the segregation back to a state mandate. Would the Court follow Powell's suggestion and "expect that once the State has assumed responsibility for education, local school boards will operate integrated school systems within their respective districts?" The Court did not. Instead, it followed a laborious route, inferring discriminatory intent in the whole system from intent found in a substantial section. Saying that purpose or intent to discriminate was required in order to find de jure segregation, the majority in *Keyes* then found a constitutional violation throughout the system.

In *Milliken*, the Court upheld the lower court finding of a constitutional violation, based at least partially on intent inferred through application of a foreseeability standard. The Court did not directly deal with the question whether segregative intent is constitutionally required. Nor did it explicitly decide, if intent is required, whether it is sufficient to say that one intends the natural and probable consequences of one's actions. Until clearer exposition by the Court became available, litigators could assume that intent was an essential element of the constitutional violation in school discrimination cases, and that the tort test of intent was sufficient. But, it was not clear that these assumptions were constitutional standards.

### III. Present Intent Requirements

Since *Keyes* the Supreme Court has written no opinion in a school segregation, equal protection suit, focusing on the requirement of intent or on the tests to be used to find intent. In *Washington v. Davis* and *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, the Court has held that disproportionate racial impact alone is not enough to prove an equal protection violation. However, *Davis* was an employment discrimination case, and *Arlington Heights* involved zoning. The two recent Supreme Court cases relating to schools, *Metropolitan School District v. Buckley* and *Austin Independent School District v. United States*, were sum-

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71. *Id.* at 225-26 (emphasis in original).
73. *See* notes 54-58 *supra* and accompanying text.
74. 426 U.S. 229 (1976).
mary dispositions in which appellate court decisions were vacated, and the cases remanded for reconsideration, in light of Davis and Arlington Heights.78

This treatment of the school cases may imply that the lower courts’ findings were unacceptable. Depending upon the interpretation of the remands, the lower courts may find it necessary to make findings of segregative intent that are much more specific than were previously thought to be required. In addition, to play it safe (and avoid future remands), the lower courts may apply different standards to find intent than have generally been used before. These standards may make it more difficult for plaintiffs to prove discriminatory intent and, when the burden of proof is on the other side, easier for defendants to disprove it. The use of different—and probably more demanding—standards of intent may, or may not, be what the majority of the Supreme Court had in mind. But it is arguable that the more rigorous standards are not constitutionally required, at least by the terms of the Court’s equal protection theory as developed through Keyes and Milliken. It is important, therefore, that the four recent cases dealing with intent be analyzed carefully in order to determine what the Court has said, and what it has not said, about the parameters of discriminatory intent.

A. Washington v. Davis

1. The Facts and Holding

Davis79 held that racial discrimination is a violation of the equal protection clause only when there has been intent to discriminate. Discriminatory impact alone is not enough. While courts and litigators may have assumed that intent was an essential element,80 before Davis it was still open to question whether intent was an absolute requirement of the constitutional violation.81

78. Both cases were remanded for reconsideration in light of Davis. Only in Buckley was reconsideration in light of Arlington Heights required, since Austin was decided prior to Arlington Heights.
80. For a discussion of this point in Keyes, see text accompanying note 39 supra. A number of circuit courts ruling on the intent question prior to Keyes agreed that segregative intent was essential to a constitutional violation. E.g., Deal v. Cincinnati Bd. of Educ., 369 F.2d 55 (6th Cir. 1967); Springfield School Comm. v. Barksdale, 348 F.2d 261 (1st Cir. 1965).
In *Davis*, black applicants for employment as police officers in the District of Columbia brought a class action suit claiming that recruiting procedures were racially discriminatory. The Supreme Court upheld the district court and overturned the appellate court, finding that the procedures violated neither the equal protection guarantee (contained in the fifth amendment due process clause), nor the Equal Employment Opportunities Act. Plaintiffs had established that, as a result of a particular personnel test, a higher percentage of black police recruits were excluded from police employment than were white police recruits. The Court indicated that, while the disproportion might be relevant, the affirmative action of the police department in recruiting blacks, and in its other procedures, negated any inference of intent to discriminate on the basis of race.

The majority explained:

Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.

Justice White, writing for the majority, went on to say that “we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.” He recognized, however, that previous cases had not always conveyed this principle. In particular, he discussed *Palmer v. Thompson* and *Wright v. Council of Emporia*.

82. 426 U.S. at 239.
83. Civil Rights Act of 1964, § 701, 42 U.S.C. § 2000e–2(h) (1970). The black applicants claimed statutory violations under Title VII along with their constitutional claim. The Court agreed with the applicants that, unlike the constitutional claim, the statutory claim arose simply on the basis of the disproportionate racial impact of hiring and promotion practices. Discriminatory purpose need not be proved, and “a more probing judicial review . . . than is appropriate under the Constitution” was to be carried out. 426 U.S. at 247. The Court went on to hold, however, that the record supported the district court’s conclusion that the relationship between the written personnel test, on which the claim of discrimination was substantially based, and the requirements of the police training program were sufficient to validate the test under the more rigorous statutory standards. *Id.* at 248–52.
84. The written personnel test in question, Test 21, is administered to nearly all prospective federal government employees in order to determine the level of each applicant’s verbal skill. *Id.* at 245.
85. *Id.* at 246.
86. *Id.* at 242.
87. *Id.*
which indicate "that in proper circumstances, the racial impact of a law, rather than its discriminatory purpose, is the critical factor."

Justice White attempted to distinguish both *Wright* and *Palmer* from the circumstances of *Davis*. In *Wright* the Court did not require intent, but the inquiry focused upon effecting a remedy, and not upon finding the initial equal protection violation. Although the distinction may be a rational one—violation in *Davis* (requiring intent) and remedy in *Wright* (requiring only effect)—it is interesting that the only members of the Court who joined Justice White in *Davis* were the four justices who had dissented in *Wright*. Perhaps the principles in the two cases were not so easily distinguished, and, in fact, the dissent in *Wright* had been vindicated, creating a new majority in *Davis* and the subsequent cases. Nevertheless, Justice White contended that the rule expounded in *Davis* had existed prior to *Wright*. He found support in *Keyes*, which was tried on the basis of the finding of discriminatory intent. Justice White had even greater difficulty in distinguishing *Palmer*. The Court in *Palmer* specifically stated that the focus in earlier cases "was on the actual effect of the enactments, not upon the motivation which led the States to behave as they did." In *Davis*, Justice White argued that *Palmer* had only limited the inquiry directed to the actual segregative motives of individual legislators. Perhaps more to the point was a footnote stating that, "to the extent that *Palmer* suggests a generally applicable proposition that legislative purpose is irrelevant in constitutional adjudication, our prior cases . . . are to the contrary." This suggests that Justice White, too, was uncertain about the status of *Palmer*.

Despite these difficulties with *Wright* and *Palmer*, the opinion stated that: "The school segregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a

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90. 426 U.S. at 243.
91. 413 U.S. 189 (1973).
92. 426 U.S. at 243. The decision in *Keyes*, however, followed the decision in *Wright*. Justice White's reference to *Keyes* and to "other later cases," id. at 244, was part of an attempt to isolate *Palmer* and *Wright* from the mainstream of Court decisions in which intent to discriminate was required. Despite these efforts, Justice White offered no persuasive justification for the deviations in *Wright* and *Palmer* from the intent requirement.
93. 403 U.S. at 225.
94. There is some language in *Palmer* which supports Justice White's contention: "[T]here is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters." *Id.* at 225. See Note, *supra* note 81, at 327.
95. 426 U.S. at 244 n.11.
racially discriminatory purpose.' Again, the opinion cited to Keyes which recognized "[t]he differentiating factor between de jure segregation and so-called de facto segregation . . . is purpose or intent to segregate.'

While the application of the Davis standard to school desegregation cases may not have been certain in light of Wright and Palmer, the Court was apparently unanimous in applying the standard to the constitutional issue presented in Davis. Five justices joined in the opinion of the Court, one justice concurred, and the dissent dealt only with the statutory standards and their application. The principle is clear. Disproportionate impact alone is not sufficient to establish an equal protection violation; the discrimination must be traced to an intent to discriminate. The discussion of the principle was sufficiently wide-ranging to indicate that intent is necessary to prove any constitutional violation based on racial discrimination. It is, therefore, important to examine closely the standards suggested in Davis for finding discriminatory intent.

2. Finding Discriminatory Intent

Both Justice White, in the majority opinion, and Justice Stevens, in his concurring opinion, dealt with methods of proving intent. Justice White summarized earlier Supreme Court cases to illustrate the manner in which discriminatory intent was handled. These cases involved discriminatory intent in a variety of contexts; among them, exclusion of blacks from a grand jury, racial gerrymandering of political boundaries, school desegregation, and racially biased administration of an ordinance. The majority would allow discriminatory purpose to be inferred from a wide range of evidentiary sources. First, intent need not be express or appear on the face of the statute; in other words, the segregation laws of the recent past are not the only evidence available to prove an intent to segregate. In addition, while disproportionate impact alone is not sufficient to prove intent, disproportionate

96. Id. at 240.
97. Id. (quoting Keyes v. School District No. 1, 413 U.S. at 205, 208) (emphasis in original).
98. Justice Stewart joined in parts I and II of the majority opinion, which included the discussion of the constitutional issue. 426 U.S. at 252.
99. Justice Stevens wrote the separate concurring opinion. Id.
100. The dissent was written by Justice Brennan and joined by Justice Marshall. Id. at 256.
102. 426 U.S. at 239–42.
impact may be used to establish a prima facie case of discriminatory purpose. Once plaintiffs have established a prima facie case, the burden of proof shifts to the defendant. Furthermore, in some situations—as in cases of systematic exclusion by race—the defendant may find it difficult to explain the difference in racial impact on non-racial grounds. The majority concluded, however, by re-emphasizing the distinction to be drawn between discriminatory purpose and discriminatory impact:

Nevertheless, we have not held that a law, neutral on its face . . . is invalid . . . simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.

In his concurrence, Justice Stevens focused directly upon the evidentiary issue, and expressed dissatisfaction with the line drawn by the majority between discriminatory purpose and discriminatory impact. He indicated that although it might be appropriate to frame the constitutional claim in terms of the requirement of purposeful discrimination,

the burden of proving a prima facie case may well involve differing evidentiary considerations.

Frequently, the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the *actor is presumed to have intended the natural consequences of his deeds.*
The distinction between discriminatory purpose and impact was "not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume." In other words, the same evidence may be used to find a dramatic discriminatory impact and to infer discriminatory intent. From the same evidence one may come to different legal conclusions, the one building on the other.

The conclusion to be drawn from *Davis* is that discriminatory purpose or intent is required to establish a constitutional violation. However, the case does not explain what, if any, additional tests are appropriate for finding intent in school segregation cases. Since the Court in *Davis* did not find the requisite intent to discriminate, it does not even give a picture of what is appropriate in employment discrimination cases. The opinion does refer to *Keyes*, however, as an example of a school segregation case where segregative intent was found, indicating approval of the tests used there. This means that the prima facie case shifting the burden to defendant may probably be used, and the intent may be inferred from the natural consequences of the action.

B. Austin Independent School District v. United States

1. *Supreme Court Action*

The first school desegregation case that the Supreme Court considered after the landmark *Davis* decision related to segregation of black and Mexican-American students in Austin, Texas. In *Austin Independent School District v. United States* the court of appeals had found unconstitutional segregation and ordered an extensive district-wide remedy. On December 6, 1976, six months after deciding *Davis*, the Court granted certiorari, vacated the judgement of the Fifth Circuit Court of Appeals and remanded the case for reconsideration in light of *Davis*.

Four justices joined in the per curiam decision; two joined a concurring opinion written by Justice Powell; and two dissented "because they were persuaded that the court of appeals correctly

107. 426 U.S. at 254.
108. *Id.* at 240.
109. *See* notes 41–48 *supra* and accompanying text.
111. 532 F.2d 380 (5th Cir. 1976).
114. Chief Justice Burger and Justice Rehnquist.
interpreted and applied the relevant decisions of this Court."

This summary disposition did not elaborate where the conflict may lie between the court of appeals' decision and *Davis*. However, Justice Powell's concurrence may provide insight into the thinking of at least three of the seven justices who did not accept the appellate court's judgment.

Justice Powell's opinion was concerned primarily with the appellate court's decision regarding the remedy for the constitutional violation. Nevertheless, he recognized that if the court of appeals found no violation on remand, there would be no need to consider the propriety of the remedy. One sentence in the concurring opinion indicated Justice Powell's concern with the finding of intent. "As suggested by this Court's remand premised upon *Washington v. Davis*, supra, the Court of Appeals may have erred by a readiness to impute to school officials a segregative intent far more pervasive than the evidence justified."

In a footnote, he elaborated on the aspect of the finding that concerned him.

Although in an earlier stage in this case other findings were made which evidenced segregative intent, . . . the opinion below apparently gave controlling effect to the use of neighborhood schools; " . . . A segregated school system is the foreseeable and inevitable result of [a neighborhood] assignment policy. When this policy is used, we may infer that the school authorities have acted with segregative intent."

Perhaps Justice Powell, joined by two other members of the Court, was saying that the tort test, by which an actor is assumed to intend the foreseeable consequences of his actions, is not an appropriate test for finding segregative intent. This would appear to conflict with *Keyes* and perhaps even with *Davis* (which referred back to *Keyes* as precedent for its holding). It is also arguable that Powell intended to say that, as the only evidence of intent, the test is insufficient under the circumstances. Further analysis of the case's preceding history and facts may help to clarify the possible conflict with *Davis*.

2. *Lower Court History: Facts and Holding*

The appellate court decision vacated by the Supreme Court was the last of a series of decisions involving litigation begun in 1970. The Austin school system was, at the time of *Brown*, racially segregated

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116. 97 S. Ct. at 520 (quoted material omitted in official reporter, 490 U.S. 990, 995).
117. 429 U.S. at 991.
118. *Id.* at 991 n.1 (citation omitted).
119. *See* note 47 *supra* and accompanying text.
120. 532 F.2d 380 (5th Cir. 1976).
by statute. Because of this history of statutory segregation, and be-
cause the school system had taken no affirmative steps to eliminate the
effects of that past segregation, the district court found a constitutional
violation requiring a remedy. The court of appeals affirmed this
finding. 121

Although the Austin schools had been statutorily segregated, the
segregation was between black and white students. Mexican-Ameri-
cans were included in the white population for this statutory purpose
and the district court in Austin found no de jure segregation against
Mexican-Americans. The Fifth Circuit Court of Appeals overturned
this finding as clearly erroneous. 122 The Austin school system had, "in
its choice of school site location, construction and renovation of
schools, drawing of attendance zones, student assignment and transfer
policies, and faculty and staff assignments, caused and perpetuated the
segregation of Mexican-American students within the school sys-
tem."123 It then remanded for a new desegregation plan consistent with
its holding.

The appellate court found a constitutional violation without finding
segregative intent. "It is not necessary to prove discriminatory motive,
purpose, or intent as a prerequisite to establishing an equal protection
violation when discriminatory effect is present."124 To support this
statement, the court cited a long list of southern school segregation
cases, as well as a few non-school cases.125 At least to the Fifth
Circuit, it was not apparent in 1972 that intent was an essential element
of the violation.

After this decision, and before the district court made further
determinations, Keyes v. School District No. 1126 was decided by the
Supreme Court. Afterwards, the district court dealt with several issues,
including the discrimination against Mexican-Americans. It

held that its finding of past intentional segregation of blacks
constituted a prima facie case of intentional segregation of
Mexican-Americans. It concluded, however, that the [Austin
school authorities] had successfully rebutted this prima facie
case by demonstrating that its racial policies had been unre-
related to its treatment of Mexican-Americans and that there
was an absence of segregative intent toward Mexican-Ameri-
cans.127

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121. 467 F.2d 848, 854 (5th Cir. 1972).
122. Id. at 864.
123. Id. at 865 (footnotes omitted).
124. Id. at 865 n.25.
125. Id.
127. 532 F.2d at 385-86.
In *Austin II*, 128 decided in 1976, the Fifth Circuit Court of Appeals reviewed the district court findings in light of *Keyes*. While it was argued before the court that the *Keyes* requirement of intent was "limited by the plaintiffs' concession in that case that they had the burden of proving intentional state action and by the obvious segregative purpose of the Denver school authorities," 129 the *Austin II* court rejected this contention. "[T]o the extent that . . . *Austin I* applied cause-and-effect tests and rejected the requirement of a showing of discriminatory intent, [that case was] supervened by *Keyes*." 130

The Fifth Circuit accepted the distinction delineated in *Keyes* 131 between de jure and de facto segregation. This is the same distinction described in *Davis*, decided one month after *Austin II*. To the Fifth Circuit, *Keyes* appeared to be the landmark case for discriminatory intent in the school segregation cases. Yet *Davis* must have been more than just a restatement of the *Keyes* holding; otherwise it would be difficult to explain why the Supreme Court remanded *Austin II* for reconsideration in light of *Davis*.

3. Implications for Finding Discriminatory Intent

The manner in which the court found the requisite intent is interesting and may shed some light on the Supreme Court's remand of this decision. The court of appeals said that the plaintiffs must prove three things in order to establish a prima facie case of unconstitutional segregation of Mexican-Americans: "(1) that there is segregation in public schools, (2) that state officials have, with segregative intent, taken or refrained from taking certain actions, and (3) that the present segregated system is a result of the action or inaction." 132 The court found all three elements, including the requisite intent, and therefore overruled the district court and reaffirmed its previous decision. The standard applied was the basic tort law rule that people intend the

128. 532 F.2d 380 (5th Cir. 1972).
129. *Id.* at 387.
130. *Id.* at 388.
131. 413 U.S. at 208.
132. 532 F.2d at 386. What constitutes an "action" for purposes of finding segregative intent has presented difficulty. Some have argued that inaction, such as failure to counteract racial imbalance arising from demographic movements, will not support a constitutional violation. The argument is of little merit. While it may be true that segregative intent is easier to prove in cases of positive action than passive inaction, the essential point is that a decision had to be made whether to act or not to act. A decision either way has significant racial consequences, and thus the action-inaction distinction is hardly a persuasive one. See Case Comment, *supra* note 25, at 149 n.100; Note, *supra* note 68, at 330–32.
natural and foreseeable consequences of their actions.\textsuperscript{133} The court found the rule to be faithful to \textit{Keyes} and also mentioned policy reasons behind this standard.

First, the foreseeability test must be employed due to the extreme difficulty, and even futility, of obtaining direct evidence of the officials' intent. For this reason courts rely on circumstantial evidence.\textsuperscript{134} Second, this test is consistent with that applied under Section 1983 of the Civil Rights Act "'under which many school desegregation cases are brought.'"\textsuperscript{135} This second argument may have lost some of its vitality, since \textit{Davis} distinguished between requirements for finding statutory, as contrasted with constitutional, violations in employment cases, an area where—prior to \textit{Davis}—the two standards were considered to be the same.\textsuperscript{136} The court also indicated that an affirmative duty to desegregate may not exist without the prior finding of a violation. Nevertheless, "'the refusal of school authorities to take affirmative action that would desegregate the school system may be probative of the segregative intent underlying various actions of those officials.'"\textsuperscript{137}

In applying these articulated standards, the \textit{Austin II} court found segregative intent and effects prejudicing Mexican-Americans. It held that the schools did not rebut this prima facie case of segregative action against Mexican-Americans.

[The case before us presents not only the use of a neighborhood assignment policy in a residentially segregated school district, but also the taking of an extensive series of actions dating back to the early twentieth century that had the natural, foreseeable, and avoidable result of creating and maintaining an ethnically segregated school system.\textsuperscript{138}]

The question then becomes, what must the court of appeals do differently on remand from the Supreme Court? Did \textit{Davis} add something to

\begin{itemize}
\item \textsuperscript{133} 532 F.2d at 388. In a footnote the court noted that the First, Second, and Third Circuits had also read the foreseeability test into the \textit{Keyes} requirement of segregative intent. \textit{Id.} at 389 n.6.
\item \textsuperscript{134} \textit{Id.} at 388.
\item \textsuperscript{135} \textit{Id.} at 389.
\item \textsuperscript{136} \textit{See note 84 supra} and accompanying text.
\item \textsuperscript{137} 532 F.2d at 389 (footnote omitted). This aspect of the foreseeability test has come under sharp criticism. The logic of the foreseeability test could lead to the requirement of the elimination of all racial imbalance in public schools. "'As a practical matter, the effect of a 'reasonably foreseeable' test is to impose an affirmative obligation to promote integration, since 'intend' will be inferred in any action which perpetuates or aggravates segregation. Intent becomes something of a fiction.'" Case Comment, \textit{supra} note 25, at 149 n.99. Other commentators have made similar arguments. \textit{E.g.,} Note, \textit{supra} note 81, at 329.
\item \textsuperscript{138} 532 F.2d at 392.
\end{itemize}
Keyes in defining a constitutional standard of intent? If so, why did the Davis opinion stress its consistency with Keyes? What did it add?

Or perhaps Davis did not add to Keyes anything significant for school cases. Did the Austin II court misinterpret, or misapply, the Keyes standards? If that was the problem seen by the Supreme Court, then why did it remand? Why did it not just reverse because the Austin II court had not properly applied established law?

The concurring opinion expresses some concern about the standard used in Austin II. Perhaps Justice Powell was merely requesting more precise articulation of the facts on which the court based its conclusion. Maybe Austin II should have repeated the finding of intentional discrimination against Mexican-Americans prior to 1954, in addition to the inferences of intent from the neighborhood school policy. Possibly there is an implication that finding intent under the tort standard may not be adequate to find the unconstitutional intent. Additional explanation would have been helpful to enable the Fifth Circuit to deal with the remand.

C. Village of Arlington Heights v. Metropolitan Housing Development Corporation

1. Facts and Holding

One month after it remanded Austin II, the Supreme Court again confronted the intent requirement in an alleged equal protection violation. In a full opinion, the Court found no constitutional violation where the refusal of a village to rezone had a discriminatory impact on blacks who wanted to live in low and moderate income housing units proposed for construction on the rezoned land. The holding reiterated the principle set down in Davis that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact . . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." Again the Court argued that this position was consistent with cases prior to Davis. "Although some contrary indications may be drawn from some of our cases, the holding in Davis reaffirmed a principle well established in a variety of contexts. E.g., Keyes v. School District No. I, . . . ."
Respondents had made an application for the rezoning of land to allow building of low and moderate income housing and challenged, on constitutional grounds, the decision by the Village of Arlington Heights to deny the rezoning request. The two basic issues in the case were whether respondents had standing, and whether there was a constitutional violation. The Supreme Court found proper standing, but found no equal protection violation where there was no intent to discriminate. The district court had concluded the village was not motivated by racial or economic discrimination; their motivation was to protect "property values and the integrity of the Village's zoning plan." The Seventh Circuit Court of Appeals approved the district court's finding on motivation, but found that the racially discriminatory impact of the village's decision was enough to establish a violation of respondents' constitutional rights, when the reasons given for the refusal to rezone did not show sufficiently compelling state interests.

The Supreme Court reviewed, and five members upheld the concurrent findings of both lower courts regarding intent. Writing for the majority Justice Powell, relied upon the decision in Davis, and explained that "respondents simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision." Respondents litigated on the theory that discriminatory impact alone was unconstitutional. "But both courts below understood that at least part of their function was to examine the purpose underlying the decision." The dissenters expressed their disagreement with the majority's review of the record and use of the principles of Davis. Davis had been handed down after the court of appeals' decision, so Justices Marshall, Brennan, and White considered it appropriate to remand the case to the appellate court for further proceedings in light of Davis.

Justice White, who wrote the Davis opinion, dissented in Arlington Heights because the lower courts had not had the benefit of the Court's decision in Davis. This implies that, prior to Davis, at least in the context of zoning cases, it was not universally recognized that discriminatory intent was required in order to find an equal protection violation. To be consistent with Austin, the Court apparently should

143. Id. at 260-64.
144. Id. at 259.
146. 429 U.S. at 270.
147. Id. at 268.
148. Id. at 272.
have remanded. Or conversely, to be consistent with *Arlington Heights* and *Davis*, the Court should probably have reviewed and decided *Austin* without remanding. Was the Court saying that the intent requirement in school segregation cases was not as clear prior to *Davis* as it was in zoning cases? Or was it perhaps saying that in *Austin* the wrong tests for intent were used, or the correct tests were misapplied, whereas in *Arlington Heights* the courts correctly applied the appropriate tests to the facts?

2. Finding Discriminatory Intent

The majority opinion went into some detail in describing circumstances in which intent may be determined. While Justices Brennan and Marshall dissented from the Court’s review of the lower courts’ decisions on intent, they concurred in Justice Powell’s articulation of ways to determine intent.\(^{149}\) First, Justice Powell noted that a plaintiff does not have “to prove that the challenged action rested *solely* on racially discriminatory purposes.”\(^{150}\) Nor does it need to be a “dominant” or “primary” purpose. Instead, the decision speaks to whether “a discriminatory purpose has been a motivating factor in the decision.”\(^{151}\) Justice Powell suggested determining intent by “a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.”\(^{152}\)

A “starting point” for this determination of intent may be the “impact of the official action,”\(^{153}\) as noted in *Davis*. The appellate court in *Arlington Heights* did find this threshold discriminatory impact; the Supreme Court did not contest this finding.\(^{154}\) The result of the denial for rezoning was the continued exclusion of blacks from the village. But the exclusion was sufficient only to raise the possibility of discriminatory intent, and not to prove it. “Sometimes a clear pattern,

\(^{149}\) *Id.* at 271. Justice White, in his separate dissent, disagreed with the need for discussion of the intent standard. *Id.* at 272.

\(^{150}\) *Id.* at 265–66 (emphasis added).

\(^{151}\) *Id.* For a critical analysis of the dominant motive issue, see Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 119.

\(^{152}\) 429 U.S. at 266.

\(^{153}\) *Id.*

\(^{154}\) Counsel for respondent, Willis Caruso, indicated in a conversation that, had they known the standards the Supreme Court would apply, they would have been able to show evidence sufficient to satisfy the intent requirement. *See* Comments of Willis Caruso, note 81 *supra*. This conclusion is totally opposite from that reached by the Supreme Court, after reviewing the record. Even taking into account the obvious advocacy stance of Mr. Caruso, one can see from the facts as described by the Supreme Court at least the possibility of sufficient evidence of intent, 429 U.S. at 255–58, particularly if the lower court had had these articulated standards, or those from *Davis*. 
unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. 155 Actually, this standard involves several elements, 1) a clear pattern, 2) unexplainable other than by race, and 3) neutral legislation. The examples given in the opinion show extreme situations of near or absolute exclusion. 156 As Justice Powell indicated, these cases are rare, but easy when found. Similar examples were given in Davis. 157 The question remains, however, what the lower limits of the standard might be. 158 In any event, the appropriate circumstances were not found to exist in Arlington Heights. 159

The Court further stated that "[t]he historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes." 160 This standard is related to the clear pattern standard mentioned above, with the major difference being one of degree. A series of official actions (implying previous similar actions, perhaps occasionally interspersed with dissimilar actions) would probably be of less probative value than a clear pattern (implying little or no deviation from incident to incident). The court of appeals found that while a buffer policy for rezoning had not been followed with unwavering consistency, there were times when it had been the basis for denial for rezoning proposals. 161

155. 429 U.S. at 266.
156. The most obvious example is that of Yick Wo v. Hopkins, 118 U.S. 356 (1886). A San Francisco ordinance, on its face apparently neutral, prohibited the operation of a laundry without the consent of city officials except in brick or stone buildings. Permits to operate laundries in wooden buildings subsequently were granted to all but one of the non-Chinese applicants, but to none of approximately 200 Chinese applicants. In a suit brought by a Chinese alien who had been convicted under the ordinance after being denied a permit, the Supreme Court found unconstitutional discrimination in violation of the equal protection clause. "Though the law be fair on its face . . . if it is applied . . . so as practically to make unjust and illegal discriminations between persons in similar circumstances . . . the denial of equal justice is still within the prohibition of the Constitution." Id. at 373.
157. 426 U.S. at 241–42.
158. Justice Powell did indicate that a statistical pattern less clear-cut than the one present in Yick Wo would be sufficient to support a constitutional violation in jury selection cases. 429 U.S. at 266 n.13.
159. Justice Powell also emphasized that a consistent pattern is not always necessary to support an equal protection violation; a single "invidiously discriminatory governmental act" may suffice under certain circumstances. Id. at 266 n.14.
160. Id. at 267.
161. The adoption by courts of a standard of consistency for the evaluation of school board policy has received mixed reviews from commentators. There is no reason either to expect or to require absolute consistency from school boards . . . School boards change composition from year to year, and the membership in the prevailing majority may change from decision to decision. The "same" school board does not make all contemporaneous, much less successive decisions.
"The specific sequence of events leading up to the challenged decision" may illuminate the purpose behind the decision. The Court here indicated that it could probably find intent in a situation where there is specific action to rezone while a project is being planned, where the original zoning would have permitted the proposed buildings. Perhaps this indicates that it is relatively easier to infer intent from action, such as rezoning, as contrasted with inaction, such as refusing to rezone. It also reflects an assumption of the legitimacy of the status quo. In Arlington Heights, the village had refused to rezone, which provided little or no evidence of the kind described.

"Departures from the normal procedural sequence" may provide some evidence of discriminatory purpose: they lead to the further inquiry of whether the departures were discriminatory. The Court found that overall the "rezoning request progressed according to the usual procedures." At the same time, it noted two deviations; the relevance of one deviation was not explained in the record, and the second—additional hearings—was found to be "at least in part" an accommodation to the developers.

"Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." This situation was not found by the Court in Arlington Heights. Here the key word is "strongly," in the sense that a decision will probably be presumed to be valid unless it is almost totally inconsistent with articulated bases on which similar decisions have usually been made.

"The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decision-making body, minutes of its meetings, or reports." In this case, the records apparently were neutral. One member of the village board testified at the trial, but the Court found "nothing in her testimony to support an inference of invidious purpose." The Court

162. 429 U.S. at 267.
163. For an analysis of the action-inaction distinction, see note 132 supra.
164. 429 U.S. at 267.
165. Id. at 269.
166. The village planner whose primary responsibility involved zoning was never asked for his opinion.
167. 429 U.S. at 270.
168. Id. at 267.
169. Id. at 268.
170. Id. at 270.
appeared reluctant to use this testimony, or to allow more than what
the district court permitted, because of a general policy against "intru-
sion into the workings of other branches of government." 171

The above examples were illustrative of "subjects of proper in-
quiry in determining whether racially discriminatory intent existed." 172
They did not purport to be exhaustive, 173 indicating that intent
may be inferred from circumstances other than those enumerated here.
Presumably each, or a combination of several such circumstances,
may be conclusive of intent in appropriate situations. The examples
used by the Court are illustrative and particularly interesting when they
are applied to the particular facts presented in Arlington Heights. It
remains to be seen, however, how they may be applied in other
contexts. It is also important to analyze what other circumstances, not
listed in Arlington Heights, may show the discriminatory intent that is
an element of an equal protection violation. Particularly relevant here
is the fact that this case did not deal with school segregation. There
probably are other standards that may not be appropriate for discussion
in a zoning context but are relevant to finding intent in school cases.

D. Metropolitan School District v. Buckley: The Indianapolis Case

1. Supreme Court Action

Approximately two weeks after the Supreme Court decided Arlington
Heights, in January, 1977, the Court vacated the judgment of the
Seventh Circuit Court of Appeals in Metropolitan School District v.
Buckley 174 and, in a summary disposition, remanded it for further
consideration in light of Davis and Arlington Heights. The remand
was a six to three decision, with Justices Brennan, Marshall, and
Stevens dissenting. There was no elaboration of the remand or dissent.

2. Lower Court: Facts and Holding

Buckley involved a metropolitan-wide remedy for school desegre-
gation and also injunctive relief for segregative housing practices by
the state. 175 The litigation began with the United States bringing suit to
desegregate the Indianapolis schools. It was eventually expanded to
include the metropolitan area school districts, because the court found
that the expansion of the municipal government to include the entire

171. Id. at 268 n.18.
172. Id. at 268.
173. Id.
175. United States v. Board of School Comm'rs., 541 F.2d 1211 (7th Cir. 1976).
county, while the state legislature expressly prevented the school district boundaries from expanding in the same way, effectively kept blacks almost exclusively in Indianapolis and its school system. The siting of low-income, almost exclusively black housing projects within the Indianapolis school district, despite the government’s authority to site them beyond those school boundaries, had the same effect.

The court of appeals upheld the district court, finding two violations of the equal protection clause.

The first was the failure of the state to extend the boundaries of the Indianapolis Public School District... when the municipal government of Indianapolis and other governmental units in Marion County, Indiana, were replaced by a consolidated county-wide government called Uni-Gov. The second violation was the confinement of all public housing projects (in which 98 percent of the residents are black) to areas within the boundaries of the City of Indianapolis. 176

The court of appeals made no specific findings of intent because it analogized its concerns to those in Wright. 177 While Wright did not permit redistricting which would have thwarted efforts to remedy the constitutional wrong, in Buckley the court said that a refusal to redistrict, when consolidation has occurred throughout the rest of the state, could not be used to impede the constitutional remedy. The court of appeals found that the violations were sufficient to uphold a metropolitan school desegregation remedy and an injunction against further discriminatory siting of government housing.

In an articulate dissent, Judge Tone argued no constitutional violation should have been found because of the recent Davis decision, and because the court had not found the requisite intent to discriminate which is an essential element of an equal protection violation. 178 While the majority was concerned that the interdistrict remedy complied with the mandate of Milliken, 179 the dissent insisted there was no interdistrict violation to necessitate an interdistrict remedy. 180

3. Implications for Finding Intent

In view of the recommended reconsideration of Buckley in light of Davis and Arlington Heights, a majority of the Court was apparently not satisfied with the Seventh Circuit’s holding of constitutional viola-

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176. Id. at 1212.
178. 541 F.2d at 1224.
179. See text accompanying note 53 supra.
180. 541 F.2d at 1224-28.
tion without specific findings of discriminatory intent. Neither the court of appeals nor the district court made a specific finding of intent. There were, however, several instances in which there was some discussion of motivation. For example, mentioning resistance to a plan to consolidate school districts in the county, the appellate court indicated that "there is no evidence that this opposition was racially motivated." 181

In another instance the court cited actions of the state legislature which took away the opportunity for the Indianapolis school district to expand its boundaries at a time when the legislature knew that a school desegregation plan was pending. By drawing "reasonable and logical inferences from probable consequences of changes in the law and the evident purpose of such changes," 182 the court found a legislative intent not to expand the school system boundaries. The court did not go further and specifically draw the inference that the legislature therefore intended to maintain the racial segregation that existed. The district court did indicate, however, that "[w]hen the General Assembly expressly eliminated the schools from consideration under Uni-Gov, it signaled its lack of concern with the whole problem and thus inhibited desegregation..." 183

When the court on remand considers discriminatory intent, it may be able to apply to this fact pattern the evidentiary sources suggested in Arlington Heights. 184 Certainly the Buckley court cannot find that the state's action was based solely on a racially discriminatory purpose, but this is not required. 185 If one applies the means of investigation suggested in Arlington Heights, some do not lead to an inference of intent. For example, the evidentiary record does not present a clear pattern that cannot be explained on other than racial grounds. Moreover, the court found a number of rational explanations other than race for the failure to allow expansion of the school district to include the suburbs. 186 Yet, when one views the school district's exemption from expansion in light of the "historical background of the decision," and the "specific sequence of events leading up to the challenged deci-

181. Id. at 1216.
182. Id. at 1220.
183. Id. at 1221 (emphasis added).
184. See notes 154-71 supra and accompanying text.
185. See note 171 supra and accompanying text.
186. For example, the court of appeals noted that the school board had argued that consolidation of all the schools would result in an oversized school district with consequent loss of citizen participation and increased taxes. The court admitted these to be "substantial reasons" for a failure to consolidate, and "apparently not racially motivated." 541 F.2d at 1220-21. For a discussion of the Arlington Heights standards, see notes 155-59 supra and accompanying text.
sion," evidence of possible discriminatory intent begins to come into focus.

School districts throughout the state had been consistently consolidated over a period of several years by state mandate. Marion County school districts, including those in Indianapolis, had not been consolidated. Attempts to achieve voluntary consolidation had been thwarted by the suburban school districts. During the period of resistance, the school desegregation suit was pending, and the Indiana legislature and the suburban school districts were aware of the possible implications of the suit. Sixteen days after the legislature specifically repealed a provision which had provided for automatic, contemporaneous extension of school district boundaries as city boundaries expanded, the state adopted a metropolitan system of government for Marion County. As the court of appeals said, "[b]ecause, in 1969, 95 percent of the blacks in Marion County lived in the inner city and segregation in its schools was under attack in federal court, it is clear to us that Uni-Gov and its companion 1969 legislation were [a] substantial cause of interdistrict segregation." Considering this finding in conjunction with the above facts, it may be possible to find not only the segregative effect of the decisions, but also the requisite segregative intent.

The record showed that if events in Indianapolis and Marion County had proceeded as would have been expected from the patterns and procedures established throughout the rest of the state, "Marion County would be either a consolidated school district under the 1959 School Reorganization Act or [the Indianapolis public school system] would have been expanded with the civil city of Indianapolis under Uni-Gov." There was, therefore, a substantial departure from the policy practiced throughout the rest of the state. The sequence of all the events preceding the state's action, including initiation of the school segregation suit, combined with the documented segregative effect create a possible inference of discriminatory intent. These are a few of the several factors suggested in Arlington Heights for "[d]etermining whether invidious discriminatory purpose was a motivating factor."

Of course, the court could find that race was a motivating factor without finding race to be the motivating factor, or even a dominant or

187. See notes 160–62 supra and accompanying text.
188. 541 F.2d at 1220.
189. Id. at 1221.
190. 429 U.S. at 266.
primary factor. If race was one of the factors in the decision, then that racial consideration may have been what tipped the balance sufficiently to have caused the decision to be made in the manner in which it was, resulting in the maintenance of segregation. Determining the effect of a given factor on a decision is more difficult than simply identifying all the factors involved. Therefore, it may be that when unconstitutional racial motive is identified as one factor in the decision-making process, the whole decision is tainted.

There is no indication in the Arlington Heights and Davis opinions that the above would not be an acceptable approach on remand. In fact, this approach to finding intent follows the suggestions made in Arlington Heights and, therefore, appears consistent with the guidelines enumerated by Justice Powell. Although the guidelines suggest evidentiary sources for finding intent, they do not describe a legal standard. On remand, the court must still determine the quantum of proof legally necessary to establish discriminatory intent and a constitutional violation.

E. Summary

In the four cases described above, the Supreme Court has made a clear statement: discriminatory intent is an essential element of an equal protection violation with regard to racial discrimination. Unless actions resulting in a discriminatory impact are linked to discriminatory intent, they do not violate the constitutional guarantee of equal protection. Declaring discriminatory intent to be essential partially defined the legal standard, but the intent required is still unclear. The significance of Davis and Arlington Heights is that they began to shape the contours of the constitutional intent requirement. The outer limits appear to be that while intent need not be explicit, neither can it be entirely inferred from segregative effect.

Consistency and rationality in the disposition of the four cases is somewhat difficult to discern. In the employment and zoning cases (Davis and Arlington Heights) the Court applied its standards to the

191. For an analysis of the Court's discussion in Arlington Heights concerning the issue of race as a dominant factor in a decision, see notes 150–51 supra and accompanying text.

192. The Court in Arlington Heights indicated in a footnote, however, that identifying a discriminatory motive would operate only to shift the burden of proof. "Proof that the decision . . . was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted . . . the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered." 429 U.S. at 270–71.
record, and decided the constitutional questions. In the area of school desegregation, appellate court decisions were accepted for certiorari, and then summarily remanded without elaboration. Yet in all but Austin (a school case) there was apparently some question in the minds of the lower courts as to whether they had to find intent. The Court gave suggestions for finding intent in the full opinions, but they were not exhaustive, and covered a wide variety of factual contexts. Finding intent in school desegregation cases will require taking the broad outlines of the Supreme Court decisions and filling in the analysis from other lower court and Supreme Court school cases. Since the Supreme Court cases have been discussed, the next section deals with ways in which the various federal circuits have found discriminatory intent in school segregation cases.

IV. FINDINGS OF DISCRIMINATORY INTENT IN THE CIRCUITS

A. Introduction

A review of some current standards used by various circuits may elucidate the tests which are appropriate for finding intent in school segregation cases. This review will cover only a few of the myriad school segregation cases. The issues and fact patterns of school cases are sufficiently complex to provide a variety of approaches; at the same time, the similarity of the factual patterns makes it easier to compare these cases.

The fact pattern generally presented is a long history of action and inaction by school officials against a background of varying student populations. This history of school board decisions covers a wide variety of subjects, such as student attendance zones, assignment of faculty, location of new school facilities, and expenditures, all of

193. See notes 110-39, 174-92 supra and accompanying text. While the Supreme Court suggested ways of finding discriminatory intent, the discussion was only suggestive in regard to school desegregation cases; it was not conclusive. The two school cases, Austin and Buckley, were remanded for reconsideration in light of an employment discrimination case and a zoning discrimination case. The district and appeals courts in the two cases must now make the redetermination, subject again to possible Supreme Court review. Presumably they will use standards similar to those used in the lower courts in similar cases, if those standards are not (apparently) invalid because of recent Supreme Court cases.

194. Litigation may ensue because the complaining parties have determined that no more can be done to develop voluntary desegregation. E.g., Morgan v. Hennigan, 379 F. Supp. 410, 417-21 (D.C. Mass. 1974). Often a single event, such as the recission of a desegregation plan, may trigger a suit. E.g., Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).
which work together to make a segregated or non-segregated school district. This broad spectrum of decision-making provides varied evidentiary sources, and necessitates distinct methods for drawing inferences of discriminatory intent, different from the analysis involved in a single action such as the denial of a rezoning application.\footnote{195} As Justice Stevens said in his concurring opinion in \textit{Davis}: "Although it may be proper to use the same language to describe the constitutional claim in each of these contexts, the burden of proving a prima facie case may well involve differing evidentiary considerations."\footnote{196}

The following analysis will present several ways in which various circuits have found, or have not found, discriminatory intent. All the cases were decided after the Supreme Court decision in \textit{Keyes},\footnote{197} the decision that differentiated between de facto and de jure segregation, and laid the groundwork for the decision three years later in \textit{Davis}. The cases following \textit{Keyes} most clearly recognized the intent requirement and developed standards for finding it.

The tests described will be minimal tests: that is, what is the lowest permissible level of evidence to sustain an equal protection violation in a given factual context? It is at this level that decisions are hardest.\footnote{198} The examples given are only examples, and are not intended to be exhaustive. The variety of factual contexts is too great to enumerate within the limits of this Note. The cases presented are meant to be illustrative of approaches that courts have used to find discriminatory intent.

\textbf{B. Purpose Test}

In \textit{Diaz v. San Jose Unified School District},\footnote{199} the Ninth Circuit reaffirmed\footnote{200} its "purpose" test. The court found no constitutional violation because there was insufficient evidence that the school board was "practicing a purposeful policy of racial separation in the school

\begin{footnotes}
\item[196] 426 U.S. at 253.
\item[197] 413 U.S. at 208.
\item[198] The cases in which segregative purpose is obvious present few problems. \textit{See}, e.g., note 156 supra. As Justice Powell noted in \textit{Arlington Heights}, where there is an abundance of evidence of segregative intent, "[t]he evidentiary inquiry is then relatively easy." 429 U.S. at 266. But as Justice Powell further suggested, "such cases are rare." \textit{Id}. Far more often the evidence of intent is limited and the inquiry more difficult as a consequence.
\item[200] The decision in \textit{Diaz} followed from two previous Ninth Circuit decisions in which the "purpose" standard of segregative intent had been adopted: \textit{Johnson v. San Francisco Unified School Dist.}, 500 F.2d 349 (9th Cir. 1974), and \textit{Soria v. Oxnard School Dist.}, 488 F.2d 579 (9th Cir. 1973).
\end{footnotes}
The facts indicated that school authorities were aware of segregation between Anglo and Spanish-surnamed school children. The school district had perpetuated the existing ethnic division by site selection of new buildings and adherence to a neighborhood school policy in a racially segregated community. After finding the school system had consistently adhered to a neighborhood school policy, the court held that the school system had no affirmative duty to improve racial balance unless it had violated the Constitution by purposely causing the imbalance.\textsuperscript{202}

The \textit{Diaz} court indicated that the "Ninth Circuit's post-Keyes decisions [had] adopted the 'purpose' rather than the 'foreseeable' standard of unconstitutional segregation."\textsuperscript{203} From this it can be inferred that the evidence of segregative intent must be more explicit than that required for the general tort standard.\textsuperscript{204} The court refused to infer discriminatory purpose from failure to follow integrative policies or from board decisions that tended to maintain the segregated status quo.\textsuperscript{205}

Since the court did not find the requisite intent, despite a pattern of decisions made with the obvious result of maintaining segregation, it is difficult to imagine a situation where the necessary intent would be found, other than where segregative intent is express. Use of the \textit{Arlington Heights} evidentiary sources, stressing official action evincing clear discriminatory purpose, may not be too helpful to determine intent when the district court emphasizes the consistency of the school authorities' adherence to the neighborhood school policy.\textsuperscript{206} It should be noted that the \textit{Diaz} court, rejecting an objective test of foreseeability, opted instead for a standard focusing on subjective motivation.

\textsuperscript{201} 412 F. Supp. at 330.  
\textsuperscript{202} \textit{Id.}  
\textsuperscript{203} \textit{Id.} at 329.  
\textsuperscript{204} For a discussion of the foreseeability test and pattern test, see notes 210-38 infra and accompanying text. It would appear that to date, only the Ninth Circuit has adopted a purpose test for segregative intent. \textit{But see} Note, \textit{supra} note 161, at 322.  
\textsuperscript{205} The \textit{Diaz} court justified the school board's maintenance of the status quo as follows:  
The Court cannot, however, say that in applying the neighborhood school policy and rebuilding the schools within the existing area the board violated the Constitution: to hold that such action constitutes segregative conduct would be to cast on the school board an affirmative duty to improve ethnic balance; this the Ninth Circuit has refused to do.  
412 F. Supp. at 310.  
\textsuperscript{206} Challenge to a neighborhood school policy on grounds of racial discrimination becomes even more difficult in light of the numerous arguments which support neighborhood schools. As the \textit{Diaz} majority points out, time and safety considerations, plus increased parental involvement in the educational process, all argue in favor of neighborhood school policies. \textit{Id.} at 335.
Thus, the purpose test poses serious practical and evidentiary problems. As one commentator has pointed out, since

individual decision-makers will rarely admit improper motivation, a finding of subjective intent generally must be inferred from circumstantial evidence . . . [B]ehind any act may lie a number of subjective motivations. Thus, judges must rely on their knowledge of human nature in deciding whether particular facts are indicative of segregative intent.  

As a consequence, decisions among the courts are likely to be inconsistent and unpredictable. Although the Diaz court refused to infer a discriminatory purpose from the school board's failure to follow integrative policies, other courts have found the same evidence sufficient to support a finding of segregative intent. Furthermore, even where the evidence of motivation is more than circumstantial, the task of determining the actual intent of an entire school board is all but impossible. As one court has argued, there is unfairness in "ascribing collective will to articulate remarks of particular bigots . . . ."  

C. Foreseeability Test

Most courts of appeals and the Supreme Court have used or approved an objective standard to find intent in school segregation cases. As noted earlier in discussing Keyes and Milliken, the lower courts inferred intent by applying the familiar tort standard of foreseeability, and the Supreme Court approved. As Justice Stevens indicated, concurring in Davis, requisite intent is found in the formulation that "normally the actor is presumed to have intended the natural consequences of his deeds." This standard was not mentioned, however, in the majority opinion in Davis or in Arlington Heights, but, again, it must be noted that neither of these cases was a school segregation case. Perhaps taking their cue from the Supreme Court when it decided Keyes and Milliken, many circuits have inferred segregative intent from the foreseeability of the effect of the school authorities' actions.

The Eighth Circuit Court of Appeals described the intent "which triggers a finding of unconstitutionality not [as] an intent to harm black students, but simply an intent to bring about or maintain segregated schools." To find the requisite intent on the part of school officials,

207. Note, supra note 161, at 325.
210. See notes 36-60 supra and accompanying text.
211. 426 U.S. at 253.
the Eighth Circuit in *United States v. School District of Omaha*\(^{213}\) used a presumption of segregative intent which "arises once it is established that school authorities have engaged in acts or omissions, the natural, probable and foreseeable consequence of which is to bring about or maintain segregation."\(^{214}\) The court of appeals found that the school officials' evidence was not sufficient to overcome the court's presumption of intent. This intent was inferred from the school authorities' policies and actions in regard to faculty assignment, student transfers, optional attendance zones, school construction, and the deterioration of a particular school.\(^{215}\) In a per curiam decision, two months after the Supreme Court decided *Davis*, the court again reviewed the *Omaha* holding and "found nothing [in the *Davis* opinion] that would cause us to revise our earlier opinion."\(^{216}\) In other words, the *Omaha* court found nothing in *Davis* to indicate that the foreseeability standard was unacceptable.

In *Hart v. Community School Board of Education*,\(^{217}\) the Second Circuit Court of Appeals used a standard identical to that of the Eighth Circuit. "Unless the Supreme Court speaks to the contrary, we believe that a finding of *de jure* segregation may be based on actions taken, coupled with omissions made by governmental authorities which have the natural and foreseeable consequence of causing educational segregation."\(^{218}\) The *Hart* court adopted the objective standard, rather than a more specific intent standard because "[t]o say that the foreseeable must be shown to have been actually foreseen would invite a standard almost impossible of proof save by admissions."\(^{219}\) This goes to the point mentioned before in regard to the "purpose" standard of intent, that subjective motivation is very difficult to discover and prove.

A second reason given in *Hart* for not requiring a finding of actual intent relates to the purpose of the litigation in school (and other) discrimination cases: "*[t]he Fourteenth Amendment is not meant to assess blame but to prevent injustice.*"\(^{220}\) The focus of the inquiry is


\(^{214}\) 521 F.2d at 535–36.

\(^{215}\) Id. at 537.

\(^{216}\) 541 F.2d at 709.


\(^{218}\) 512 F.2d at 50.

\(^{219}\) Id.

\(^{220}\) Id.
not to discover and punish violators, but to determine whether people have been denied equal protection of the law. If they have, then their right to equal protection must be enforced. Under this rationale a more specific intent requirement appears to work at cross purposes with a meaningful guarantee of constitutional rights.

Using the Hart standard, a district court found unconstitutional segregation in the public schools and housing of Buffalo. In *Arthur v. Nyquist*, the court found the requisite intent in a substantial portion of the school district, and then shifted the burden to the school authorities to prove that their other actions were not performed with the same discriminatory intent. This is the same burden shift used in *Keyes*. Defendants then had to prove "that segregative intent was not among the factors that motivated their actions."223

The Sixth Circuit has also employed the foreseeability test to infer intent to discriminate. Asked to review whether a previous adjudication of segregation in Cincinnati schools was sufficient to prevent a suit ten years later, the court of appeals reviewed its decisions about intent after *Keyes*. The test used was again the tort test of foreseeability.

"[A] court may infer intent, which is a subjective fact not easily proven, from evidence of racial imbalance accompanied by acts or omissions of a school board, the natural and probable result of which is to produce or perpetuate a segregated school system."226

In *Oliver v. Michigan State Board of Education*, the Sixth Circuit again employed the foreseeability test and presumption of segregative intent in order to find that school authorities had violated the students' rights to equal protection.229 The district court outlined...
the factual showing establishing de jure segregation, including the requisite intent.

It is established that where an appropriate factual showing has been made, including a showing that an existing segregated situation is to a significant extent the natural, probable, and actual result of the actions and inactions of the state and local agencies, the plaintiffs have laid an evidentiary foundation for the conclusion that the results, segregated schools, were intended to be reached by these authorities.230

In summary, a number of courts have adopted a foreseeability test focusing upon the objective consequences of actions of school officials. This focus allows a court to avoid some of the evidentiary problems of a "purpose" test, where the party supposedly harboring the intent is often ill-defined and the evidence of subjective motivation usually unclear.231 Furthermore, the foreseeability test offers a relatively clear-cut standard, familiar to courts and litigators. The test has been criticized, however, on the grounds that its sweep is too broad. The failure of a school board to adopt policies which might alleviate racial imbalance necessarily perpetuates existing imbalance. Such a result is clearly foreseeable, and thus application of the standard may impose upon the school board an affirmative obligation to promote integration.232

D. Pattern or Totality of the Facts Test

In Armstrong v. Brennan,233 a case decided after Davis,234 the Seventh Circuit affirmed a district court's finding of discriminatory purpose based on the total pattern of school authorities' actions, although no individual action unmistakenly signalled discriminatory intent. Quoting the language of Davis, the appellate court explained:

Purpose may of course be inferred from "the totality of the relevant facts," which may include discriminatory impact . . . . As Mr. Justice Stevens said in his concurring opinion

First, in Higgins, the school system had initiated a voluntary desegregation program which the court did not want to discourage. 508 F.2d at 789. Second, different court personnel were involved in the two decisions. In Higgins, Circuit Judge Miller was joined by Judges Lively and Weick. In Oliver, Circuit Judge Celebrezze wrote an opinion in which Judge Peck joined; Judge Weick dissented. The Sixth Circuit recently affirmed its acceptance of the foreseeability standard citing Oliver for support. NAACP v. Lansing, No. 76–1267 (6th Cir. July 26, 1977).

230. 368 F. Supp. 143, 162, quoted in 508 F.2d at 181 (emphasis added).
231. See notes 207–09 supra and accompanying text.
232. For further authority in regard to this argument, see note 137 supra.
233. 539 F.2d 625 (7th Cir. 1976), vacated and remanded per curiam, 45 U.S.L.W. 3849, 3850 (U.S. June 29, 1977).
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in that case, "Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor."\textsuperscript{235}

The court then reviewed the evidence from which the district court inferred intent, and affirmed.\textsuperscript{236} The district court, after reviewing the evidence, had found it "hard to believe that out of all the decisions made by school authorities under varying conditions over a twenty-year period, mere chance resulted in there being almost no decision that resulted in the furthering of integration."\textsuperscript{237} The district court found a conscious and systematic program of segregation affecting the whole public school system. The court of appeals, upholding the district court's standard for intent, affirmed its finding of "a pattern clear enough to give rise to a permissible inference of segregative intent."\textsuperscript{238}

E. Various Levels of Intent Analysis Within a Single Case

The preceding analysis gives an overview of the tests various courts have used for finding intent in school segregation cases. This analysis may be misleading, however, if it conveys the impression that courts use only one standard of intent in a particular case, and that evidence of intent within a case lends itself to no more than a single level of intent analysis. The more common fact situation is where the court must deal with evidence of innumerable school board decisions and actions, each of which—separately and in combination—may provide evidence for different modes of intent analysis. The evidence of intent may be obvious, on the face of a statute, or deeply submerged, allowing school authorities to rebut any presumptions of intent. More likely, the evidence of intent will vary between these extremes.

For instance, in Reed v. Rhodes,\textsuperscript{239} a district court case decided after Davis, the court applied different levels of intent analysis to the various actions of the school authorities in the Cleveland public schools. In Reed, the simplest analysis inferred intent from the effect of school board actions.\textsuperscript{240} This was the foreseeability test combined

\begin{itemize}
\item \textsuperscript{235} 539 F.2d at 634.
\item \textsuperscript{236} It is interesting to note that Circuit Judge Tone wrote the opinion supporting the finding of intent in Armstrong; he was the dissenting judge who could not find the requisite intent in Buckley, 541 F.2d at 1224.
\item \textsuperscript{237} 408 F. Supp. 765, 819 (E.D. Wis. 1976), quoted in 539 F.2d at 634.
\item \textsuperscript{238} 539 F.2d at 637.
\item \textsuperscript{239} 422 F. Supp. 708 (N.D. Ohio 1976).
\item \textsuperscript{240} Id. at 713-15. In applying this test, the Reed court interpreted Davis to be consistent with Keyes and subsequent lower court decisions in its acceptance of a
with the presumption of intent as described in Oliver, Hart and Omaha. The Reed court indicated, however, that inference of intent from effect was unnecessary where many incidents "can be rationally attributed only to a deliberate and conscious desire to create or perpetuate a segregated condition." This analysis was used to find the intent behind the siting of certain school construction and intact busing, where complete classes of black students were bused intact from one school to another and maintained intact at the predominately white receiving school.

The court used a somewhat different test to examine school officials' actions in other fact situations. This test was: "how, under the circumstances at a given time, would a school board fairly and realistically employ its available classroom space without any intent to discriminate?" Divergence from this standard would imply discriminatory intent. Thus, discriminatory intent was inferred from school decisions relating to attendance zones, additions to buildings, new construction, and feeder patterns.

Relay classes and intact busing were a facet of a "consistent and deliberate policy of racial isolation." The finding of intent with regard to these policies suggested again the importance of a consistent pattern of behavior, rather than occasional, isolated instances. As the court suggested, quoting from Oliver (another Sixth Circuit case), "the question is whether a purposeful pattern of segregation has manifested itself over time, despite the fact that individual official actions, considered alone, may not have been taken for segregative purposes and may not have been in themselves constitutionally invalid."

Another level of intent analysis was applied where the school board admitted they had a policy of assigning black principals to black schools and white principals to white schools. Citing Swann v. Charlotte-Mecklenburg Board of Education, the Reed court considered this per se unconstitutional, indicating that "the ability to identify a foreseeability standard for the finding of segregative intent. "It should be noted, however, that the decision in . . . [Davis] is in no way a departure from the existing state of the law, particularly with regard to the inferring of intent from effect." Id. at 8.

241. 508 F.2d 178 (6th Cir. 1974).
242. 512 F.2d 37, 50 (2d Cir. 1975).
243. 521 F.2d 530 (8th Cir. 1974).
244. 422 F. Supp. at 715.
245. Id. at 717.
246. Id. at 784.
247. 508 F.2d at 182–83 (emphasis added).
248. 402 U.S. 1, 18 (1971).
'white' or 'black' school merely by reference to the racial composition of its faculty and administration constitutes a *prima facie* violation of the equal protection clause." The court also dismissed the role model rationale for the racial assignment as inadequate to combat the inference of segregative intent.

The above are illustrative of a court’s findings—in a single case—of the discriminatory intent which undergirds an equal protection violation. Various levels of intent analysis were applied to a variety of different school board actions, decisions, and practices, over a period of time, in one school system. The combinations of fact patterns vary with each case; the inferences of intent vary just as much. Nevertheless, certain standard tests seem to underlie the various courts’ determinations.

V. CONCLUSIONS

A. Minimal Levels of Intent Required for Equal Protection Violations

A sampling of intent tests in several federal circuits indicates that a variety of tests are being applied to a multiplicity of fact patterns. There is no indication from the Supreme Court that any one of these tests does not meet the minimal level of intent required for finding a constitutional violation. Recent opinions of the Supreme Court regarding segregative intent have dealt with zoning and employment discrimination, fact situations not truly analogous to the circumstances of school segregation. Therefore, the analyses used are not necessarily the only ones applicable to school segregation cases.

For example, *Arlington Heights* focused on the constitutionality of one particular village decision, the decision to deny the request for rezoning. This single decision was evaluated in its historical context, in part to assess whether it was part of a pattern indicating discriminatory intent. Nevertheless, the alleged violation was circumscribed in time and place, and the evidentiary sources the court found useful in assessing intent were, likewise, applicable to this one-time situation.

This is not to say that the inquiries suggested in *Arlington Heights* cannot be used in other factual contexts; they were derived from cases culled from various areas of discrimination law. But, as the case itself indicated, the evidentiary sources suggested and used in *Arlington Heights*...

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249. 422 F. Supp. at 788.
Heights were not exhaustive, and others may be used to find, or not find, discriminatory intent in other cases.

The number and complexity of the actions and facts in evidence, and the long periods of time over which those actions are taken, make school segregation cases more difficult to analyze in terms of intent. To evaluate the myriad evidentiary factors, the court will often use several levels of intent analysis within a single case. Furthermore, a finding of segregative intent in a substantial portion of the system creates a presumption of similar intent throughout the district. This presumption may be rebutted only by a showing of absolute neutrality by the state. With this kind of burden shift, and with the many different levels of intent analysis generally shown in any one case, it is difficult to decide what minimal tests of intent will lead to a finding of a school segregation violation. Nevertheless, it is important that the intent necessary to find a violation be found at its minimum level. If a test above this minimum level is used, the effect may be to foreclose equal protection guarantees from innumerable minority students.

If a court uses a test more rigorous than is necessary to decide whether public school authorities have abridged the rights of minority students, the court may be preventing those students from vindicating their constitutional rights to equal protection under the law. On the other hand, any standards employed must be adequate to prove the intent required to establish the violation. If the test does not determine intent, whole school systems may be altered to provide a remedy for a constitutional violation that does not exist. It now appears to be unquestionable that numerical segregation in schools, and segregative action or inaction, do not violate the Constitution unless some kind of discriminatory intent is also present.

A summary review of the tests being used, and a comparison with Supreme Court opinions, may help clarify the constitutional requirements pertaining to intent in school segregation cases. Throughout the analysis it should be kept in mind that objective tests of intent are important because intent is difficult to define without analytical guidelines. As Judge Battisti said in Reed:

[Intent] is an amorphous term than can mean different things in different factual and legal contexts. Because intent is such a subjective element, existing in pure form only in the minds of individual people, courts have found it necessary to discern evidence of intent through an analysis of its objective manifestations. This is admittedly an artificial mechanism, but one not unknown to other areas of the law, and without which courts would be hard put to protect individual rights.251

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251. 422 F. Supp. at 712–13 (footnotes omitted).
The tort test, which assumes that a person intends the foreseeable effects of his actions, appears to be acceptable to the Supreme Court, as evidenced by its implicit approval in *Keyes* and *Milliken*. This test has been used in school segregation cases by a number of circuits, and has the advantage of being familiar because of its use in a wide variety of legal contexts. Neither the majority opinion in *Davis*, nor the *Arlington Heights* case, mentioned the foreseeability test as an appropriate guidepost for establishing intent. But at least three justices have accepted the tort standard in the recent intent cases: Justice Stevens in his concurring opinion in *Davis* specifically indicated his acceptance of the foreseeability test as an appropriate standard, and Justices Brennan and Marshall dissenting from the summary disposition in *Austin* indicated their agreement with the foreseeability standards used by the lower court. Counter-balancing this, however, is the concurrence in *Austin* where Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, raised doubts about the test, or at least raised doubts about the way the foreseeability test was applied in that particular context. The probable acceptability of the foreseeability test relates to the fact that it is a well-established legal standard with broad applicability. The propriety of this test relates to the primary purpose of equal protection litigation, which is not to assess blame, but to guarantee constitutional rights.

The test which infers intent from the pattern or the totality of the facts seems equally appropriate in light of the purpose of trying to establish the constitutional violation. Again, the focus is not on the specific intent of the individual actors but on the general intent that manifests itself over time. The pattern test may be used as an alternative to or as a supplement to the foreseeability test depending upon the circumstances, and is applicable to facts which involve a series of actions occurring over a period of time. The pattern test may be inferred from language in *Arlington Heights*. The Court talked about "a clear pattern, unexplainable on grounds other than race, [which] emerges from the effect of the state action even when the governing legislation appears neutral on its face." The pattern test in *Armstrong v. Brennan* is similar to the "clear pattern" test suggested in

252. See notes 47, 55 supra and accompanying text.
254. 429 U.S. at 990. For a discussion of the foreseeability standard as applied by the lower court in *Austin*, see notes 110-38 supra and accompanying text.
255. 429 U.S. at 991. See notes 116-20 supra and accompanying text.
256. 429 U.S. at 266.
257. 539 F.2d 625 (7th Cir. 1976), vacated and remanded per curiam, 45 U.S.L.W. 3849, 3850 (U.S. June 29, 1977). See notes 233-38 supra and accompanying text.
Arlington Heights in that it looks at the effects of a series of actions. The inference created by the pattern may be rebuttable, but it will at least prove a prima facie case of segregative intent.

The purpose test of the Ninth Circuit\(^2\) appears to require a higher level of intent than may be mandated by the Supreme Court. The court appears to be looking for evidence of the subjective intent of those involved in the decision-making process. If this test requires more than the minimum intent necessary to find an equal protection violation, it may be denying minorities their rights to redress unconstitutional segregative actions. Thus, the purpose test may be constitutionally defective.

**B. Effect of the Recent Supreme Court Decisions on School Segregation Law**

The fundamental import of the four recent Supreme Court decisions discussed above is that the mere fact of discriminatory impact is not sufficient to show an equal protection violation. An essential element of the constitutional violation is segregative intent.

In school segregation cases, however, almost all courts after Keyes in 1973 had assumed that discriminatory intent was a requisite element of the violation and had found intent when they found a violation. The Buckley case\(^9\) is an exception to this general assertion, and the Supreme Court's remand of the case for further consideration in light of Davis and Arlington Heights seems appropriate.\(^2\) The Court's explicit requirement of intent did little to change the basis upon which most school segregation cases were in fact litigated.

However, the recent actions of the Supreme Court have done little to clarify or amplify the legal standards for ascertaining whether or not the requisite segregative intent is present in a particular school case. In fact, in several lower court cases decided since Davis, there is no indication that Davis had any impact on the determination of discriminatory intent. The two full Supreme Court opinions related to employment and zoning discrimination, and the tests used by the Court were not totally applicable to school cases. Both Davis and Arlington Heights suggested possible approaches for finding intent, but did not preclude the use of evidentiary sources other than those described. The summary dispositions of the two school cases, Austin and Buckley,  

\(^{258}\) See notes 199–209 supra and accompanying text.  
\(^{259}\) 541 F.2d 1211 (7th Cir. 1976). See notes 177–79 supra and accompanying text.  
\(^{260}\) It seems particularly appropriate since the Buckley court had relied on Wright, and the Davis and Arlington Heights decisions considerably narrowed the applicability of Wright. See text accompanying notes 89–92 supra.
shed little light on how to find intent from the factual pattern in school cases.

The two full opinions did indicate that the minimum level of discriminatory intent must be evident from more than just discriminatory impact, but this may be demonstrated by considerably less than overt and express segregative purpose. Thus, the outer limits of the minimum requirement of intent are set. The remands of the school cases indicate that the lower courts may be primarily responsible for further refining the evidentiary tests for finding intent. This is what the lower courts have been doing since the initial perimeters were set in Keyes. There has been no clear indication from the Supreme Court that the tests now used do not properly delineate at least the threshold intent necessary for a constitutional violation.

While this Note suggests that the Supreme Court has not changed the legal standard that may be used by the lower courts, there may still be collateral effects on school segregation cases. The most obvious effect on the two cases remanded is additional delay in bringing these cases to a final conclusion. The two cases have dragged on now for almost a decade, and the remands promise more months of confusion and delay for the communities involved.261

Secondly, since neither of the two full Supreme Court opinions reviewed a trial court determination of intent, the remand of the school cases did not disapprove of the continued use of existing standards of intent. This situation presents problems, since no standard of segregative intent has gained uniform application among the circuits, and no clear standard has been articulated by the Supreme Court.

The net effect may be that, in their uncertainty over the proper standard to apply, the lower courts will use tests more rigorous than actually necessary to find the intent which triggers the finding of a constitutional violation (where segregative acts and effects are already present). If, as has been suggested, the Ninth Circuit purpose test is more demanding than necessary, then its application by any of the circuits will fail to remedy some situations in which a constitutional violation is present. The fact that there is confusion about acceptable standards may also cause lower courts to decide conservatively, using a more rigorous standard to avoid possible reversal. As one judge

261. Of course, dealing with the cases in this way is totally valid if it accomplishes something. But in these cases it is possible to argue that the courts' findings need only be re-worded to show the process of reasoning from the facts to the inference of intent, in order to meet the mandate of the Supreme Court. Any appellate court decision may then be taken once again to the Supreme Court for review of the adequacy of the intent standards used. This involves even more delay and uncertainty.
reported, "he tends to write narrower opinions these days because of the 'feeling that the Supreme Court will cut us down.'" 262

In sum, recent decisions have had minimal effect on the standards that courts are required to use to find equal protection violations. Nevertheless, the Supreme Court opinions may have considerable impact on the legal standards that courts will in fact use for finding discriminatory intent, in order to avoid delay and possible reversal. If the standards the courts use to find segregative intent are higher than constitutionally required, it will have the effect of preventing many minority students from receiving equal protection under the law, as guaranteed by the fourteenth amendment to the Constitution. Whether this effect is what the majority of the Supreme Court intended, we can only infer. Can we infer that in this situation the Supreme Court intended the natural, probable, and foreseeable consequences of its actions?

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