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EMPLOYMENT DISCRIMINATION—Washington v. Davis: Splitting the Causes of Action Against Racial Discrimination in Employment

INTRODUCTION

The pervasive use of testing to determine employment opportunities has come under increasing attack in the last decade. Ability tests are used to decide who will be hired or promoted for jobs ranging from common labor to professional and executive positions. Testing is not a highly developed science, and often fails to serve the selection process in an even-handed manner. This problem is aggravated by some employers who use tests not designed to measure ability for job related functions. Employment testing becomes a legal question when the adverse effects of faulty tests and improper testing usage fall more heavily on certain groups than others. Since basic intelligence "must have the means of articulation to manifest itself fairly in the testing process," examinations standardized against white middle-class norms fail to accurately assess the actual capabilities of lower income and minority group applicants. The best efforts of expert psychologists have failed to remove these discrepancies.

The disparate impact of employment testing has led to torrents of litigation against private and public employers on a variety of statutory and constitutional theories. Tests utilized by private employers have been invalidated under Title VII of the Civil Rights Act

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1. One authority reports that the use of standardized tests in the United States doubled in the period from 1957 to 1966. W. Mehrens & J. Lehman, Standardized Tests in Education 5 (1969). See generally D. Goslin, The Search for Ability (1963), where the author states that "it is probably safe to say that there are more ability tests being given annually in the United States than there are people." Id. at 54.


4. See A. Anastasi, Psychological Testing 250-53 (3d ed. 1968) [hereinafter cited as Anastasi]. Insofar as a test attempts to measure inherent factors, all environmental factors must be eliminated. Achieving this separation has proved impossible, because the environmental and hereditary facets of intelligence are inextricably intermixed. Insofar as a test attempts to predict ability to perform certain tasks, some environmental factors are important. But determining which factors are important, and excluding all others, has proved extremely difficult.
of 1964\(^5\) and 42 U.S.C. § 1981.\(^6\) Tests employed in the public sector have been found defective under the fourteenth amendment,\(^7\) 42 U.S.C. §§ 1981 and 1983,\(^8\) and Title VII following the 1972 Amendments.\(^9\) When test results are alleged to have a discriminatory impact, these various constitutional and statutory provisions have often been concurrently pleaded. As a result, the legal standards governing these provisions have become inextricably interwoven. Moreover, since the United States Supreme Court's decision in *Griggs v. Duke Power Co.*,\(^10\) the lower courts have uniformly applied

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

7. U.S. CONST. amend. XIV, § 1.


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


(a) It shall be unlawful employment practice for an employer—

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

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate.

the standards developed therein regardless of the basis of the at-
tack.\textsuperscript{11}

Faced with its first combined statutory and constitutional chal-
lenge to employment testing, the Supreme Court moved to restrain
universal application of the \textit{Griggs} standard. In \textit{Washington v.}
\textit{Davis},\textsuperscript{12} the Court ruled that \textit{Griggs}, an action based solely on Title
VII, does not govern constitutional attacks on employment discrimi-
nation. Charges of discrimination must now show intentional "dis-
criminatory purpose." Since intent is difficult to prove in employ-
ment situations, this holding will greatly reduce the usefulness of
the equal protection clause in preventing employment discrimina-
tion.

The \textit{Washington} Court also approved a new "job relatedness"
standard which differs significantly from the test articulated in
\textit{Griggs}, and recently affirmed in \textit{Albemarle Paper Co. v. Moody}.\textsuperscript{13}
Since the statutory challenge in \textit{Washington} was based upon § 1981,
the question remains open as to whether this new standard is meant
to apply to Title VII cases as well. Should this new rationale be
applied to actions brought under Title VII, the Court will have
significantly weakened all safeguards against discrimination in
employment. This article will examine the effect of \textit{Washington}
on employment discrimination litigation under the fourteenth amend-
ment and § 1981, and the impact of the decision on Title VII
standards.

\section*{History of the Case}
\textit{Washington v. Davis in the District Court}

Applicants for the District of Columbia Police Department
accepted as recruits enter an intensive 17-week Police Academy
Training Program if they: (1) meet acceptable character and phys-
ical standards, (2) are high school graduates, and, (3) receive a
score of at least 40 percent on "Test 21." Test 21 is an examination
developed by the United States Civil Service Commission to mea-
sure verbal ability, vocabulary, reading and comprehension. The
test is used generally throughout the federal service. Although the

\textsuperscript{11} Considering the legality of standardized intelligence tests under Title VII, the Court
stated, "If an employment practice which operates to exclude Negroes cannot be shown to
be related to job performance . . . the practice is prohibited." Once it is shown that a
particular selection procedure has an exclusionary effect, the employer has the burden to
show that the discriminatory procedure "bear[s] a demonstrable relationship to successful
performance of the jobs for which it was used." 401 U.S. at 431.

\textsuperscript{12} 96 S.Ct. 2040 (1976).

\textsuperscript{13} 422 U.S. 405 (1975).
Washington Police Department was not involved in the formulation of the test, Test 21 was adopted as an entrance requirement in an attempt to predict an applicant's success in the academy training program.  

Two black applicants who had been denied admission to the Academy claimed that the use of Test 21 had a racially discriminatory impact, and sued the Department under the fifth amendment, 42 U.S.C. § 1981 and section 1-320 of the District of Columbia Code. To support their claim of discrimination, the applicants produced evidence showing: (1) the number of black police officers, while substantial, was not proportionate to the population of blacks in the city; (2) Test 21 had never been validated to prove its reliability for measuring job performance; and, (3) in the period between 1968 and 1971, 57 percent of blacks, as opposed to 13 percent of whites, scored below 40 percent on the test.

The Department did not contest the accuracy of the plaintiffs' evidence, but argued that these statistics alone did not prove a racially discriminatory impact. The Department also argued that regardless of the sufficiency of this evidence, Test 21 was a job related test and could be sustained as a proper device for selecting recruits. Accordingly, both parties moved for summary judgment.

Although neither party raised any issue under Title VII, the district court treated the case as governed by Title VII as well as by the fifth amendment. Under these standards, Judge Gesell held that the plaintiffs established a prima facie case of discrimination. He then found that the Department had proved the use of Test 21 to be justified, despite the disproportionate pass/fail rate of blacks and whites.

The Department did not show the test to be related to job performance. Instead, the court accepted a validation study indicating the test could be correlated to performance in the training program. The court held such "training program validation" satisfied both constitutional and Title VII requirements of employment testing. In accepting this training program validation as a substitute for actual job performance correlation, the court determined the Department had a valid interest in raising the professional standards of the

15. Id.
17. 348 F. Supp. at 16.
police force. This goal was reasonably met by screening applicants with Test 21 and selecting those who would most likely succeed in the training program.¹⁹

Washington v. Davis in the Court of Appeals

Unlike the district court, the United States Court of Appeals for the District of Columbia recognized that the parties had not raised any issues under Title VII in their motions for summary judgment. The court of appeals noted that most employment discrimination decisions based on constitutional grounds made no distinction between the standards required by the Constitution and those mandated by Title VII. In addition, while Title VII was not applicable against the Department at the time plaintiffs filed their suit, Congress had amended Title VII to include federal employees, and the applicants were given the benefit of the revision.²⁰ Consequently, the court of appeals held that the proper standards for this case, on both statutory and constitutional grounds, were those set out in Griggs.

The court of appeals found that the applicants had made out a prima facie case of discrimination and rejected the Department’s contention that its affirmative recruiting effort was significant to the case; under Griggs, only the discriminatory impact of Test 21 was material. This impact was established by the divergent pass/fail rates between blacks and whites. This discrimination was not dissipated by any of the other factors found relevant by the district court.²¹

The court of appeals held that the Department had failed to show Test 21 was sufficiently job related. Reviewing the evidence in greater detail than the district court, the court of appeals determined the alleged predictive value of Test 21 was based upon a correlation between Test 21 scores and the scores on written exams given during the training course.²² This evidence proved only that a

¹⁹. Davis v. Washington, 348 F. Supp. 15, 17 (D.D.C. 1972). Judge Gesell was also influenced by data that showed many blacks who passed Test 21 failed to report for duty. The court felt this showed Test 21 played only a small part in the discrepancy between the number of blacks on the force and in the population. 348 F. Supp. at 16-17. With the additional fact of the Department’s affirmative efforts to encourage black applicants, Judge Gesell held that Test 21 was neither designed nor operated to discriminate against otherwise qualified blacks.


²¹. For example, the court of appeals found that the failure of many blacks to report for duty after they passed the test was not relevant because a similar number of white applicants who passed the test also failed to report for duty. 512 F.2d at 961 n.32.

²². 512 F.2d at 962 n.38. The court cited the Police Department’s own validation study of Test 21: David L. Futransky, Relation of D.C. Police Entrance Test Scores to Recruit School Performance and Job Performance of White and Negro Policemen (mimeograph)
written aptitude test will accurately predict performance on a second round of written tests. Even assuming Test 21 was predictive of progress at recruit school, the Department had not shown any relationship between performance at the school and performance on the job. The data also gave no indication that the admission of applicants who scored below 40 percent on Test 21 would necessitate extended training time or produce recruit school failures. Moreover, the Department never used either Test 21 scores or recruit school averages for any purpose after the course was over. On this basis, the court of appeals held that the mere fact Test 21 scores predicted training scores was not sufficient to satisfy the Griggs burden of job relatedness.

Washington v. Davis in the Supreme Court

The United States Supreme Court reversed in a seven to two decision. While the majority substantially accepted Judge Gesell's position on the job relatedness issue, the Court first ruled on an issue which was not discussed by either lower courts or briefed by either party. Examining the original motions for summary judgment, the Court noted that the sole basis for plaintiffs' motion was the fifth amendment. The Supreme Court ruled that the constitutional standard for adjudicating claims of invidious racial discrimination was not satisfied solely by a showing of racially disproportionate impact. It was plain error for the court of appeals to apply Title VII standards in this case. Since the central purpose of the equal protection clause is to prevent official misconduct that discriminates on the basis of race, proof of disproportionate impact is relevant, but it is not sufficient to prove racial discrimination. In the instant case the use of Test 21 rationally served the legitimate governmental interest of upgrading the communicative abilities of police officers, whose jobs require special abilities to communicate orally and in writing. Therefore, the use of Test 21 did not violate the equal protection clause.

The Court then addressed the statutory issues raised by the Department's motion for summary judgment, and held that the court of appeals erred in not affirming the district court's ruling. The

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25. Justice White reviewed the Department's motion for summary judgment and found that the argument had been made that the Griggs standard had been satisfied. He reasoned that in granting the Department's motion for summary judgment the district court necessar-
applicants were not entitled to relief on either constitutional or statutory grounds because training program validation was sufficient to meet the job relatedness requirement. It was apparent to the Supreme Court, as it had been to the district judge, that some verbal and communicative skill would be useful, if not essential, to satisfactory progress in the training program. In addition, the majority found the concept of training program validation was supported by regulations of the Civil Service Commission; was not foreclosed by either *Griggs* or *Albemarle Paper Co. v. Moody*; and was the "much more sensible construction of the job relatedness requirement."  

Limited to its facts, *Washington v. Davis* only affects discrimination actions brought under the fourteenth amendment and § 1981 and § 1983. The effect of the *Washington* holding on these provisions is readily seen by examining their present substantive foundations. Before examining the substantive law of employment discrimination, an introductory note on the methods and problems of test validation is in order.

A BRIEF EXCURSION INTO THE PROBLEM OF JOB RELATEDNESS AND TEST VALIDATION

Under *Griggs*, the employer has the burden of proof to rebut a prima facie case of employment discrimination with a showing of business necessity. The job related aspect of a business necessity defense requires evidence that the employer's testing methods are rationally designed to select potentially successful employees. The essential issue is not the internal reliability of the test itself—*i.e.*, does it measure all test takers with the same degree of error—instead, the central question is the test's accuracy in selecting better workers. Testing experts and the courts recognize three basic techniques for the validation of employment tests: criterion related, content, and construct. Each technique has different implications when used to validate a test which may have a disparate impact on minority groups.

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27. 96 S.Ct. at 2053-54.
**Criterion Related Validity**

The criterion related technique requires a statistical relationship between an individual's test scores and his ratings on some quantified criterion or criteria of job success. A significant correlation between the test and the job criterion validates the test. This correlation may be demonstrated by either a predictive or a concurrent validation study. Predictive validation involves testing a large representative sample of applicants, permitting the test takers to perform the tasks in question, and then correlating the test performance with task performance. The test is valid to the extent that those who perform well on the test tend to perform well on the job. Though predictive validity is the most satisfactory method to validate a test, such studies are expensive and difficult to conduct.

Concurrent validation entails the testing of a group of incumbent employees and the correlation of their test scores with the quality of their performance on the job. This method is faster and cheaper than the predictive methods, but because the incumbent employees are already performing on the job, their test scores may differ significantly from what they might have been when they first applied. Moreover, the incumbent employees may not be representative of the population from which the employer presently receives applicants and therefore no longer provide a permissible test sample.

**Content Validation**

Content validation avoids the statistical emphasis of criterion related techniques. This method involves a comparison of the actual content of the test and the content of the job. One court has described the requirements of this method as:

[D]efendant must demonstrate not only that the knowledge, skills and abilities tested for . . . coincide with some of the knowledge, skills and abilities required to perform successfully on the job, but also that (1) the attributes selected for examination are critical and not merely peripherally related to successful job performance; (2) the various portions of the examination are accurately weighed to reflect the relative importance to the job or the attributes for which they test; and (3) the level of difficulty of the test matches the level of difficulty for the job.  

30. Anastasi, supra note 4, at 108.
Construct Validation

Construct validation requires a showing that some trait or construct is critical to the job and that a particular test accurately measures this trait thus determining job performance potential. The nature of this validation technique is highlighted by a comparison with content validity testing. Because this test is furthest removed from actual performance on the job, it is the least reliable form of validation. Because it is triply difficult to isolate a construct, show it is related to a job, and then show the test is related to the construct, this technique has never been seriously advanced as a defense in any reported case.


To appreciate the potential effect of Washington v. Davis on the law of employment discrimination, it is necessary to examine prior constitutional and statutory developments in the lower courts. The substantive law of the equal protection clause forms the groundwork for most employment discrimination cases which have been brought under 42 U.S.C. §§ 1981, 1983.

When allegations of denial of equal protection have been made,
the courts have invoked several different standards of review. The most lenient standard is "restrained review" (hereinafter referred to as the "rational relationship standard") which has two forms. One form requires only the existence of any reasonable set of facts to sustain the constitutionality of the challenged act. When the most probable purpose is not justified by a legitimate state interest, the court will search for some legitimate purpose to sustain the statute. But when the second form of restrained review is applied, the court will only look to the most probable purpose for the statute in determining if the classification is reasonable. In either form the classification under attack must have a "rational relationship" to the object of the legislation.

The courts apply "active review" (hereinafter referred to as the "strict scrutiny standard") when a "fundamental right" is involved in the litigation. Procreation, marriage, the right to vote, and the right to interstate travel have been declared fundamental. On the other hand, the Supreme Court has refused to declare the right to a public education or to welfare benefits as "fundamental." To justify interference with a "fundamental right" the state must demonstrate a compelling state interest for making the classification.

Strict scrutiny is also applied where a "suspect classification" is challenged. Explicit racial classifications are a "suspect classification" and require close scrutiny with a very heavy burden of justification as well as showing that they are necessary to accomplish the objective of the legislation. Although the Supreme Court has been...

41. See notes 42-46 infra.
44. Shapiro v. Thompson, 394 U.S. 618 (1969). Justice Harlan's dissent, 394 U.S. at 658-62, has led to the suggestion that there is no longer a distinction between a mere right and a fundamental right. See Houle, Compelling State Interest vs. Mere Rational Classification: The Practitioner's Equal Protection Dilemma, 3 Urban Lawyer 375 (1971).
48. See note 47 supra.
urged to include classifications based on wealth or sex in the suspect category, it has declined to do so.\textsuperscript{49}

The application of equal protection standards in a variety of racial discrimination contexts has resulted in the development of three broad principles: (1) statistics of racial imbalance constitute strong evidence of racial discrimination, and may be used to create a prima facie case of discrimination;\textsuperscript{50} (2) proof of racial discrimination does not require proof of willful intent to discriminate;\textsuperscript{51} and (3) facially neutral practices may be unlawful if applied in a discriminatory manner or if their effects create racial imbalance or perpetuate past discrimination.\textsuperscript{52}

The lower courts have applied these principles in cases alleging racially discriminatory tests in public employment. The black plaintiffs in \textit{Arrington v. Massachusetts Bay Transportation Authority}\textsuperscript{53} demonstrated that defendant’s entrance standards admitted 75 percent of white applicants, but only 20 percent of the black applicants. Although the court concluded the discrepancy was a result of educational and cultural deprivation, it found that the strict scrutiny standard was appropriate because some citizens were

\begin{itemize}
  \item \textsuperscript{49} Geduldig v. Aiello, 417 U.S. 484 (1974); Reed v. Reed, 404 U.S. 71 (1971).
  \item \textsuperscript{50} Statistics of racial imbalance have been accepted by the Supreme Court as strong evidence of discrimination in such varying contexts as jury selection, Turner v. Fouche, 396 U.S. 346, 360 n.20 (1970), and cases cited therein, and voter redistricting, Gomillion v. Lightfoot, 364 U.S. 339 (1960). \textit{See also} Meredith v. Fair, 298 F.2d 696 (5th Cir. 1962), \textit{cert. denied}, 371 U.S. 828 (1962), for application to university admission policies.
  \item \textsuperscript{51} In a recent fourteenth amendment case, Judge Skelly Wright stated:

  The complaint that analytically no violation of equal protection vests unless the inequalities stem from a deliberately discriminatory plan is simply false. Whatever the law was once, it is a testament to our maturing concept of equality that, with the help of Supreme Court decisions in the last decade, we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to the private rights and the public interest as the perversity of a willful scheme.

  \item \textsuperscript{52} Purportedly neutral devices have been invalidated in the context of voter registration requirements. Davis v. Schnell, 81 F. Supp. 875 (S.D. Ala.), \textit{aff’d per curiam}, 336 U.S. 933 (1949); jury selection criteria, Turner v. Fouche, 396 U.S. 346 (1970); and pupil school assignment criteria, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).
\end{itemize}
being deprived of a right that should be available to all.\textsuperscript{54} The court based its reasoning on \textit{Harper v. Virginia Board of Elections},\textsuperscript{55} interpreting that case to hold that the strict scrutiny standard applies where a fundamental right has been violated. The court found the compelling state interest requirement would be met if the defendant could show a relationship between the tests it used and the job applicants were required to perform. The necessary degree of correlation between the test and the job was not examined because there was no attempt at correlation.\textsuperscript{56}

These same principles, developed through an equal protection analysis and applied in employment testing cases brought under sections 1981 and 1983, were later used in Title VII actions. Title VII courts accepted the principle that statistics may create a prima facie case of discrimination,\textsuperscript{57} and one court has held that statistics alone may establish a violation of Title VII.\textsuperscript{58} In addition, Title VII courts relied upon developments in other areas of racial discrimination litigation which concluded that purportedly neutral practices which are not related to job performance may be unlawful if they create a statistical racial imbalance or perpetuate the effects of past discrimination.\textsuperscript{59} Significantly, this proposition was adopted to bar professionally designed tests, despite the statutory provision which exempts from coverage "any professionally developed ability test . . . not designed, intended, or used to discriminate."\textsuperscript{60}

In \textit{Griggs}, the Supreme Court approved the use of these equal protection principles in a decision which relied largely on congressional intent and statutory interpretation. The Court held that an employment practice which is nondiscriminatory on its face but

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\item\textsuperscript{54} \textit{Id.} at 1358.
\item\textsuperscript{55} 383 U.S. 663 (1966).
\item\textsuperscript{56} 306 F. Supp. at 1358-59.
\item\textsuperscript{58} Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 426 (8th Cir. 1970), \textit{quoting from Alabama v. United States}, 304 F.2d 585, 586 (5th Cir. 1962), \textit{aff'd mem.}, 371 U.S. 37 (1962), "'statistics often tell much and the Courts listen . . . .'"
\item\textsuperscript{60} 42 U.S.C. § 2000e-2(h) (1970).
\end{itemize}
which has disparate impact on blacks is unlawful under Title VII unless the employer can show that the practice is a "business necessity." The prohibition of unintentional discrimination and facially neutral practices was traced directly to the statute. The Court found that congressional intent supported a conclusion that employment tests must be job related. The additional requirement allowing justification of a discriminatory practice by a showing of business necessity was supported neither in the explicit language nor the legislative history of the 1964 act. At least one commentator has suggested that the basis of the business necessity justification was derived from the equal protection principles of rational relationship and compelling state interest.

The lower courts studied Griggs to determine the level of proof required when a standardized test was challenged. The Griggs standard was adopted by a California district court in Penn v. Stumpf, as authority for an attack on standardized testing under the fourteenth amendment. However, where a civil service test for firemen was attacked in Western Addition Community Organization v. Alioto, the court looked to Griggs for guidance, but recognized that it was not controlling. The public agency was required to demonstrate a "reasonably necessary" relationship between the qualities tested and the requirements of the job. The court examined the different methods of validation available to the agency and determined that either content or empirical (predictive) validity would be acceptable. The court relied on EEOC regulations promulgated under Title VII to justify this conclusion. Although Griggs was not controlling, Title VII standards were used to determine the outcome of an equal protection case where no statutory cause of action had been pleaded.

A valuable insight into the problem of the proper standard of review in testing cases is found by comparing the decision of the Second Circuit in Chance v. Board of Examiners with the First

62. Note, Business Necessity under Title VII of the Civil Rights Act of 1964: A No-
66. Id. at 1352.
67. 29 C.F.R. § 1607.5 (1972).
68. 458 F.2d 1187 (2d Cir. 1972).
Circuit opinion in *Castro v. Beecher.* In *Chance,* an action brought under the fourteenth amendment and § 1981, the trial court held that the rational relationship standard was inappropriate because the case involved racial discrimination. The board was required to make a strong showing that the test actually measured those qualities which were essential to perform the job for which the standards were being required. The Second Circuit Court of Appeals affirmed the result but refused to apply the strict scrutiny standard. The court noted that the Supreme Court had never applied the strict standard where the discrimination resulted from unintentional actions. But even under the rational relationship standard, the board failed to establish the reasonableness of the test. The court indicated public employers under the fourteenth amendment must meet the same standards as private employers under Title VII, and thus the *Griggs* standard of review may actually have been the one applied.

*Castro* was another public employment testing case brought under both the fourteenth amendment and § 1981. The trial court found the rational relationship standard appropriate but was reversed on appeal. The First Circuit suggested the application of the rational relationship standard would uphold a test regardless of its predictive validity. The lower constitutional standard only requires a showing that the test was rationally related to some activity demanded by the job. However, the court said this standard was adequate only if there was no racial impact. The *Castro* court looked to *Griggs* as persuasive authority and found the "demonstrable relationship" language required a convincing showing of a relationship between the test and the job. Regardless of the variance in language used by the other courts in similar cases, the *Castro* court decided that the same standard had actually been applied in *Arrington, Penn,* and *Chance.*

Following *Chance* and *Castro,* the lower courts have uniformly invalidated tests for public employment in actions brought under §§ 1981 and 1983. Since the Supreme Court had not held the right to

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69. 459 F.2d 725 (1st Cir. 1972).
70. Id. at 732.

See also Arnold v. Ballard, 390 F. Supp. 723 (N.D. Ohio 1975); United States v. City of Chicago, 385 F. Supp. 543 (N.D. Ill. 1974); Wade v. Mississippi Cooperative Extension Serv-
Employment Tests

Employment tests "fundamental" in the equal protection context, courts focused on the result of the testing process—a suspect racial classification created by the test’s disproportionate impact. This classification sufficed to evoke a stricter scrutiny than the mere rational relationship test. By choosing this middle path of analysis, courts could avoid deciding whether the strict scrutiny standard had been properly invoked. This approach continued to recognize that the defendant met his burden if the test could be found "job related" under the Griggs rationale. Support for this intermediate level of analysis was found in the new rational relationship standard of Reed v. Reed, and the Supreme Court's opinion in McDonnell Douglas Corp. v. Green, where Castro and Chance were cited as authority for the job relatedness requirement in a case dealing solely with Title VII issues. Not all courts accepted this reasoning. In Allen v. City of Mobile, the Fifth Circuit Court of Appeals affirmed the judgment of the district court upholding the constitutionality of a written test used by the Mobile, Alabama, police department, despite a showing of adverse impact on blacks. The relevance of Griggs to the issue was recognized, but the court declined to apply Griggs outside of Title VII's scope. The court specifically refused to require that the test be professionally validated. Instead, it examined the test and concluded that the skills it measured, e.g., reading, comprehension, memory, and verbal ability were useful attributes for a policeman. Based on these observations, the court upheld the test on the grounds that "it bears a rational relationship to the ability to perform the work required."

The Fifth Circuit crystallized its position on public employment discrimination in Tyler v. Vickery. The court noted that most, if not all, of the courts of appeals utilized the fourteenth amendment to apply Title VII and EEOC guidelines to employment tests administered by various public agencies. The Tyler court reasoned that the other courts of appeals had read Title VII into the fourteenth amendment to avoid the anomalous situation of a public

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73. Id. at 1337.
74. 404 U.S. 71 (1971).
75. 411 U.S. 792 (1973).
77. 331 F. Supp. at 1146.
78. 517 F.2d 1089 (5th Cir. 1975).
employer being free to engage in employee selection practices which would be illegal for a private employer. However, with the 1972 amendments in effect, such a construction of the fourteenth amendment was no longer necessary. Under the appropriate constitutional standards, the Tyler court held an otherwise legitimate classification does not become “suspect” simply because greater numbers of a racial minority fall into a group disadvantaged by the classification.


Part of the Court's opinion will have a severe, if not fatal effect on constitutional challenges to employment tests. First, the flat announcement that a showing of racially disproportionate impact is not sufficient to subject a “facially neutral” state action to strict scrutiny will require plaintiffs to prove discriminatory intent—a nearly impossible burden in the testing context. Second, the Court's rejection of the intermediate level of equal protection analysis developed under Title VII will require plaintiffs who cannot prove discriminatory intent to prove there is no “rational basis” for the public employment tests. Effective use of this challenge is foreclosed, however, by the analysis used to uphold Test 21 in Part II of the Court's opinion.

The majority began its equal protection analysis by assuming that Test 21 is “neutral on its face,” and that it establishes a “racially neutral qualification” for employment. The Court examined the questions, and having found no blatant slant, deemed the test “facially neutral.” The Court then determined that the Constitution does not prevent the Government from seeking “modestly to upgrade the communicative abilities of its employees . . . particularly where the job requires special abilities to communicate orally and in writing.” Following this analysis it is a small step to conclude that Test 21, which concededly measures written and verbal ability, is rationally related to a permissible governmental purpose.

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79. Id. at 1096-97.
81. [O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.
82. Id. at 2050. See also cases cited at 96 S.Ct. at 2050 n.12.
83. See text accompanying notes 35-40 supra.
84. 96 S.Ct. at 2050.
Under this type of analysis, it is difficult to imagine how any “facially neutral” employment test will be found to violate the Constitution.

As well as virtually eliminating constitutional remedies for discrimination in public employment testing, the Court’s equal protection analysis invites criticism in several other respects. First, although the majority emphasized that strict scrutiny has never been applied on a showing of disproportionate impact alone, the Court also recognized that an invidiously discriminatory purpose may be inferred from the totality of the facts. This inference can be drawn from the fact that the state action in question bears more heavily on one race than another. In Washington, the Court found the “totality of the facts,” including the Department’s affirmative recruitment efforts and the increasing black population of the force, effectively countered the showing of disproportionate impact. It is unclear from the majority opinion whether the disproportionate impact will create a presumption of discriminatory purpose when the “totality of the facts” reveal no such countervailing circumstances. The Court ultimately leaves the standard of proof required to trigger operation of strict scrutiny confused and uncertain.

85. It should be noted that the majority carefully selected cases supporting its holding that racially discriminatory impact without regard to intent does not trigger the application of strict scrutiny. The Court discussed a grand jury selection case, Strauder v. West Virginia, 100 U.S. 303 (1879); a school desegregation case, Keyes v. School District No. 1, 413 U.S. 189 (1973); and a case involving the unequal administration of an ordinance, Yick Wo v. Hopkins, 118 U.S. 356 (1886), for the general proposition that discriminatory intent is required to show invidious discrimination. The fact that all of these cases found there had been intentional racial discrimination does not necessarily support the proposition that invidious discrimination is not found unless racially discriminatory intent is present. Perhaps more appropriate to the instant case is Gaston County v. United States, 395 U.S. 285 (1969), where the Court invalidated a voter registration test after considering the educational deprivation suffered by blacks at the hands of the public educational system. Since Gaston County, like Washington, concerned the racially disproportionate impact of a test, it might be a more appropriate starting point for the Court’s equal protection discussion than the cases relied upon. See Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966). See also Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1 (1971); Turner v. Fouche, 396 U.S. 346 (1970).

86. 96 S.Ct. at 2049.

87. Id. at 2050-51.

88. Justice Stevens did not rely on the evidence of good faith efforts to recruit black police officers. He found that the test served the neutral and legitimate purpose of requiring all applicants to meet a uniform minimum standard of literacy, and that reading ability is “manifestly” relevant to the police function. Moreover, since the same test is used throughout the federal service, the evidence that the test has a racially disproportionate impact on the applicants for the District of Columbia Police Department is “not sufficient to overcome the presumption that a test which is this widely used by the Federal Government is in fact neutral in its effect as well as in its “purpose”. . . .” 96 S.Ct. at 2054 (Stevens, J., concurring). This superficial analysis would imply that a test which is valid in one context should be presumed valid in another.
A second flaw in the majority's reasoning is found in the presumption that Test 21 is a "facially neutral qualification for employment." This presumption is made despite proof that black high school graduates fail Test 21 at a rate 400 percent greater than white high school graduates. This statistic coupled with the Court's long standing recognition that blacks have suffered from inferior educational opportunities, should lead to the conclusion that Test 21 creates a racially suspect classification. The resulting classification destroys the presumption of "facial neutrality" and should invoke a level of equal protection analysis more demanding than minimal rational relationship. By ignoring the fact of racially disproportionate impact, and focusing instead on its presumption of facial neutrality the Court evaded the realities of the case.

Perhaps the reason the Court indulges in such a device in this case is the fear, expressed in the majority's footnote 14, that acceptance of the disproportionate impact analysis might lead to the invalidation of tests and qualifications in nearly every area where the government attempts classifications. Given these consequences, the majority states that the "impact" rule should not be extended beyond those areas where it is already applicable by reason of statute. Thus, Congress becomes the guardian of equal protection by judicial abdication.

The Impact of Washington v. Davis on § 1981 and Title VII

Part III of the majority opinion held that the black police applicants were entitled to relief on neither constitutional nor statutory grounds. Under statutory standards, evidence of disproportionate impact shifted the burden of proof to the Department. The Court found that the Department had demonstrated the job relatedness

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90. 96 S.Ct. at 2052, citing Goodman, De Facto School Segregation: Constitutional and Empirical Analysis, 60 CALIF. L. REV. 275, 300 (1972). Goodman suggests that the disproportionate impact analysis might lead to invalidation of "tests and qualifications for voting, draft deferment, public employment, jury service and other government-conferred benefits and opportunities . . . sales taxes, bail schedules, utility rates, bridge tolls, license fees, and other state-imposed charges." This 'list of horribles' goes on to include minimum wage and usury laws as well as professional licensing requirements as needing major modifications in light of the disproportionate impact rule. See Silverman, Equal Protection Economic Legislation and Racial Discrimination, 25 VAND. L. REV. 1183 (1972).
91. 96 S.Ct. at 2052.
92. The majority opinion is not clear as to how far the holding in Part III extends: to § 1981 alone, or to Title VII by implication. The majority's emphasis in Part I that Title VII was not involved in this case, and the similar observation in Justice Stevens' concurring opinion, indicate that the only statutes construed in Part III were § 1981 and § 1-320 of the District of Columbia Code.
of the test even though no proof was available correlating Test 21 performance with performance on the job. Any proof of actual job performance was deemed irrelevant, because the Court determined that this requirement was satisfied by the correlation between performance on the entrance exam and performance in the training program. Under this new method of training program validation, the positive relation between Test 21 scores and recruit school final averages sufficed to validate the test.

The Court recognized training program validation as a "much more sensible construction of the job relatedness requirement."93 Although the case did not involve a Title VII challenge, this sweeping statement indicates that proof of training program validation will be available to all employers, even in actions brought under Title VII. This possibility is foretold by the Court's statement that training program validation is not foreclosed by either Griggs or Albemarle Paper Co. v. Moody.94 Such a construction is likely since the fundamental requirements announced in Griggs were business necessity and job relatedness.95 Albemarle is not to the contrary, since the Court recognized that the "concept of job relatedness takes on meaning from the facts of the Griggs case."96 As neither Griggs nor Albemarle involved facts where a training program preceded the job, they do not preclude the application of training program validation in a different context. Thus, since Title VII itself does not require that employment tests meet any specific standard of job relatedness, the Court's new standard of training program validity could be applied in Title VII cases.

What Griggs and Albemarle would seem to foreclose, however, is training program validation in the absence of proof that success in the training program predicted success as a policeman.97 This rela-

93. 96 S.Ct. at 2053.
94. 422 U.S. 405 (1975).
95. 401 U.S. at 432.
96. 422 U.S. at 426.
97. Griggs held that "[i]f an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." 401 U.S. at 431. Once the discriminatory impact of a test is shown, the employer carries the burden of proving that the challenged practice "bear[s] a demonstrable relationship to successful performance of the jobs for which it was used." Id. Albemarle read Griggs to require that a discriminatory test be validated through proof "by professionally acceptable methods" that it is "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which the candidates are being evaluated." 422 U.S. at 431, quoting 29 C.F.R. § 1607.4(c) (1975). The Albemarle Court also rejected the employer's attempt to validate the written test by proving it was related to supervisor's ratings because there was no showing that the ratings accurately reflected job performance. The Department's proof in Washington is similarly deficient.
tionship could be shown by either proving a correlation between recruit school averages and job performance, or through a two-part validation showing that (1) the training curriculum includes information proven to be important to job performance and (2) the standard used as a measure of training performance reflects the trainees' mastery of the material included in the training curriculum. In Washington, the Department's validation study did not demonstrate a correlation between Test 21 scores and job performance, or any possible relationship between training examinations and job performance. The record also failed to establish the importance of the training curriculum to job performance, or that the recruit school final averages accurately reflected the trainees' mastery of the curriculum. Although Griggs and Albemarle do not foreclose training program validation per se, their focus on some indicia of job performance would appear to mandate some underlying relationship between the test and the job not required by the Court in Washington.

The EEOC regulations on minimum standards for validation also require a higher standard of proof than mere correlation between Test 21 scores and academy final averages. The first deficiency under the regulations was the Department's failure to fully describe the criterion of recruit school final averages. Neither information on the subject matter of the courses nor the final examinations were presented to the district court for review. Without this information, there could be no real determination that the correlation with final exam averages was sufficiently related to the Department's need to ascertain "job specific ability." Second, the EEOC

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99. The EEOC regulations require that the validity of a qualification test be proved by "empirical data demonstrating that the test is predictive of or is significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." 29 C.F.R. § 1607.4(c) (1976). These Regulations have been repeatedly endorsed by the Court. "The message of these Guidelines is the same as that of the Griggs case." Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975).

The same Guidelines also set forth minimum standards for validation and delineate the criteria that may be used for this purpose:

The work behaviors or other criteria of employee adequacy which the test is intended to predict or identify must be fully described; and, additionally, in the case of rating techniques, the appraisal forms and instructions to the raters must be included as part of the validation evidence. Such criteria may include measures other than actual work proficiency, such as training time, supervisory ratings, regularity of attendance and tenure. Whatever criteria are used they must represent major or critical work behaviors as revealed by careful job analyses.

Employment Tests

regulations do not expressly permit training program validation. The closest specific criteria to training performance is "training time." All Washington Police Department recruits, however, go through the same training course in the same amount of time, including those who experience some difficulty. There was no job analysis establishing the significance of scores on training examinations, nor was there any other type of evidence showing that scores are of "major or critical" importance.¹⁰⁰

It appears Washington will permit training program validation to insulate employment tests from attack under Title VII. However, both the prevailing case law and administrative regulations, which Washington does not purport to overrule, demand a higher standard of proof for this validation. Consequently, the majority's holding in Part III should have a greater impact on actions brought under § 1981 than those brought under Title VII. Training program validation will be a proper method of meeting the job relatedness requirement mandated by Griggs and Albemarle in actions brought under either statute, but the employer's burden of proof will remain much higher when Title VII is invoked.¹⁰¹

THE DEVELOPING AD HOC APPROACH TO JOB RELATEDNESS

In its initial search for support of the concept of training program validation, the Court turned to the current regulations of the Civil Service Commission (CSC).¹⁰² These regulations suggest that "suc-

¹⁰⁰ 96 S.Ct. at 2060 (Brennan, J., dissenting).
¹⁰¹ The majority notes that Title VII mandates a "more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives." 96 S.Ct. at 2051. Thus, after dismissing the case on both constitutional and § 1981 theories, the Court suggests that "If there are now deficiencies in the recruiting practices under prevailing Title VII standards, those deficiencies are to be directly addressed in accordance with appropriate procedures mandated under that section." 96 S.Ct. at 2053-54. This suggestion of the continuing viability of Title VII standards is echoed in Justice Stevens' concurring opinion, where some care is taken to differentiate the actual statutory holding from Title VII standards. 96 S.Ct. at 2055 (Stevens, J., concurring).
¹⁰² Current instructions of the Civil Service Commission on "Examining, Testing, Standards, and Employment Practices" provide, in part:
§ 2-2. Use of applicant appraisal procedures
a. Policy. The Commission's staff develops and uses applicant appraisal procedures to assess the knowledges, skills, and abilities of persons for jobs and not persons in the abstract.
(1) Appraisal procedures are designed to reflect real, reasonable, and necessary qualifications for effective job behavior.
(2) An appraisal procedure must, among other requirements, have a demonstrable and rational relationship to important job-related performance objectives identified by management, such as:
(a) Effective job performance;
(b) Capability;
cess in training" is a proper criterion for validating an entrance examination. The CSC, however, strongly asserted that the Department had failed to meet its burden of proof. In short, it maintained that a positive correlation between entrance exam scores and the criterion of success in training may establish the job relatedness of the exam, but only subject to certain limitations. Applying its own standards of criterion validation to Test 21, the CSC concluded that the Department's evidence failed to establish

the appropriateness of using Recruit School Final Averages as the measure of training performance or the relationship of the Recruit School program to the job of a police officer.

Thus, the striking fact of Washington is that Test 21 did not meet any standard for criterion validation. Essentially, the majority approved an ad hoc method of construct validation. The construct approach is readily seen in the Court's description of Test 21 and the academy training program: "some minimum verbal and communicative skill would be very useful, if not essential, to satisfactory progress in the training regimen." If communicative ability is a

(c) Success in training;
(d) Reduced turnover; or
(e) Job satisfaction.
103. See text accompanying notes 29-30 supra.
104. Under Civil Service Commission regulations and current professional standards governing criterion-related test validation procedures, the job-relatedness of an entrance examination may be demonstrated by proof that scores on the examination predict properly measured success in job-relevant training (regardless of whether they predict success on the job itself).

The documentary evidence submitted in the district court demonstrates that scores on Test 21 are predictive of Recruit School Final Averages. There is little evidence, however, concerning the relationship between the Recruit School tests and the substance of the training program, and between the substance of the training program and the post-training job of a police officer. It cannot be determined, therefore, whether the Recruit School Final Averages are a proper measure of success in training and whether the training program is job-relevant.

105. Proof that scores on an entrance examination predict scores on training school achievement tests, however, does not, by itself, satisfy the burden of demonstrating the job-relatedness of the entrance examination. There must also be evidence—the nature of which will depend on the particular circumstances of the case—showing that the achievement test scores are an appropriate measure of the trainee's mastery of the material taught in the training program and that the training program imparts to a new employee knowledge, skills, or abilities required for performance of the post-training job.

Id. at 24-25, cited at 96 S.Ct at 2058.
106. Id. at 30, cited at 96 S.Ct at 2058.
107. See text accompanying notes 32-33 supra.
108. 96 S.Ct. at 2052.
valid construct, then a minimum level of ability would be essential to academy performance. However, no evidence demonstrating that Test 21 measures ability to learn the material taught at the academy was presented.\footnote{109} Furthermore, while the Department's validation study demonstrated that persons with high Test 21 scores are more likely to achieve a final average exceeding 85, there was no evidence that a trainee with a final average below 85 was more difficult to train. Finally, applicants who scored lower than 40 percent on Test 21 had never been admitted to recruit school; thus, neither the Department nor the Court had any evidence that a score of 40 percent on Test 21 was indicative of the "minimal" level of verbal ability essential to guarantee progress in the academy. The majority bridged this factual gap by adopting a "common sense theory of validity,"\footnote{110} which assumed, without proof, that a score of 40 percent was meaningful.

The Court’s uncritical acceptance of common sense validation on the statutory issues parallels its inadequate response to the constitutional questions raised by the proof of Test 21's racially disproportionate impact. On both issues the majority examined the Department’s proffered justification for Test 21 and upheld its use with only the most minimal scrutiny. By adopting this position, the Court undermined the § 1981 cause of action against employment tests as surely as it did the constitutional cause of action. Although statistically disproportionate impact may create a prima facie case under the statute, the employer’s burden of proving job relatedness will be very light. Yet the Court’s decision implies that the prevailing standards under Title VII will remain intact.

**CONCLUSION**

*Washington* splits the previously indistinguishable causes of action for racial discrimination in employment into three distinct remedies: constitutional, § 1981, and Title VII. The *Griggs* and Title VII standards are now fully removed from the constitutional prohibition of racial discrimination. This distinction may have been prompted by the 1972 amendments to Title VII, which placed public employers under the same restrictions as private employers, and reduced the need to apply Title VII standards through the fourteenth amendment. In addition, the Court moved to eliminate the liberal influence of the lower courts' employment decisions on equal protection analysis in general.\footnote{111}
In addition, the substantive standards of the major statutory remedies have been split. In part, this action continues the recent recognition that § 1981 and Title VII are separate statutory schemes with similar goals but different historical developments. However, the analysis adopted by the Washington Court sets standards for § 1981 that restrict its usefulness as a remedy for discriminatory employment selection techniques. The Court now holds that employers should not suffer the full weight of Title VII and the EEOC Guidelines unless employees fully comply with the procedural limitations Congress imposed on Title VII actions.

The Court’s acceptance of an ad hoc standard of proof for Test 21’s validation cannot be justified, however, by the majority’s desire to limit Title VII standards to Title VII cases: the Department’s proof was inadequate under requirements of the CSC, the EEOC and the American Psychological Association. If § 1981 is to remain a viable remedy against employment discrimination, and if evidence of a racially disproportionate impact still creates a prima facie case under § 1981, then some rational method of proof should be mandated for the demonstration of job relatedness. The Washington majority appears to endorse the construct validation of any entrance exam by the giving of another written test measuring several contexts, including public employment, that the substantially disproportionate impact of a statute or official practice, without regard to discriminatory purpose, suffices to prove racial discrimination violating equal protection principles absent some justification approaching the compelling state interest standard. The Court may have feared that the employment discrimination cases, which accepted Griggs as authority, would eventually “infect” equal protection cases in all contexts with the Griggs standard.

113. Absent a meaningful job relatedness requirement, the potency of the statutory structure is virtually destroyed since it is always possible to design a test that measures some ability but discriminates against a certain group. To demonstrate this fact, one psychologist developed the so-called “Chitlin’ Test,” or the “Dove Counter-Balance Intelligence Test,” which asked questions uniquely relevant to the experience of black people. Excerpts are quoted in Fleischman, Let’s Be Human, Nat’l Labor Service (Jan. 1968).
114. These procedural prerequisites can be formidable to the employee. Before a Title VII action can be filed, a complaint must be registered with the EEOC within 180 days of the discriminatory act if the unlawful employment practice occurred in a state or city which does, not have its own anti-discrimination law and agency. 42 U.S.C. § 2000e-5(e). If the employment practice occurred where such a state law and agency exist, the state or local agency must be given 60 days to act on the complaint first, and only then may the EEOC procedures be invoked. 42 U.S.C. § 2000e-5(c) (1970). But regardless of the length of the state statute of limitation, the charge must be filed with the EEOC no more than 300 days after the occurrence of the act or within 30 days after receipt of notice that the state or local agency has terminated its proceeding, whichever comes first. 42 U.S.C. § 2000e-5(e) (1970). Washington is testimony that these procedural requirements can block an otherwise valid charge under Title VII’s substantive requirements. See 96 S.Ct. at 2047 n.10.
115. See notes 98 and 102-06 supra, and accompanying text.
the same construct at the end of a training course. The facile reasoning demonstrated by this approach is mitigated only by the likelihood that it will not be extended to cases under Title VII.  

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116. When future cases present the issue of applying the Washington standard of proof to Title VII actions as well as those under § 1981, the Court will do well to remember these words:

Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance . . . . What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.
