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Greene v. City of Memphis: Is Intent the Sine Qua Non of Discrimination Claims?

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CASENOTES

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Seemingly routine actions taken by our nation's cities and states, exercising their police power, increasingly face charges of racial discrimination. This casenote provides an historical perspective for, and an analysis of, a recent case currently on appeal before the United States Supreme Court. The author highlights the problems surrounding the various tests used to determine whether state action does in fact discriminate against a particular class or group of people.

Residents of the all-white Hein Park subdivision of Memphis, Tennessee, obtained the city's approval to close West Drive, a thoroughfare that ran through Hein Park. This action afforded them the privacy and safety of living on a dead-end street. Local residents, including residents of a large, predominantly black neighborhood just beyond West Drive's merger with another street, had customarily used West Drive for crosstown access. After the city's action, various residents and property owners of the affected black neighborhood initiated a class action suit against the city of Memphis and its officials who had approved the closing. The suit alleged that the defendants had designed the street closing deliberately to isolate Hein Park from the blacks and that this action limited access to the black area so severely that it reduced the blacks' property values. The plaintiffs claimed that the closing violated their rights under the thirteenth and fourteenth amendments, and sought relief under title 42 of the United States Code, sections 1982 and 1983.[1]

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1. The thirteenth amendment, section 1, provides: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1.

The fourteenth amendment, section 1, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any

The United States District Court for the Western District of Tennessee dismissed the complaint for failure to state a claim.[2] The plaintiffs appealed to the United States Court of Appeals for the Sixth Circuit, which reversed the dismissal and remanded, holding that the plaintiffs properly stated a claim and that on remand plaintiffs would have to prove that the city's action was racially motivated, absent a showing of egregious differential treatment (*Greene I*).[3] On remand, the district court ruled for the defendants because the differential treatment was not so "stark" that one could infer a discriminatory motive. Once again, the black residents sought review in the court of appeals. The United States Court of Appeals for the Sixth Circuit *held*, reversed and remanded: The closing of a city street that disproportionately and adversely affects local blacks through inconvenience and reduction in their property values violates the thirteenth amendment as a "badge of slavery," justifying relief under section 1982, even without a showing of racial motives. *Greene v. City of Memphis*, 610 F.2d 395 (6th Cir. 1979) (*Greene II*).

For almost a century the United States Supreme Court has wrestled vigorously with the question whether racial discrimination claims require a showing of intent or motive to discriminate, and, if so, by what standard a court should determine the presence and effect of intent.[4] The Supreme Court created a milestone in the review of racial discrimination in *Korematsu v. United States*,[5] in which the Court developed a methodology for viewing discrimination claims under the fourteenth amendment's equal protection

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person within its jurisdiction the equal protection of the laws.

Id. amend. XIV, § 1.

42 U.S.C. § 1982 (1976) provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

42 U.S.C. § 1983 (1976) provides:

> 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 jursidiction 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.

2. Greene v. City of Memphis, No. 75-1339 (W.D. Tenn. 1975).

3. Greene v. City of Memphis, 535 F.2d 976, 977 (6th. Cir. 1979) (*Greene I*).

4. *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976); Wright v. Rockefeller, 376 U.S. 52 (1964); Akins v. Texas, 325 U.S. 398 (1945); Norris v. Alabama, 294 U.S. 587 (1935); Guinn v. United States, 238 U.S. 347 (1915); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

5. 323 U.S. 214 (1944).

clause.[6] Under this methodology, classifications that discriminate racially are "suspect"[7] factors, which the courts will examine very closely. This close review, or "strict scrutiny," requires a challenged government to prove that a compelling state interest justifies the disputed classification.[8] Additionally, courts will strictly scrutinize any state action that infringes on a recognized fundamental right.[9] If the challenged action involves neither a suspect class nor a violation of a fundamental right, a court will conduct a less intense review: the action need only be rationally related to a legitimate state interest.[10]

This Court-developed review raises two basic questions. The first is whether the case involves a fundamental right or suspect class. For this purpose, the Court has identified rights that are fundamental and classes that are suspect.[11] When a case, such as *Greene II,* involves alleged discrimination against a suspect class, the second basic question is what test is appropriate for deciding whether a government's action has discriminated in violation of equal protection, and thus whether strict scrutiny is the proper standard of review. The court of appeals in *Greene II* found this question very troublesome.[12]

Several contradictory decisions on discrimination followed *Korematsu,* and in these cases the Supreme Court never clearly determined which factor should trigger strict scrutiny of allegedly discriminatory state actions: the racially disproportionate impact of the action, or proof of the governmental unit's intent to discrim-

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6. U.S. CONST. amend. XIV, § 1. The due process clause of the fifth amendment also implies an equal protection element. *Id.* amend. V. *See, e.g.,* Washington v. Davis, 426 U.S. 229, 239 (1976) (citing Bolling v. Sharpe, 347 U.S. 497 (1954)).

7. The term "suspect" originated in Justice Black's majority opinion in *Korematsu,* 323 U.S. at 216.

8. In this more intense two-prong approach, the government must show a compelling interest and prove that it could not have taken alternative action that would have an equally effective result but a less discriminatory impact. *Id.* at 214.

9. *See generally* Shapiro v. Thompson, 394 U.S. 618 (1969). *But see generally* Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1 (1972).

10. *See, e.g.,* Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

11. For example, in Loving v. Virginia, 388 U.S. 1 (1967), the Court categorized as suspect any classifications that relate to race, but the Court refused to categorize as suspect any classification based on wealth, in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973). Furthermore, the Court has held fundamental such rights as travel, Shapiro v. Thompson, 394 U.S. 618 (1969), but has declined to do so for activities such as receiving welfare benefits, Jefferson v. Hackney, 406 U.S. 535 (1972).

12. 610 F.2d at 401. For another view of the issue, see Judge Celebrezze's dissent, maintaining that section 1982 review requires the same showing of discriminatory intent as do claims based directly on the fourteenth amendment. *Id.* at 408.

inate—or both.[13] By not firmly establishing a clear approach for reviewing claims, the Court left the lower courts without guidance and fostered controversial decisions such as *Greene II*.[14] This absence of direction led to further argument against judicial review of government actions even when these actions were based on apparently benevolent motives.[15]

The unclear language of the court opinions in discrimination cases evidenced and heightened the confusion. One example is the use of the terms "disproportionate impact" and "uneven impact." These phrases describe the consequences of a state action that places one class of people at a disadvantage to another—in effect, preferring one class over another. Uneven impact occurs when government action conferring or denying benefits produces better results for one class than for another. Disproportionate impact occurs when action infringes more economically on one class than on others, or from the uneven distribution of benefits among classes.[16] The difficulty in understanding such concepts and their distinctions created chaos among the lower courts. Furthermore, the language of equal protection uses the terms "purpose" and "intent" interchangeably to describe the results that "the decisionmakers desire to achieve by the operation of their decision."[17]

In *Palmer v. Thompson*,[18] the Supreme Court stated that in reviewing racial discrimination claims the Justices would not consider the intent behind governmental action.[19] In *Palmer*, blacks in

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13. The Court has used various approaches to examine state action, including inquiries that focus on the state's motive and the action's impact, singularly or in combination, Board of Educ. v. Allen, 392 U.S. 236 (1968) (developing a "purpose" or "primary effect" test under the establishment clause of the first amendment); on improper motives, using the action's impact only to judge motive, Gomillion v. Lightfoot, 364 U.S. 339 (1960) (redesigning municipal boundaries); or on the action's impact, disregarding the state's motives, Palmer v. Thompson, 403 U.S. 217, 224-25 (1971) (closing municipal swimming pools after court ordered racial integration).

14. *See* Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36, 39 (1977).

15. The majority opinions in both *Greene II*, 610 F.2d at 402, and *Palmer*, 403 U.S. at 224-25, indicate a sensitivity to these arguments. *See* Eisenberg, *supra* note 14, at 114-15.

16. *See* Eisenberg, *supra* note 14, at 40-41.

17. *Id.* at 41 (quoting Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 101).

18. 403 U.S. 217 (1971).

19. *Id.* at 224-25. The Court stated that such a focus would be inherently impractical and ultimately futile. The majority opinion ostensibly distinguished Griffin v. County School Bd., 377 U.S. 218 (1964), and Gomillion v. Lightfoot, 364 U.S. 339 (1960), on the ground that the focus in those cases was on the effect, not the motive, of the actions. *Id.* at 225; *see* notes 23-25 and accompanying text *infra*. Justice White's dissent concluded that the evidence pointed to a clear racial motive behind the closing. 403 U.S. 246-54.

Jackson, Mississippi, fought to desegregate the city's public swimming pools and won in the district court.[20] The city, however, then closed most of the pools and leased the remainder to a private party who prohibited use by blacks. The blacks challenged the action under the equal protection clause, alleging that the city closed the pools solely to avoid integration.[21] The Court, however, refused to find the city's motives a determinative factor of discrimination and held that Jackson had no obligation to keep the pools open, especially since the closings affected blacks and whites equally.[22]

Although the *Palmer* Court was clear in finding motive an irrelevant factor, other racial discrimination cases decided by the Court have implied that motive or intent played a major role in the outcome of the decision. Eleven years before *Palmer,* in *Gomillion v. Lightfoot,*[23] plaintiffs alleged that the Alabama Legislature had redesigned the city limits of Tuskegee from a square to an "uncouth" twenty-eight-sided figure.[24] This act displaced virtually all of the town's black voters from the municipality, although it excluded no whites. The Court held that this gerrymandering of the city limits discriminated unconstitutionally;[25] but the holding implied that the motive or intent behind the governmental action was relevant. The Court found that, given the uncontradicted allegations of the complaint, the conclusion was "irresistible . . . that the legislation [was] *solely concerned* with segregating *white and colored voters* by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote."[26] The Court also stated that "[a]cts generally lawful may become unlawful when done to accomplish an unlawful end, . . . and a constitutional power cannot be used by way of condition to attain an unconstitutional result."[27]

Four years after *Gomillion,* in *Griffin v. County School*

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20. Clark v. Thompson, 206 F. Supp. 539 (S.D. Miss.), *aff'd per curiam,* 313 F.2d 637 (5th Cir. 1962), *cert. denied,* 375 U.S. 951 (1963).

21. The mayor of Jackson allegedly had made public statements that "we are not going to have any intermingling," had called the blacks "agitators," and had expressed his intention to maintain segregation. 403 U.S. at 250 (White, J., dissenting).

22. *Id.* at 220, 224-25.

23. 364 U.S. 339 (1960).

24. *Id.* at 340.

25. *Id.* at 347. The government argued that its police powers made the action lawful. *Id.*

26. *Id.* at 341 (emphasis added).

27. *Id.* at 347-48 (quoting Western Union Tel. Co. v. Foster, 247 U.S. 105, 114 (1918) (citation omitted). In *Palmer,* the Court admitted that its language in *Gomillion* suggested the relevancy of motive in determining a law's constitutionality. 403 U.S. at 225.

Board,[28] the Court relied expressly on governmental motive and ordered a county government to re-open public schools that it had closed for the alleged purpose of preventing desegregation.[29] The Court compared the Virginia law, challenged in *Griffin*, to a similar Louisiana law struck down three years earlier by a district court. The Court found that the intent behind both laws, and not their impact, was the key factor: Although "the Louisiana plan and the Virginia plan worked in different ways, it is plain that both were created to accomplish the same thing: the perpetuation of racial segregation by closing public schools . . . ."[30]

Curiously, in *Palmer*, decided seven years after *Griffin*, the Court said that the effect of the action on blacks, and not the motive behind the action, determined the outcome of *Griffin*.[31] This contradictory statement added to the confusion about the role of legislative intent in discrimination claims. The language and result in *Griffin* are inconsistent with the language and result in *Palmer*, although in both cases a government closed public facilities to prevent desegration.[32] Likewise, the majority opinion in *Palmer* attempted to obviate its inconsistency with *Gomillion* by explaining that the Court based its decision in *Gomillion* not upon the city's motives in redistricting but rather, as in *Griffin*, upon the adverse impact on blacks.[33]

A significant clarification of the role of impact and motive in the Court's scrutiny of state action came in 1976, in *Washington v. Davis*.[34] *Davis* represented a critical deviation from *Palmer's* reliance on a "pure impact" test. In *Davis*, the Court announced an "impact-plus" test for determining whether an action discriminates racially.[35] Under this test, a court strictly scrutinizes state action that has a disproportionate racial impact only if the plaintiff has shown that the action involves a discriminatory intent or motive.[36] In *Davis*, blacks who had failed written tests for employ-

28. 377 U.S. 218 (1964).

29. *Id.* at 232.

30. *Id.*

31. 403 U.S. at 225.

32. The actions, however, were not identical. In *Griffin*, the county had closed its public schools and provided tuition grants to students enrolled in segregated private schools. The closing in *Palmer*, on the other hand, denied the use of the swimming pools to blacks and whites equally. This distinction may in part explain the difference in the results.

33. 403 U.S. at 225.

34. 426 U.S. 229 (1976).

35. *Id.* at 238-48.

36. Five years before *Davis*, a unanimous Court held that a plaintiff claiming disproportionate impact need not prove the presence of discriminatory motive. Griggs v. Duke

ment as police officers in Washington, D.C., alleged that the tests violated the equal protection clause. They presented evidence that blacks failed four times more frequently than whites. The Court refused to invalidate the police test merely because of its disproportionate impact.[37] Departing from its earlier pure-impact test, the Court based its rationale for an "impact-plus" standard on two concerns. First, it feared that a pure-impact test would lead to the judicial veto of legitimate government actions:

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.[38]

Second, the Court stressed that judicial review of legitimate political actions of government might become uncontrollable if disproportionate impact were the limit of the inquiry.[39] The Court in *Davis* added more confusion to the controversy surrounding the role of motive by restricting the *Palmer* holding to the elimination of motive only from an analysis of the legitimate reasons behind the pool closings in *Palmer*.[40] The Court also stated that it had not intended in *Palmer* to make the question of motive totally irrelevant in racial discrimination cases.[41]

Shortly after *Davis*, in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[42] the Court reaffirmed its holding in *Davis* requiring a showing of discriminatory motive.[43] In

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Power Co., 401 U.S. 424, 431 (1971) (blacks challenging a utility company's educational requirements for employment or promotion). The cause of action in *Griggs*, however, was under Title VII of the Civil Rights Act of 1964, which Congress passed to prevent discrimination in employment. The Court in *Davis* decided that the *Griggs*-Title VII standard was not required by the Constitution, 426 U.S. at 239. Furthermore, the Court treated the *Davis* case according to standards already developed, since Title VII did not apply to the District of Columbia's employees when the *Davis* plaintiffs initiated their complaint. *Id.* at 238-41. *See also* Note, 1977 DUKE L.J. 1267.

37. 426 U.S. at 240, 242.

38. 426 U.S. at 248 (footnote omitted). Judge Celebrezze's dissenting opinion in *Greene II* also relied on this rationale to support the validity of the street closing. *See* 610 F.2d at 408-09.

39. 426 U.S. at 247; *see* Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 547-49 (1977).

40. 426 U.S. at 243.

41. *Id.* at 244 n.11.

42. 429 U.S. 252 (1977).

43. *Id.* at 265-66. In *Arlington Heights*, the plaintiffs based their discrimination claim

Arlington Heights, the Court upheld a town's refusal to rezone a predominantly white area to permit building low- and moderate-income housing, despite the action's disproportionately adverse impact on minorities hoping to live there. The Court cited the lack of any proven intent.[44] Moreover, the Court provided a non-exhaustive list of factors for use in determining whether motive can be inferred: (1) disproportionate impact;[45] (2) historical background of the government action, especially if it reveals invidious motives;[46] (3) events leading toward the action, particularly any departures from normal procedures;[47] and (4) the legislative record and testimony of the officials devising or implementing the action.[48]

In *Arlington Heights,* the Court took a stand fully consistent with its position in *Griffin* on the relevance of intent.[49] In these cases, the Court apparently relied on an intent standard when the intent behind the government action was clearly discriminatory, while retreating to a pure-impact standard in cases in which intent was not obvious.[50] Another force behind the case development, suggested by some authors, is the fear of the pure-impact standard, hastening the Court's adoption of the impact-plus test.[51]

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on the equal protection clause and the Civil Rights Act of 1968, since the rezoning refusal allegedly promoted racial segregation of the neighborhood.

44. The Court required the plaintiffs to show that intent to discriminate was at least *a* motive behind the government's action. Such proof shifts to the challenged government the "burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered." 429 U.S. at 270 n.21.

45. *Id.* at 266. The Court also decided that the determination of discriminatory intent begins with a "sensitive inquiry" into whatever evidence of intent is available. The action's impact is only a "starting point," and except for impact as stark as that in *Gomillion,* impact alone is not determinative. *Id.*

46. *Id.* at 267.

47. *Id.*

48. *Id.* at 268.

49. Just recently, the Court affirmed the intent requirement of *Davis* and *Arlington Heights* in another equal protection case, *Personnel Adm'r v. Feeney,* 442 U.S. 256 (1979) (using an impact-plus test to uphold a state's veterans' preference statute despite disproportionate impact on the sexes). In *Feeney,* the Court provided its definition of "intent" in motive analysis:

> "Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences . . . . It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

Id. at 279 (citations and footnote omitted).

50. This inconsistency is most evident in the results in *Griffin, Davis,* and *Arlington Heights. See also* Eisenberg, *supra* note 14, at 137.

51. 610 F.2d at 405. *See also* Schwemm, *From Washington to Arlington Heights and*

Greene II is significant because the court of appeals confronted two very important issues that the Supreme Court will soon consider. The first is whether the intent required for claims under the equal protection clause of the fourteenth amendment should be extended to claims under the thirteenth amendment and 42 U.S.C. sections 1982 and 1983.[52] The second issue, if the Court does require a finding of intent, is whether a reviewing court should apply a pure-impact test or an impact-plus test.

In *Greene II,* the plaintiffs' claim arose under sections 1982 and 1983; the court of appeals ordered relief under section 1982[53] without expressly finding an intent to discriminate.[54] The Supreme Court has not yet addressed directly the issue whether intent to discriminate is a required element under a section 1982 claim. In *Jones v. Alfred H. Mayer Co.,*[55] the Court traced the origin of section 1982 to section 1 of the Civil Rights Act of 1866,[56] which Congress based on the thirteenth amendment and, to some extent, the fourteenth amendment.[57] As the Court noted, "some members of Congress supported the Fourteenth Amendment 'in order to eliminate doubt as to the constitutional validity of the Civil Rights Act as applied to the States.' "[58] In *Jones,* cited by Judge Celebrezze's dissent in *Greene II,*[59] the Court interpreted the purpose behind section 1 as being "to prohibit *all racially motivated* deprivations of the rights enumerated in the statute."[60] This legislative history suggests that, for claims brought under section 1982 and the thirteenth amendment, the Court will require proof of a racially discriminatory intent; this requirement would parallel the standard used for equal protection claims under the fourteenth amendment.[61] This approach is further suggested by the language of

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Beyond: Discriminatory Purpose in Equal Protection Litigation, 1977 U. ILL. L. F. 961, 992.

52. 610 F.2d at 404 n.13.

53. *Id.* at 405. The court, however, did not decide whether relief could be granted directly under the thirteenth amendment and § 1983. *Id.* at 402 n.8.

54. The closest the court came to a consideration of intent was its statement that the closing "appears to have been a unique step to protect one neighborhood from outside influences which the residents considered to be 'undesirable.' " *Id.* at 404.

55. 392 U.S. 409 (1968).

56. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (current version at 42 U.S.C. § 1982 (1976)).

57. 392 U.S. at 429-37.

58. *Id.* at 436 (quoting Hurd v. Hodge, 334 U.S. 24, 32-33 (1948)).

59. 610 F.2d at 408.

60. *Id.* (quoting 392 U.S. at 426) (emphasis added by Celebrezze, J.).

61. *Id.*

Runyon v. McCrary,[62] in which the Court found a violation of section 1981[63] solely because of a private school's discriminatory motive and practice in refusing admission to blacks:

> Just as in *Jones* a Negro's § 1 [of the Civil Rights Act of 1866] right to purchase property on equal terms with whites was violated when a private person refused to sell to the prospective purchaser solely because he was a Negro, so also a Negro's § 1 right to "make and enforce contracts" is violated if a private offeror refuses to extend to a Negro, solely because he is a Negro, the same opportunity to enter into contracts as he extends to white offerees.[64]

The Court in *Runyon* noted that section 1981, like 1982, originated from section 1 of the Civil Rights Act of 1866.[65]

The *Greene II* court, however, expressly left open the question whether proof of intent or motive is ever required in a successful claim under section 1982.[66] The court cited Justice Powell's dissent in the recent decision of *County of Los Angeles v. Davis*,[67] in which he suggested that the question of intent under section 1981, a provision related to section 1982, remains unresolved.[68]

The *Greene II* court's avoidance of the intent issue departs from the standard announced in *Arlington Heights*. Moreover, *Green II* contrasts sharply with the position it took, and the standard it developed, in *Greene I:*

> To establish a section 1982 or 1983 claim on remand, Greene must prove his allegations that city officials conferred the closed street on West Drive residents because of their color; he *must prove racial motivation, intent, or purpose,* in the absence of such egregious differential treatment as to in itself violate equal protection or, alternatively, to command an inference of racial motivation.[69]

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62. 427 U.S. 160 (1976).

63. 42 U.S.C. § 1981 provides in part that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . . "

64. 427 U.S. at 170-71 (footnote omitted). *See also* Note, *supra* note 36, at 1280-84.

65. 427 U.S. at 168-70. The Court dismissed as a clerical mistake a historical note attached to section 1981 that indicated section 1981 originated in section 16 of the Enforcement Act of 1870, *id.* at 168 n.8. The Court has interpreted sections 1981 and 1982 on a parallel basis. *Id.* at 190 (Stevens, J., concurring). *See also* 392 U.S. at 441 n.78.

66. 610 F.2d at 404 n.13.

67. 440 U.S. 625 (1979).

68. 610 F.2d at 404 n.13.

69. 535 F.2d at 979 (emphasis added).

This language could fairly have been read to establish the following standards of proof of intent required for racial discrimination claims under sections 1982 or 1983: (1) When no egregious differential treatment exists, plaintiff must affirmatively prove defendant's intent to discriminate racially; (2) when egregious differential treatment does exist, the Court will raise a) a conclusive presumption of racial intent, when there can exist no grounds, other than race, to justify such differential treatment; or b) a rebuttable presumption of racial intent, when there does exist, and defendant proves, some ground other than race to justify such differential treatment.

Whether by affirmative showing or by presumption, each of these situations at least implies the presence of intent to discriminate. The majority opinion in *Greene II,* however, labeled this ostensible requirement mere "dicta."[70] The court held that the disproportionate impact of the street closing on the blacks, without more, was so "stark" as to violate the thirteenth amendment. The court did not mention intent; it merely stated that the district court, on remand, had read too stringently the *Arlington Heights* and *Greene I* standards.[71]

This sharp retreat from the intent requirement arguably not only frustrates the standard set forth in *Greene I,* but nullifies the very objective sought by the Supreme Court in *Arlington Heights:* the reviewing court must conduct a "sensitive inquiry" into the "circumstantial and direct evidence of intent," with disproportionate impact providing only "an important starting point."[72] Justice Powell's majority opinion in *Arlington Heights* concluded that this evidentiary inquiry is relatively easy when "a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face."[73] The Court stated that cases of such stark discrimination are "rare" and cited *Gomillion's* gerrymandering as an

70. 610 F.2d at 400.

71. *Id.* at 401, 402.

72. 429 U.S. at 266. In Personnel Adm'r v. Feeney, 442 U.S. 256 (1979), the Court elaborated on the *Arlington Heights* inquiry, describing it as two-fold. First is the determination of whether the government's action is facially neutral. If so, the second step is to determine whether the adverse impact reflects invidious discrimination. In this second step, impact provides an important starting point, but "purposeful discrimination is 'the condition that offends the Constitution.'" *Id.* at 274 (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971)). *See generally* 34 U. MIAMI L. REV. 343 (1980).

73. 429 U.S. at 266.

example.[74] Drastically widening what the Court in *Arlington Heights* had called a "rare exception," the court in *Greene II* allowed itself to begin and end its "inquiry" by equating the invidiousness of the street closing to the action in *Gomillion*.[75] Perhaps the *Greene II* court felt that such a finding would allow it to avoid addressing the intent issue.

Even in a case such as *Gomillion*, however, a court must conduct some inquiry into intent to determine whether any grounds do exist to explain the differential treatment involved.[76] The court in *Greene II* gave cursory attention, at best, to the legitimate reasons advanced by the city in support of the closing[77]—a factor that the Court in *Arlington Heights* considered very important.[78] A reasonable interpretation of both the *Greene I* and the *Arlington Heights* standards would require a finding of intent, whether by way of affirmative proof, rebuttable presumption, or conclusive presumption.

In *Greene II* the district court's majority relied on a pure-impact test, purporting to follow the standard (but avoiding the true objective) of *Arlington Heights*. Judge Celebrezze, in dissent, reasoned that pure-impact inquiries might stifle legitimate government action and that, by definition, "a street closing will not result in an identical impact upon residents and nonresidents."[79] He also recognized that the judiciary must accord a certain amount of deference to legislative action involving land use regulation, especially when racial motive is facially absent; the judge agreed with the conclusion of the trial court that the closing discriminated on the basis of residency, not race.[80] The majority criticized this inquiry for its narrow scope; the court had examined the history of other street closings in Memphis, which revealed only that no blacks had ever been denied permission to close their neighborhood (because no blacks in Memphis had ever attempted to do so).[81] The majority's inquiry seems narrow as well, in refusing to consider seriously not only the general historical background of the action, but also the city's legitimate motives behind the closing.

The decision in *Greene II* typifies the problems that a lower

74. *Id.*.
75. 610 F.2d at 402.
76. 429 U.S. at 266.
77. 610 F.2d at 402-03.
78. 429 U.S. at 265-68.
79. 610 F.2d at 407; *accord*, 429 U.S. at 266 n.15.
80. 610 F.2d at 408.
81. *Id.* at 400.

court confronts when determining the validity of racial discrimination claims.[82] The problems arise primarily because of the Supreme Court's failure to clarify the role of intent in determining when impermissible discrimination occurs, and to specify in adequate detail a standard test for identifying when racial motives exist, especially in cases of facially neutral government action. That *Greene II* illustrates these problems better than it resolves them is not surprising. The Supreme Court cases on this subject confuse and contradict each other; they leave the courts without an appropriate standard for determining violations of section 1982, and, in particular, for determining if and when intent is a requisite element under a section 1982 violation.

The primary issue before the Supreme Court in reviewing *Greene II* will be whether a city exercising its police powers to close a street for purportedly legitimate purposes has, without proof of any racial motive, violated section 1982 and the thirteenth amendment. In view of its past decisions, the Supreme Court will probably conclude that discriminatory intent is a requisite element for relief under section 1982 claims. This holding would be consistent with similar claims under the equal protection clause. The Court will probably adopt an impact-plus test, similar to those of *Davis* and *Arlington Heights,* to aid the courts in determining the presence of discriminatory intent. If the Court does so—and it should—it will probably base its rationale on an apparent and justified aversion to a pure-impact test.

Thus, the pure-impact test should be merely the starting point for deciding claims under section 1982 and the thirteenth amendment. This would provide maximum protection for the legitimate exercise of state governmental power, as well as a clear and practical standard to guide future decisions on claims of racial discrimination.

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82. The line of cases including *Davis* fell short of resolving what standard the courts should use in reviewing discrimination claims under section 1982. *See* Comment, 1978 B.Y.U. L. REV. 1030, 1040.