

PROVING DISCRIMINATORY INTENT IN CONSTITUTIONAL LAW DISPARATE IMPACT CASES

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I decided to prepare for this symposium by learning something about the Federalist Society, so I read its brochure. The brochure states emphatically that the province and duty of the judiciary is to say what the law is, not what the law should be. This dictum immediately reminded me—pardon the analogy—of the French Revolution.

One of the concerns of the French Revolution was to do something about the judges of the *Ancien Regime*.¹ The French revolutionaries saw the judges as tools of the ruling class who had distorted all legal decisions so that France no longer possessed a government ruled by law.² Consequently, the first French Constitution forbade French judges to interpret the law.³ The constitution authorized the judiciary simply to apply the law. If any question arose as to what the law was, judges were to consult the legislature. This scheme, of course, was utopian. The body within the legislature designed to advise the judges, the Cassation, quickly became the Supreme Court of France.⁴ This Eighteenth-Century controversy demonstrates

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1. See generally A. SOBOWL, *THE FRENCH REVOLUTION, 1787-1799: FROM THE STORMING OF THE BASTILLE TO NAPOLEON* (A. Forest & C. Jones trans. 1st ed. 1975).

2. See *id.* at 88-91.

3. The first French Constitution stated:

When, after two cassations, the judgment of the third court is protested in the same manner as the first two, the question may not be discussed further in the Court of Cassation without having been submitted to the legislative body, which shall pass a decree declaratory of the law, to which the Court of Cassation shall be required to conform.

FR. CONST. tit. III, ch. V, § 21 (1791), reprinted in J. STEWART, *A DOCUMENTARY SURVEY OF THE FRENCH REVOLUTION* 256 (1951).

4. The first French Constitution commissioned the Court of Cassation in these words:

A single Court of Cassation for the entire kingdom shall be established near the legislative body. Its functions shall be to pronounce:

Upon petitions in cassation against judgments rendered in the last resort by the courts;

Upon petitions for removal from one court to another because of legitimate suspicion;

Upon rulings of judges and suits against an entire court.

FR. CONST. tit. III, ch. V, § 19 (1791), reprinted in J. STEWART, *supra* note 3, at 256.

the extreme difficulty in distinguishing what the law is from what the law should be.

When arguments exist on both sides of an issue, partisans often express their argument in the strongest terms and ignore any opposing position, regardless of its strengths and merits. The topic of this panel recalls the old story of the rabbi serving as a religious judge who listened to both sides' arguments. The plaintiff argued and the rabbi said, "You're right." Then the defendant argued and the rabbi said, "You're right." The two litigants then said, "But rabbi, we can't both be right," and the rabbi said, "You're right." Here, something *can* be said for both sides.

A sketch of the polar arguments will help. If courts examine all practices that cause a disparate racial impact and then require very difficult standards of justification, frequently racial allocations will result. Under such a regime, failure to achieve proportional racial representation will often be invalidated. The strongest argument against racial allocations is that ours is a society where people should be judged on individual merit. A system allocating goods or services on the basis of race, it is argued, moves us in exactly the wrong direction. The fact that the Civil Rights Act of 1990⁵ carefully avoided any reliance on a theory of affirmative action indicates public acceptance of this side of the argument.

On the other hand, if courts require a finding of a formal racial classification or a subjective purpose to discriminate, a large number of instances of racial discrimination will pass undetected and remain uncorrected. Employers may indeed—consciously or unconsciously—use employment practices that discriminate. A law forbidding racial discrimination will be unenforceable if it always requires case-by-case proof of discrimination. An emphasis upon the bottom line—the results—is often necessary to eliminate discrimination.

When analyzing constitutional law on this topic, arguments can be drawn from the same doctrine to support both approaches. On the one hand, "suspect classification" doctrine is

5. H.R. 4000, 101st Cong., 2d Sess. (1990); S. 2104, 101st Cong., 2d Sess., 136 CONG. REC. S1019-20 (daily ed. Feb. 7, 1990). The Civil Rights Act of 1990, as passed by Congress, was vetoed by President Bush on October 22, 1990, Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1632 (Oct. 22, 1990).

grounded in the notion that decisions ought to be based on individual attributes and not on group identifications.⁶ A constitutional doctrine that requires proportional racial representation is inconsistent with this basis of the suspect classification doctrine.⁷ On the other hand, suspect classification doctrine is also based on "smoking out" impermissible purposes by requiring some justification for decisions based on questionable criteria.⁸ A results test may be the only practical method to detect hidden racial bias.

The Supreme Court has taken a mixed approach to this question. In *Washington v. Davis*,⁹ the Supreme Court endorsed an "intent" test, refusing to extend the "results" approach of *Griggs v. Duke Power Co.*¹⁰ to the equal protection context. Does that settle the controversy? Not really. Constitutional law is like a waterbed. If one pushes a lump down somewhere, it will come up somewhere else. Despite the fact that *Davis* seemingly decided against an impact or results test, the question of how to prove the requisite forbidden intent remains. A professor of evidence could not understand the crazy quilt of cases in the Supreme Court that have dealt with this issue. The requirements to prove discriminatory intent differ for different categories of cases.¹¹ These cases demonstrate a pattern that indicates that some truth lies on both sides of the equation.

The key to this mystery lies in one of the examples the Court used in *Davis*. In the opinion of the Court, Justice White described a wide range of situations in which one must prove in-

6. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 16-6, 16-13, 16-14, 16-23, 16-24 (2d ed. 1988). See also *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971).

7. See L. TRIBE, *supra* note 6, § 16-22.

8. See J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 145-70 (1980).

9. 426 U.S. 229, 240 (1976) ("[T]he invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.").

10. 401 U.S. 424, 430 (1971) ("Under [Title VII], practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.").

11. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279 (1987) (although murderers of white persons were more than four times as likely to receive the death penalty as murderers of black persons, plaintiff failed to show that imposition of the death penalty in his case was racially motivated); *Hunter v. Underwood*, 471 U.S. 222 (1985) (striking down provision of Alabama Constitution disenfranchising people convicted of crimes of moral turpitude, which provision had a racially disparate impact, on the basis that the 1901 Alabama Constitutional Convention, which adopted the provision, convened with the stated purpose "to establish white supremacy in this state"); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) (refusal to rezone to permit racially integrated, low and moderate income housing did not demonstrate requisite racially discriminatory intent).

vidious intent to make out a prima facie case.¹² The exclusion of blacks from criminal trial jury panels was one example.¹³ Justice White said that no constitutional violation could be shown unless blacks had been consciously and systematically excluded.

Interestingly, that was not—and is not—the law. The constitutional focus of courts on this issue has moved from the Fourteenth Amendment's Equal Protection Clause¹⁴ to the Sixth Amendment's guarantee of trial by jury.¹⁵ The Sixth Amendment requires, at least in terms of the trial jury panel, a representative jury. The constitutional right to a trial by jury is thus a right of representation. Hence, a failure of representation demonstrates that there has been a Sixth Amendment violation.¹⁶

A number of other rights that have been described as equal protection rights—although less clear than Sixth Amendment rights—also appear to be rights of representation. The cases that have focused on impact as sufficient proof of discrimination in violation of the Fourteenth Amendment involve rights that take on the appearance of representational rights.¹⁷

Some examples of cases that can be defended under a theory of a right to representation might be useful at this point. In *Dayton Board of Education v. Brinkman*,¹⁸ the Supreme Court decided that a school system that had been segregated in 1954 carries a continuous presumption that the effects of that segregation still linger. In such school districts, the courts can impose a Fourteenth Amendment remedy largely upon proof of racial disproportion.

In *Castaneda v. Partida*,¹⁹ a Texas county used a “key-man system” for picking grand jurors. Although strongly contested, statistical analyses arguably showed under-representation of Mexican-Americans on grand jury panels. The county contended, and the trial court found, that there was no invidious

12. See *Davis*, 426 U.S. at 239-43.

13. See *id.* at 239.

14. U.S. CONST. amend. XIV, § 1 (“nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws”).

15. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .”).

16. See *Taylor v. Louisiana*, 419 U.S. 522 (1975).

17. See, e.g., *Guardians Ass'n v. Civil Serv. Comm'n of New York*, 463 U.S. 582 (1983).

18. 443 U.S. 449 (1979).

19. 430 U.S. 482 (1977).

intent, because the persons who chose the grand jurors were themselves Mexican-Americans. The Supreme Court, however, found sufficient proof of inappropriate intent and held that a prima facie case of discrimination in the selection of the grand jury had been made. Justice Powell's dissent provides some clues as to what underlay the Court's decision.²⁰ He argued that the Court had actually brought the standards of representation for grand jury selection close to the standards for petit jury selection. Thus, the Court essentially created a right of representation.

Finally, we should briefly examine political apportionment cases in which racial minorities claim that authorities either selected an at-large system so that minorities would not be able to elect representatives under it, or drew district lines in a manner to minimize minority representation.²¹ In some of these cases, elections at large traced back to the turn of the century. In the case of southern cities, at-large elections were not chosen over elections by district for reasons of racial discrimination, because minorities at that time were not allowed to vote at all. The plaintiffs' claims in these cases thus turn on an argument not that the adoption of the system, but rather that its retention, is motivated by the purpose of minimizing the representation of minorities. Notice the difficult proof problem. It is hard enough to prove why a legislative body has done something—it is even harder to prove why a legislature did not do something. The legislative history is sparse, to say the least.

On the eve of the passage of federal legislation that provided a similar result, in *Rogers v. Lodge*²² the Supreme Court developed a "modified effects" test for determining racial discrimination in political districting. For its part, Congress prescribed a similar "modified effects" test, borrowing from earlier decisions of lower federal courts.²³

What ties all these cases together is that the central name of the game is representation, and the right to fair representation.

20. See *Castaneda*, 430 U.S. at 508-09 (Powell, J., dissenting).

21. See, e.g., *Rogers v. Lodge*, 458 U.S. 613 (1982); *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

22. 458 U.S. 613 (1982).

23. See Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1988)); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973).

When such a right is at stake, a theory that considers the fair treatment of groups, and concentrates on effects, fits.

In closing, we as a public find ourselves in conflict regarding the basic polar arguments about group rights and individual rights—whether we should require fairness to all groups of people, or whether we should treat all individuals as individuals. Neither Congress nor the courts have a consistent vision; both vacillate. Maybe we, too, find ourselves in the position of the rabbi who must admit that both sides are right, but both cannot be right.