Constitutional Law—Zoning—Supreme Court's Apparent Refusal to Impose Affirmative Duty on Local Housing Officials in Racial Discrimination Cases. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 97 S. Ct. 555 (1977).

Metropolitan Housing Development Corporation (MHDC)[1] and other plaintiffs[2] instituted an action for declaratory relief against the Village of Arlington Heights.[3] The plaintiffs alleged that the denial of a rezoning permit for a proposed moderate and low income housing development was racially discriminatory and in violation of the equal protection clause of the fourteenth amendment as well as the Fair Housing Act.[4] The area surrounding the proposed development was zoned for single family dwellings.[5] The district court found that the Village's refusal to rezone was motivated by a legitimate desire to maintain the "integrity of the Village's zoning plan"[6] and therefore held the denial was not an arbitrary and capricious act in violation of the fourteenth amendment.[7]

---

1. MHDC is a non-profit low and moderate income housing developer for the Chicago metropolitan area. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 97 S. Ct. 555, 558-59 (1977). [hereinafter cited as Village of Arlington Heights v. MHDC].

2. There were individual plaintiffs of which the Supreme Court only mentioned one named Ransom. Ransom was a black working in Arlington Heights who lived 20 miles away, but who desired to live in Arlington Heights if low income housing became available. *Id.* at 562-63. Defendants initially challenged the standing of plaintiffs. The Supreme Court ruled that since Ransom had demonstrated standing to assert his own rights that it did not have to be concerned with the standing of MHDC, a corporation. *Id.* at 562.

3. Plaintiffs named as defendants the following: (1) the Village, (2) the Village Mayor, (3) Village Manager, (4) the Director of Building and Zoning, and (5) the entire Village Board of Trustees. *Id.* at 558 n.1.

4. *Id.* 42 U.S.C. §§ 3601-3631 (1973). MHDC entered into a 99 year lease and sale agreement with/the Clerics of St. Viator to develop racially integrated low and moderate income housing in the Village of Arlington Heights. The agreement involved a 15 acre parcel of land which was part of an 80 acre tract owned by the Clerics of St. Viator. The lease and sale agreement was made contingent upon MHDC's securing rezoning clearances from the Village of Arlington Heights. MHDC, by petition to the Village Plan Commission, sought to have the proposed development area rezoned for multiple-family housing. Village of Arlington Heights v. MHDC, 97 S. Ct. 555, 558-59 (1977).

5. *Id.* at 558.

6. MHDC v. Village of Arlington Heights, 373 F. Supp. 208, 211 (N.D. Ill. 1974), *rev'd* 517 F.2d 409 (7th Cir. 1975), *rev'd and remanded*, 97 S. Ct. 555 (1977). The Village's refusal to rezone related to the Village's policy, enacted in 1962, providing that an area should be zoned for multiple-family dwellings only if it would serve as a buffer zone or transition between single-family zoning and commercial or manufacturing districts, neither of which existed near the proposed development. Village of Arlington Heights v. MHDC, 97 S. Ct. 555, 559 (1977).

7. MHDC v. Village of Arlington Heights, 373 F. Supp. 208, 221 (N.D. Ill. 1974), *rev'd*, 517 F.2d 409 (7th Cir. 1975), *rev'd and remanded*, 97 S. Ct. 555 (1977).

On appeal, the Seventh Circuit found that the Village did not administer its zoning policy in a racially discriminatory manner, but found that the effect of the denial was racially discriminatory.[8] The Seventh Circuit found a racially discriminatory effect by considering the historical context of the segregated housing situation in the Chicago metropolitan area and by looking at the ultimate effect of the Village's denial of the rezoning request.[9] Based on this finding, the appellate court reversed the lower court and indirectly held that the Village had an affirmative duty to alleviate the discriminatory effect.[10] The court of appeals did not consider the issue concerning the alleged violation of the Fair Housing Act.

On certiorari, the Supreme Court reversed the court of appeals judgment and remanded the case.[11] The Supreme Court held that regardless of the discriminatory effect of state action one must further prove that a discriminatory purpose was a motivating factor for the action in order to show a violation of the equal protection clause of the fourteenth amendment.[12]

The primary issue faced by the Court in *Village of Arlington Heights v. MHDC* was whether a racially discriminatory intent or purpose had been a motivating factor for the defendant Village's refusal to rezone.[13] The main argument presented by the plaintiffs was that the Village's buffer zone policy[14] had not been consistently applied and that its strict administration in this particular instance indicated an underlying racially discriminatory motive.[15] Plaintiffs further contended that the Village's denial of the rezoning request had a racially discriminatory impact or effect thereby perpetuating the segregated character of Arlington Heights.[16] On the basis of

8. MHDC v. Village of Arlington Heights, 517 F.2d 409, 412, 415 (7th Cir. 1975), *rev'd and remanded*, 97 S. Ct. 555 (1977).

9. *Id.* at 413.

10. Id. at 415. Although the appellate court did not specifically use the term "affirmative duty" in their decision, it is reasonable to infer that the court actually imposed such a duty on the Village.

11. Village of Arlington Heights v. MHDC, 97 S. Ct. 555, 566 (1977).

12. *Id.* at 563.

13. *Id.* at 565.

14. *See* note 6 *supra*.

15. *Id.* at 565.

16. *Id.* Arlington Heights is located about 26 miles northwest of downtown Chicago. The Village's population in the 1970 census was over 64,000 of which only 27 were black. The Arlington Heights area's black population actually decreased from 1960 to 1970, whereas the percentage of blacks in the city of Chicago increased from 14% to 18%. It is interesting to contrast these population changes with the change in employment opportunities in the same

these two arguments, plaintiffs asserted that the Village's action had violated the equal protection clause of the fourteenth amendment and the Fair Housing Act of 1968.[17]

In answer to the plaintiffs' contentions, Arlington Heights urged that its decision to deny the rezoning request was not based on any racially discriminatory intent or purpose. Instead, according to the Village, the denial was motivated by a commitment and desire to abide by their zoning plan.[18] More specifically, defendants asserted a general interest in protecting the property values of those neighborhood landowners who had relied on the enforcement of the Village zoning plan.[19]

In reaching its decision, the Supreme Court stated that in order to show a violation of the equal protection clause, the plaintiffs had to prove that a racially discriminatory intent or purpose was a motivating factor in the denial of their rezoning request.[20] The Court enumerated several "subjects of proper inquiry"[21] in determining whether such a racially discriminatory intent existed. The Court stressed that discriminatory effect was but one factor to be examined.[22] Finally, the Court concluded that plaintiffs failed to carry their burden of proving a racially discriminatory intent or purpose on the part of the Village. The Court therefore held that the Village's denial of the rezoning request did not violate the equal protection clause of the fourteenth amendment.[23] The question of the alleged violation by defendants of the Fair Housing Act[24] was remanded to the court of appeals for consideration by that court.[25]

---

time period. The city of Chicago lost 230,000 jobs between 1960 and 1970, whereas job opportunities in the Arlington Heights area doubled to 200,000. In 1970, however, only 137 out of 13,000 employees in Arlington Heights were black. The explanation for this wide disparity is partially attributed to the fact that black workers have been unable to financially afford housing in Arlington Heights. Almost all blacks that worked in Arlington Heights were forced to live over 20 miles away in the city of Chicago. According to the statistics of plaintiffs expert witness Pierre de Vise, a demographer and urbanoligist, Arlington Heights is the most racially segregated village or city in the Chicago area among municipalities of more than 50,000 residents. MHDC v. Village of Arlington Heights, 517 F.2d 409, 413-14 (7th Cir. 1975), *rev'd and remanded*, 97 S. Ct. 555 (1977).

17. Village of Arlington Heights v. MHDC, 97 S. Ct. 555, 558 (1977).

18. *Id.* at 566.

19. *Id.*

20. *Id.* at 563.

21. *Id.* at 564-65. For a fuller discussion of these "subjects of proper inquiry" *see* note 69 *infra* and accompanying text.

22. *Id.* at 564-65.

23. *Id.* at 566.

24. 42 U.S.C. §§ 3601-3631 (1973).

25. Village of Arlington Heights v. MHDC, 97 S. Ct. 555, 566 (1977).

Justices Marshall and Brennan, who concurred in part and dissented in part, reasoned that the proper thing for the Supreme Court to do was to remand the entire case to the court of appeals for further consideration consistent with the *Arlington Heights* majority opinion.[26] Justice White, in a separate dissent, also took the view that both the statutory issue and the constitutional issue should be remanded to the court of appeals.[27]

The Court's decision in *Arlington Heights* was preceded some fifty years by *Village of Euclid v. Ambler Realty Co.*,[28] the Supreme Court's first major decision concerning zoning. In *Euclid* the Supreme Court recognized the regulation of land use, through a community's zoning ordinance, to be a proper exercise of a state's police power. The Court in *Euclid* indicated that a zoning ordinance should be upheld where its validity was "fairly debatable."[29] Moreover, the Court noted that a zoning ordinance should be held unconstitutional only if it was found to be clearly arbitrary and unreasonable and without substantial relation to public health, safety, morals or general welfare.[30]

Although the *Euclid* case upheld the regulation of land use by local officials, it was not the Supreme Court's intention to allow local officials to abuse their discretion and zone in a racially discriminatory manner.[31] Various federal circuit courts[32] have invalidated zoning regulations under the equal protection clause and Fair Housing Act upon a finding of racial discrimination absent a corresponding finding of a compelling state interest to justify the discrimination. These courts have used variations of the same test in determining whether a racially discriminatory action was present.

---

26. *Id.* at 566-67.

27. *Id.* at 567.

28. 272 U.S. 365 (1926).

29. *Id.* at 388.

30. *Id.* at 395. This test was later reaffirmed by the Supreme Court in Village of Belle Terre v. Boraas, 416 U.S. 1, 5 (1974) and Nectow v. City of Cambridge, 277 U.S. 183, 187-88 (1928).

31. *Cf.* Shelley v. Kraemer, 334 U.S. 1, 10-11 (1948) (plaintiffs successfully challenged the validity of a state court determination that held private, racially restrictive covenants enforceable).

32. United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); Crow v. Brown, 457 F.2d 788 (5th Cir. 1972); English v. Town of Huntington, 448 F.2d 319 (2d Cir. 1971); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970); Southern Alameda Spanish Speaking Organ. v. City of Union City, 424 F.2d 291 (9th Cir. 1970).

The case primarily cited by these courts is *Kennedy Park Homes Ass'n.* v. *City of Lackawanna,* an opinion by the Second Circuit.[33] In that case the plaintiff Home Association purchased 30 acres for a proposed low income housing subdivision in an area populated almost exclusively by Caucasians.[34] After much publicity and rumored threats of violence, the city council placed a moratorium on all new subdivisions in the specific area of the proposed subdivision.[35] The plaintiff challenged the moratorium and the Second Circuit decided that the city council's[36] action resulted in racial discrimination in violation of the equal protection clause. In reaching its decision, the court looked at the immediate objective behind the defendant's decision as well as its historical context and ultimate effect.[37] Using this test, the court inferred that the City's action was racially motivated.[38]

The *Kennedy Park* court, though it found a discriminatory purpose, indicated in dicta that the city could be held liable without the finding of a discriminatory purpose if a racially discriminatory effect was proven.[39] Various circuit courts have relied on this dicta to hold that a discriminatory effect, as indicated by the historical context and ultimate effect of an action, is sufficient to show violations of the equal protection clause or of the Fair Housing Act. Therefore, these courts have not felt compelled to infer or directly find a discriminatory motive or purpose.[40] These courts have utilized

---

33. 436 F.2d 108 (2d Cir. 1970).

34. *Id.* at 110-11. The city of Lackawanna was a three-ward city consisting of 98.9% non-white persons living in the first ward, as contrasted to one non-white person in the second ward, and less than 30 in the third ward. Not only was the first ward segregated in terms of population, but also its only physical connection to the other wards was by way of a bridge. The court noted that the first ward had the following characteristics: (1) most dilapidated housing, (2) highest residential density, (3) high risk area for health purposes, (4) juvenile and adult crime rates are respectively double and triple the city's average, and (5) a steel plant occupies one-half of the land area in the first ward thereby causing unbearable air pollution at times. *Id.*

35. *Id.* at 111, 113.

36. In this case, the city council's action represented state action. The equal protection clause of the fourteeth amendment prohibits and protects against discriminatory or wrongful state action, not discriminatory or wrongful private action. Burton v. Wilmington Parking Auth., 365 U.S. 715, 721 (1961).

37. Kennedy Park Homes Ass'n. v. City of Lackawanna, 436 F.2d 108, 112 (2d Cir. 1970), *cert. denied,* 401 U.S. 1010 (1971).

38. *Id.* at 109.

39. *Id.* at 114.

40. United States v. City of Black Jack, 508 F.2d 1179, 1185 (8th Cir. 1974), *cert. denied,* 422 U.S. 1042 (1975); United Farmworkers Hous. Project, Inc. v. City of Delray Beach, 493 F.2d 799, 808 (5th Cir. 1974). *See* Banks v. Perk, 341 F. Supp. 1175 (N.D. Ohio

the historical context part of the test to look at the sociological condition of a city before the challenged action has taken place.[41]

Some conditions that have resulted in findings of racial discrimination under the historical context test include critical needs for low income housing[42] and zoning plans which allow deviations for white persons, but not for minorities.[43] Other historical conditions found to be indicative of present racial discrimination are segregated and undesirable housing areas resulting from deliberate past racial discrimination.[44]

Beyond looking at the historical context, courts following the *Kennedy Park* test also consider the ultimate effect of the opposed action. This involves a consideration of both the immediate and long range repercussions of the challenged action. Under this branch of the test, the courts have found unconstitutional discrimination where the ultimate effect of the proposed action is shown to be continued segregation of minorities in an isolated section of a city,[45]

1972), *aff'd in part, rev'd in part*, 473 F.2d 910 (6th Cir. 1973); Hawkins v. Town of Shaw, 461 F.2d 1171 (5th Cir. 1972); Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970); Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968); Note, *Exclusionary Zoning—Does a Zoning Ordinance with Racially Discriminatory Effects Violate the Constitution*, 7 LOY. CHI. L.J. 141, 146-47 (1976). *See generally* Note, *Compelling State Interest Test Applied to Denial of Rezoning Request*, 30 U. MIAMI L. REV. 475, 480 (1976).

41. *See generally* Note, *A New Discriminatory Effect in Zoning*, 9 JOHN MARSHALL J. 533, 540-41 (1976); Note, *Constitutional Law—Equal Protection—Zoning to Avoid Perpetuating De Facto Segregation*, 43 TENN. L. REV. 133, 140-42 (1975). Some courts are not explicit in calling their test the historical context-ultimate effect test, nevertheless, these courts find a racial discrimination violation on the basis of a racially discriminatory effect without finding a racially discriminatory motive or purpose.

42. United Farmworkers Hous. Project, Inc. v. City of Delray Beach, 493 F.2d 799, 803 (5th Cir. 1974) (refusal to permit a federally assisted low income housing project to tie in with the city's water and sewage system).

43. *Id.* at 808.

44. United States v. City of Black Jack, 508 F.2d 1179, 1186 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975). In order to indicate the segregated character of the city of Black Jack, Missouri, the following facts are pertinent. The area which the city occupies was an unincorporated area in St. Louis County. When the area was incorporated, the County had zoned part of the area for multiple-family housing construction. In 1969, an 11.9 acre tract was purchased within this area by an organization for purposes of constructing low to moderate income housing. Public opposition to this idea was swift and active and resulted in the incorporation of this area into the city of Black Jack. *Id.* at 1182. After this occurred, a zoning ordinance was passed by the city prohibiting any new multiple-family housing construction. The resulting racial composition of the city's schools was virtually all white. This is in marked contrast to the nearby St. Louis school district which was almost 66% black. Also, a school district only two miles away from Black Jack was all black. *Id.* at 1183.

45. United Farmworkers Hous. Project, Inc. v. City of Delray Beach, 493 F.2d 799, 810-11 (5th Cir. 1974).

or the denial of better housing to minorities currently residing in substandard dwellings.[46]

In addition to the constitutional challenges[47] to allegedly discriminatory zoning, several cases have also presented claims under the Fair Housing Act.[48] The policy of the Fair Housing Act of 1968 is "to provide, within constitutional limitations, for fair housing throughout the United States."[49] Lower court decisions have held, in relation to Fair Housing Act claims, that zoning powers implemented in a racially discriminatory manner so as to exclude housing opportunities for minority persons are in violation of the Act.[50] The courts considering Fair Housing Act claims have applied the so called "prima facia case" test as the required burden of proof to show a violation of the Act.[51] All the prima facie case standard requires is that a discriminatory effect be proven.[52] Here again, a discriminatory effect is most often proved by an examination of the historical context and ultimate effect of the challenged action.[53] The Supreme Court has not ruled on the validity of the use of the prima facie case burden of proof under the Fair Housing Act.

The courts that have required proof of a racially discriminatory effect alone in order to prove an equal protection violation or violation of the Fair Housing Act have primarily relied on the language of four Supreme Court cases to support their rationale. First, in *Burton* v. *Wilmington Parking Auth.*,[54] Justice Clark wrote that to

---

46. United States v. City of Black Jack, 508 F.2d 1179, 1186 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975).

47. United Farmworkers Hous. Project, Inc. v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974); Hawkins v. Town of Shaw, 461 F.2d 1171 (5th Cir. 1972); Crow v. Brown, 457 F.2d 788 (5th Cir. 1972); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970); Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968).

48. United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); United Farmworkers Hous. Project, Inc. v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974); Banks v. Perk, 341 F. Supp. 1175 (N.D. Ohio 1972), *aff'd in part, rev'd in part*, 473 F.2d 910 (6th Cir. 1973).

49. 42 U.S.C. § 3601 (1973).

50. *See* note 48 *supra*.

51. United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); United Farmworkers Hous. Project, Inc. v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974).

52. *Id.*

53. *See* notes 40 and 41 *supra* and accompanying text.

54. 365 U.S. 715, 725 (1961). The *Burton* case involved a restaurant's refusal to serve a black person solely on the ground that he was black. The restaurant owner was a lessee of the state and hence his action constituted state action. The Supreme Court therefore held that the equal protection clause of the fourteenth amendment had been violated. *Id.* at 717.

an individual denied the equal protection of the laws it made no difference whether the denial was made in good faith or bad faith. Second, the Supreme Court in *Reitman* v. *Mulkey*[55] accepted the California Supreme Court's approach of looking at factors such as the immediate objective, ultimate effect and historical context in determining whether a statute was invalid under the equal protection clause of the fourteenth amendment. Third, in *Palmer* v. *Thompson*,[56] the Supreme Court noted the difficulty and futility of determining the " 'sole' " or " 'dominant' " motivation or purpose behind an enactment which had a discriminatory effect. The Court pointed out that the actual effect of the enactment was as important as the motives and purposes behind the enactment in determining fourteenth amendment racial discrimination claims.[57] And finally, in *Wright* v. *Emporia*,[58] the Court focused upon the effect of the action rather than the motivation behind it, in holding a school board's action invalid as an impedence to desegregating a school system. In light of these four Supreme Court opinions, the lower courts reasoned they were justified in looking to the effect of state action to determine whether there has been racial discrimination in violation of the fourteenth amendment.

The Supreme Court, however, in its recent opinion in *Washington* v. *Davis*,[59] voiced its disapproval of several lower court decisions[60] that relied on solely racially discriminatory effects, rather than a racially discriminatory purpose, in finding a violation of the fourteenth amendment. The Court indicated its awareness of the apparent confusion that resulted from the Supreme Court's decisions in *Palmer* and *Wright* by briefly explaining what these cases actually held.[61] The Court explained that there may be particular

55. 387 U.S. 369, 373 (1967). In *Reitman*, the statutes involved dealt with racial discrimination in housing.

56. 403 U.S. 217 (1971). This case involved the voluntary closing of defendant-city's five public swimming pools because the city decided not to try to operate the pools on a segregated basis. This action was brought by several black citizens to force the reopening of the pools on a desegregated basis. The Supreme Court ruled that the city did not have to reopen the pools.

57. *Id.* at 225.

58. 407 U.S. 451, 462 (1972).

59. 426 U.S. 229 (1976).

60. *Id.* at 244-45. Included within the list of decisions were: Crow v. Brown, 457 F.2d 788 (5th Cir. 1972); Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108, 114 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); Southern Alameda Spanish Speaking Organ. v. City of Union City, 424 F.2d 291 (9th Cir. 1970); Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968).

61. Washington v. Davis, 426 U.S. 229, 242-45 (1976).

circumstances, as in *Wright*, where the racial effect of a law, as opposed to the discriminatory purpose or intent, would be the crucial factor in determining whether a violation of the equal protection clause has occurred.[62] However, the court stressed that neither *Palmer* nor *Wright* was intended to work a fundamental change in equal protection law.[63] The Court further noted that disproportionate racial impact or effect was not irrelevant although it was "not the sole touchstone of an invidious racial discrimination forbidden by the Constitution."[64] The Court stressed that proof of a racially discriminatory purpose, whether express or implied, was still the requirement for proving an equal protection violation.[65] It is important to point out, however, that the Supreme Court in *Davis* noted that in Title VII[66] cases a racially discriminatory purpose need not be proven to show a racial discrimination violation.[67]

The Supreme Court in *Arlington Heights* reiterated the *Davis* requirement that a discriminatory purpose was necessary to prove a violation of the equal protection clause.[68] The Supreme Court used a six criterion test to determine whether a racially discriminatory purpose or intent exists. The six criteria that the Court mentioned were the following: (1)impact of the official action; (2) historical background; (3) specific sequence of events leading up to the challenged action; (4) departures from the normal procedural sequences; (5) substantive departures; and (6) the legislative and administra-

62. *Id.* at 243.

63. *Id.* at 243-44.

64. *Id.* at 242.

65. *Id.* at 239-41. It is worth noting that at least one case, Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975), circumvented this rigid equal protection requirement of proof of a discriminatory purpose. The plaintiffs contention in *Mount Laurel* was economic discrimination rather than racial. In this case, the New Jersey Supreme Court held that a municipality had an affirmative duty to provide for low and moderate income housing adequate to meet the region's housing needs. 336 A.2d at 731-32. The court found this affirmative duty necessary in order to serve the state's general welfare. The court explained that upon a finding that the municipality did not provide its fair share of regional low and moderate income housing needs the burden of justifying this fact shifted to the municipality. *Id.* at 728. *See generally* Note, *Land Use Planning—Zoning Regulations That Exclude Segments of the Region's Population on the Basis of Wealth are Presumptively Invalid*, 7 TEX. TECH. L. REV. 182 (1975).

66. 42 U.S.C. §§ 2000e to 2000h-6 (1974).

67. Washington v. Davis, 426 U.S. 229, 246-47 (1976). *See also* Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971) where the Supreme Court noted that under a Title VII claim Congress requires the removal of arbitrary barriers that invidiously discriminate on the basis of race.

68. Village of Arlington Heights v. MHDC, 97 S. Ct. 555, 563 (1977).

tive history behind the decision.[69] An analysis and comparison of these six criteria with the historical context, ultimate effect test used by the court of appeals indicates very little difference between the tests assuming both are used to infer a discriminatory purpose.

In considering historical context, the court of appeals had noted the high degree of segregation in both housing and employment opportunities in the Chicago area, and specifically in and around Arlington Heights.[70] The Supreme Court in *Arlington Heights*, however, apparently failed to look at the historical background or historical context of the challenged action. In particular, in 1970 out of Arlington Height's 64,884 residents only 27 were black. Also, whereas the Chicago metropolitan area black population increased from 14% to 18% from 1960 to 1970, the black population in the Arlington Heights area actually decreased.[71] As the court of appeals noted, low income housing has not been available to minorities in the nicer segregated white communities.[72] It is unlikely that the segregated character of the Chicago metropolitan area and in particular Arlington Heights resulted purely by coincidence. It is also doubtful that all blacks desire to live in the substandard and dilapidated housing units that are found in the ghettos of the Chicago area. Admittedly, some blacks, if given the choice, would choose to remain in the segregated black communities. But the fact is, blacks in and around the Chicago area do not always have the choice, especially in areas such as Arlington Heights where the supply of low income housing is limited if not nonexistent.[73]

Although the Supreme Court in *Arlington Heights* did admit that the impact of the Village's refusal to rezone did bear more heavily on minority persons,[74] it apparently did not look to the ultimate effect of the Village's decision. The ultimate effect of the Village's decision, as the court of appeals pointed out, is that no low income housing will be built in the Arlington Heights area.[75]

The court of appeals also noted that the Village of Arlington Heights has ignored segregation problems and has in fact been

69. *Id.* at 564-65.

70. MHDC v. Village of Arlington Heights, 517 F.2d 409, 413-14 (7th Cir. 1975), *rev'd and remanded*, 97 S. Ct. 555 (1977).

71. *Id.* at 413. *See* note 16 *supra*.

72. *Id.* at 414.

73. *Id.*

74. Village of Arlington Heights v. MHDC, 97 S. Ct. 555, 565 (1977).

75. MHDC v. Arlington Heights, 517 F.2d 409, 414 (7th Cir. 1975), *rev'd and remanded*, 97 S. Ct. 555 (1977). The appellate court pointed out that the plaintiffs were unable to locate any other "economically feasible and suitable alternative site." *Id.*

"exploiting the problem by allowing itself to become an almost one hundred percent white community."[76] It does not appear, therefore, that the Supreme Court adequately considered the historical background of the challenged action nor did it consider in detail the ultimate effect of the action. This lack of consideration presents the possibility that the Supreme Court's six criterion test for inferring a discriminatory purpose is a mere shell which the Court may use to achieve a desired result.

Whether or not the Supreme Court properly applied the six criterion test, the *Arlington Heights* Court did emphasize that proof of a racially discriminatory purpose, whether express or implied, was required to show a violation of the equal protection clause.[77] The court of appeals, however, was under the mistaken belief that a discriminatory effect was sufficient and hence did not even attempt to infer a discriminatory purpose.[78] It is entirely possible that the court of appeals would have justifiably inferred a discriminatory purpose from the facts if given the opportunity on remand. But the Supreme Court majority refused to remand the case to the court of appeals on the equal protection claim, much to the dismay and disapproval of the three Justices who dissented on this particular point.[79]

Perhaps the greatest defect in the Supreme Court's opinion, however, is the erroneous conclusion that the court of appeals found the Village's refusal to rezone was not racially motivated in the first instance.[80] The court of appeals actually held that the Village did not administer its zoning policy in a racially discriminatory manner.[81] This is not the same as finding that the purposes behind the policy were valid because the administration of a policy and the purposes behind it are not one and the same. A close reading of the court of appeals opinion indicates that the Supreme Court's conclu-

---

76. *Id.*

77. *See* note 68 *supra* and accompanying text.

78. The rationale of the court of appeals in *Arlington Heights* and other circuit courts following the discriminatory effect test is based on the principal that "normally the actor is presumed to have intended the natural consequences of his deeds . . . ." as Justice Stevens said in his concurring opinion in Washington v. Davis, 426 U.S. 229, 253 (1976).

79. Village of Arlington Heights v. MHDC, 97 S. Ct. 555, 566-67 (1977). *See* notes 26 and 27 *supra* and accompanying text.

80. Village of Arlington Heights v. MHDC, 97 S. Ct. 555, 565 (1977). *See* MHDC v. Village of Arlington Heights, 517 F.2d 409, 412 (7th Cir. 1975), *rev'd and remanded*, 97 S. Ct. 555 (1977).

81. *Id.*

sion is not justified.[82] It appears, therefore, that the unstated reason behind the Supreme Court's decision not to give the court of appeals an opportunity to infer a racially discriminatory purpose, may have been the realization that the lower court would infer a discriminatory purpose from the totality of the relevant facts—a result the Court wanted to avoid for reasons known only to the Justices.[83]

The plaintiffs in *Arlington Heights,* however, have not lost all hope of relief. The Supreme Court has remanded the case to the court of appeals for a determination of whether defendant's action violated the Fair Housing Act of 1968, Title VIII of the Civil Rights Act of 1968.[84] In the past, circuit courts have not required a showing of discriminatory purpose in order to prove a prima facie case of racial discrimination in violation of the Fair Housing Act.[85]

The Supreme Court itself has recently held, in *Washington* v. *Davis*,[86] that a discriminatory purpose need not be proven in cases arising under Title VII of the Civil Rights Act.[87] Whether or not the Court's decision in *Davis* will control Fair Housing Act cases may depend upon the language the Court used in referring to the burden of proof under Title VII cases. The *Davis* Court pointed out that under Title VII a discriminatory purpose need not be proven where "hiring and promotion practices disqualifying substantially disproportionate numbers of blacks are challenged."[88] It is therefore hard to rationalize how the Supreme Court will be able to require showing of a discriminatory purpose in order to prove that an aggrieved party has been racially discriminated against in relation to housing and not require proof of such a discriminatory purpose in employment discrimination cases.

The Supreme Court's present ruling in the *Arlington Heights*

82. See the court of appeals holding on this in MHDC v. Village of Arlington Heights, 517 F.2d 409, 412 (7th Cir. 1975), *rev'd and remanded,* 97 S. Ct. 555 (1977). Also, refer to the pertinent background facts in note 16 *supra.*

83. One reason why the Supreme Court may have wanted to steer clear of the constitutional argument is its general policy of avoiding constitutional questions where another remedy is available. such as is here, the Fair Housing Act claim. Another reason why the Court may have avoided the constitutional argument is its reluctance to impose a burdensome and arguably impractical affirmative duty on local officials to rectify pre-existing segregational areas that resulted from racially discriminatory practices.

84. 42 U.S.C. §§ 3601-3631 (1973).

85. *See* notes 51 and 52 *supra* and accompanying text.

86. 426 U.S. 229 (1976).

87. 42 U.S.C. §§ 2000e to 2000h-6 (1974). See notes 66 and 67 *supra* and accompanying text.

88. 426 U.S. at 246-47.

case may be an indication, however, that the Court is unwilling to impose an affirmative duty on local housing officials to integrate housing projects and eliminate racial discrimination in housing. If the Supreme Court is unwilling to impose such an affirmative duty on local housing officials, the end result may be a continuation of the trend of white persons moving to the suburbs to newer and better living conditions. At the same time, our larger cities will continue to be populated by a higher and higher percentage of minority persons, often in older, dilapidated housing. These aggrieved persons, however, may be more successful if the Supreme Court approves the use of the prima facie case burden of proof in Fair Housing Act claims. This lesser burden of requiring only proof of a discriminatory effect would be a step in the right direction by the Supreme Court in rectifying discriminatory housing practices. If the Supreme Court does not approve the lesser burden for Fair Housing Act claims, such a decision along with the *Arlington Heights*[89] decision on equal protection claims would be a step backward by the Supreme Court in its continuing dealings with the aspirations and rights of American citizens.

Gerald D. Quast

89. 97 S. Ct. 555 (1977).