Title VI: The Impact/Intent Debate Enters the Municipal Services Arena

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INTRODUCTION

In the late 1970's, beset by a severe budgetary crisis, New York City undertook a series of actions to reduce expenditures and increase the efficiency of its municipal services systems. As part of this plan, the city's Health and Hospital Corporation (HHC) decided to close Sydenham Hospital, a municipal acute care facility located in a low-income black and Hispanic neighborhood. The decision to close Sydenham appeared fiscally sound. Because of the hospital's location, however, the HHC's proposal impacted disproportionately on blacks and Hispanics. Therefore, in Bryan v. Koch, a class comprised of local minority residents sought to enjoin the closing of Sydenham, claiming that it would constitute racial discrimination in the expenditure of federal funds in violation of Title VI of the Civil Rights Act of 1964 (Act).

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2 As of 1978, despite severe budget cuts in other municipal services, the HHC had suffered relatively "inconsequential reductions in support." 492 F. Supp. at 221. Eventually, however, the HHC was required to develop a program to eliminate its projected fiscal 1980 deficit of $60 to $80 million by reducing manpower costs and increasing revenues. Id. The city's Office of Management and Budget concluded that this could best be accomplished by closing entire hospital facilities. Id.


4 42 U.S.C. §§ 2000d to 2000d-4 (1976). The Civil Rights Act of 1964 (Act) was intended to be a "constitutional and desirable means of dealing with the injustices and humiliations of racial and other discrimination," H.R. Rep. No. 914, 88th Cong., 1st Sess., reprinted in [1964] U.S. Code Cong. & Ad. News 2391, 2394, by "eradicat[ing] significant areas of discrimination on a nationwide basis." Id. at 2393. In accordance with this broad remedial purpose, the Act prohibits discrimination in such diverse areas as public accommodations, see 42 U.S.C. § 2000a (1976), education, see id. § 2000c, and employment, see id. § 2000e, as well as in federally funded programs.
Title VI prohibits discrimination on the ground of race, color, or national origin in the administration of programs receiving federal financial assistance. Traditionally, the statute has been used by private plaintiffs and administrative agencies to remedy

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No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.


It is settled that Congress has the constitutional power to condition receipt of federal funds upon the recipient's compliance with federal statutory and administrative directives. See Fullilove v. Klutznick, 100 S. Ct. 2758, 2772 (1980). This power derives from article I, § 8 of the Constitution, which provides that "Congress shall have Power...to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. art I, § 8.

The Supreme Court has repeatedly held that Congress may use the spending power to induce local governments and private parties to cooperate voluntarily with federal policy. E.g., Fullilove v. Klutznick, 100 S. Ct. 2758, 2765 (1980); Lau v. Nichols, 414 U.S. 563 (1974); see II STATUTORY HISTORY OF THE UNITED STATES 1019 (B. Schwartz ed. 1970); L. TRIME, AMERICAN CONSTITUTIONAL LAW 247-48 (1978).

A "recipient" within the meaning of Title VI is "the intermediary entity whose nondiscriminatory participation in the federally-assisted program is essential to the provision of benefits to the identified class which the federal statute is designed to serve." Bob Jones Univ. v. Johnson, 396 F. Supp. 597, 601 n.15 (D.S.C. 1974), aff'd mem., 529 F.2d 514 (5th Cir. 1975). Thus, payments made directly to an individual, such as veterans' pensions or social security benefits, generally are not covered by Title VI since they are not conditioned on participation in any program or activity. See Hearings Before House Judiciary Committee on H.R. 7152, 88th Cong., 1st Sess., Part IV, at 2773 (1963) (letter from Deputy Attorney General Katzenbach to Rep. Emanuel Celler, Chairman, Judiciary Committee); 110 CONG. REC. 6544 (1964) (remarks of Sen. Humphrey). See generally Note, Administrative Cutoff of Federal Funding Under Title VI: A Proposed Interpretation of "Program," 52 IND. L. REV. 608 (1977); Note, Title VI, Title IX, and the Private University: Defining "Recipient" and "Program or Part Thereof," 78 MICH. L. REV. 608 (1980).

Section 601 of Title VI does not expressly create a private right of action to redress violations of the statute, but a majority of the lower federal courts considering the issue have recognized an implied private right of action. E.g., NAACP v. Wilmington Medical Center, Inc., 599 F.2d 1247, 1257 (3d Cir. 1979); Bossier Parish School Bd. v. Lemon, 370 F.2d 847, 851-52 (5th Cir.), cert. denied, 388 U.S. 911 (1967). Two recent decisions of the Supreme Court, however, have generated some confusion as to the viability of the Title VI private right of action. In Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), it was argued that the sole function of section 601 was to provide a statutory predicate for administrative enforcement under section 602. Id. at 282; see note 8 and accompanying text infra. While the Bakke Court declined to resolve the question, Justice White, in a separate opin-
discrimination in federally funded education,\(^9\) employment,\(^\text{10}\) and

ion, stated that an implied private cause of action under Title VI would be contrary to the legislative intent. *Id.* at 380-81. At least one lower federal court since *Bakke* has relied in part on Justice White's reasoning, concluding that there is no private right of action under Title VI. *Clark v. Louisa County School Bd.*, 472 F. Supp. 321, 323 (E.D. Va. 1979). On the other hand, in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), the Court concluded that the legislative history of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1976), showed that Congress believed it had created a private right of action under Title VI. 441 U.S. at 694-96, 703. Subsequently, *Cannon* has been interpreted as placing the Supreme Court's imprimatur on the private right of action under Title VI. *See Guardians Ass'n v. Civil Serv. Comm'n*, No. 79-7377, slip op. at 6151 (2d Cir. July 25, 1980) (Coffrin, J., concurring); *NAACP v. Wilmington Medical Center, Inc.*, 599 F.2d 1247, 1257 (3d Cir. 1979); *Brown v. New Haven Civ. Serv. Bd.*, 474 F. Supp. 1256, 1264 (D. Conn. 1979); *Note, An Implied Private Right of Action Under Title VI*, 37 WASH. & LEE L. Rev. 297, 308 (1980); Comment, *Civil Rights: Title VI — Is a Private Right of Action Intended?,* 19 WASHBURN L.J. 565, 570-71 (1980).


\(^9\) Title VI creates enforcement and rule-making powers in appropriate federal administrative agencies. Section 602 of Title VI provides:

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract . . . is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken . . . . Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement . . . . or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means . . . .


housing programs.\textsuperscript{11} \textit{Bryan v. Koch} exemplifies the growing use of Title VI to prevent discrimination in the provision of health care and other municipal services.\textsuperscript{12} The utility of Title VI in municipal services cases, however, remains uncertain. First, the requirements for a prima facie showing of racial discrimination under Title VI are unsettled.\textsuperscript{13} Early cases\textsuperscript{14} and agency regulations\textsuperscript{15} set forth a standard of discriminatory effect, whereby the Title VI plaintiff may make out a prima facie case by proving that the challenged policy impacts disproportionately on a group protected by the statute.\textsuperscript{16} Recently, however, some courts have adopted a discriminatory intent standard.\textsuperscript{17} Moreover, municipal services litigation under Title VI poses a sensitive policy issue: the extent to which the judiciary may scrutinize and abridge the municipal decision-making process in order to remedy discrimination.\textsuperscript{18}

This Note initially will outline a prima facie case of racial discrimination under the intent and impact standards as they have developed under the Constitution and Title VII of the Civil Rights Act of 1964.\textsuperscript{19} It will then discuss the current conflict in the courts as to the appropriate standard for Title VI violations. This will be followed by an analysis of the legislative history of the statute with a view toward ascertaining congressional intent. \textit{Bryan v. Koch} will then serve as a vehicle to explore the intent-impact debate in the context of municipal services litigation. After a discussion of the relevant policy considerations and Title VI precedent, the Note

\textsuperscript{11} E.g., Garrett v. City of Hamtramck, 503 F.2d 1236 (6th Cir. 1974); Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971); Hicks v. Weaver, 302 F. Supp. 619 (E.D. La. 1969).
\textsuperscript{13} E.g., Lau v. Nichols, 414 U.S. 563, 568 (1974); Wade v. Mississippi Coop. Extension Serv., 528 F.2d 508, 516-17 (5th Cir. 1976); Shannon v. HUD, 436 F.2d 809, 816-17 (3d Cir. 1970).
\textsuperscript{15} E.g., 45 C.F.R. § 80.3(b)(2) (1979).
\textsuperscript{16} E.g., Lora v. Board of Educ., 623 F.2d 248 (2d Cir. 1980); see notes 38-41 and accompanying text infra.
\textsuperscript{18} See Bryan v. Koch, 627 F.2d at 619.
will conclude that municipal services cases under Title VI should be governed by an impact standard. Finally, the Note will suggest the nature of the proof necessary to present a prima facie case of racial discrimination in the provision of municipal services and the scope of the defendant’s burden of justification.

THE PRIMA FACIE CASE OF RACIAL DISCRIMINATION: INTENT VERSUS IMPACT

A legislative or administrative policy that is racially neutral on its face generally will be valid if it is rationally related to a legitimate public objective.\(^2\) When a facially neutral policy tends to produce a disproportionate racial impact,\(^3\) however, the courts will undertake a different inquiry. The civil rights litigation of the past two decades has produced two mutually exclusive standards for es-

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\(^2\) See City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam); Dandridge v. Williams, 397 U.S. 471, 485 (1970). The "rational relation" test applies to governmental acts or policies that do not affect fundamental rights or involve suspect classifications. Id. In contrast, state action "impermissibly interfer[ing] with the exercise of a fundamental right or operat[ing] to the peculiar disadvantage of a suspect class" is subject to strict scrutiny. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976) (footnotes omitted). The strict scrutiny standard imposes on the defendant the burden of showing that the challenged governmental action is necessary to advance a compelling state interest. See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 305 (1978). The strict scrutiny test, therefore, has been characterized as "strict" in theory and "fatal" in fact since it almost invariably causes the challenged action to be struck down. Gunther, The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972).

\(^3\) A government action has a disproportionate racial impact if it is detrimental to a greater percentage of minority group members than whites, or if it more seriously disadvantages minority group members than whites. Perry, The Disproportionate Impact Theory of Racial Discrimination, 125 U. Pa. L. Rev. 540, 541 n.3 (1977). Disproportionate impact may arise from the underrepresentation of minorities in proportion to their numbers in the general population, see Eisenberg, Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication, 52 N.Y.U.L. Rev. 36, 40 (1977), from employment selection criteria that exclude a greater percentage of minorities than whites, see Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971), from official action having a greater adverse economic effect on minority groups than whites, see Jefferson v. Hackney, 406 U.S. 535, 537-38 (1972) (cutback in welfare benefits), or from an unequal allocation of certain civil rights between minority groups and whites, see White v. Regester, 412 U.S. 755, 756 (1973) (voting). Thus, as a general rule, disproportionate impact occurs whenever official procedures relating to selection or entitlement to benefits produce a less favorable result for a protected group. Eisenberg, supra, at 41. See generally Brest, The Supreme Court, 1975 Term — Foreword: In Defense of the Antidiscrimination Principle, 90 Harv. L. Rev. 1 (1976).

The phrases "adverse impact" and "disproportionate impact" have been used interchangeably by the courts and the commentators in describing discriminatory effect. See B. Schlei & P. Grossman, Employment Discrimination Law 73 n.42 (1976). They will be so used throughout this Note.
establishing a prima facie case of racial discrimination based on a facially neutral policy having a disparate racial impact.

Constitutional challenges to facially neutral policies are governed by the Supreme Court's decision in Washington v. Davis. In Washington, the Court held that a personnel test that disqualified a disproportionately high number of black applicants did not violate equal protection absent a showing of purposeful intent to discriminate. A statistically disproportionate racial impact, the Court found, was insufficient by itself to present a prima facie case of unconstitutional discrimination. Under this constitutional standard, if the plaintiff makes a prima facie showing of discriminatory intent, the defendant must prove that its policy was not racially motivated.

In contrast, a discriminatory effects test has emerged under Title VII of the Civil Rights Act of 1964. Under a classic Title VII analysis, the plaintiff presents a prima facie case of discrimination by showing that the defendant-employer's hiring or promotion criteria have a statistically disproportionate effect on a protected group. The rationale of the disproportionate impact test is that statistical or other empirical evidence of racially disparate impact, if unrebutted, will permit a legitimate inference of discriminatory

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22 426 U.S. 229 (1976). The fourteenth amendment provides that a state shall not "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Although the fifth amendment has no specific equal protection provision, see U.S. Const. amend. V, its due process clause has been construed as containing an equal protection component. Bolling v. Sharpe, 347 U.S. 497, 499 (1954). The equal protection guarantees of the fifth and fourteenth amendments prohibit not only laws that overtly discriminate, but also laws that are facially neutral but have a discriminatory effect. See Yick Wo v. Hopkins, 118 U.S. 356, 369-70 (1886); Strauder v. West Virginia, 100 U.S. (10 Otto) 303, 306-09 (1880).

23 426 U.S. at 239. In Washington, the plaintiffs challenged the constitutionality of a police department qualifying test that excluded 57 percent of the black applicants, but only 13 percent of the white applicants. Id. at 233. In concluding that the constitutional standard was purposeful discrimination, the Washington Court noted that the central purpose of the equal protection clause was to prevent official conduct that discriminates on the basis of race. Id. at 239.

In applying the constitutional standard, the commentary and caselaw have used the terms "intent," "motive," "motivation," and "purpose" interchangeably to mean that "the decisionmakers desire to achieve [a particular effect] by the operation of their decision." Brest, Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive, 1971 Sup. Ct. Rev. 95, 101.

24 426 U.S. at 242. The Court suggested, however, that where discriminatory effect could not be explained on nonracial grounds, "discriminatory impact . . . may for all practical purposes demonstrate unconstitutionality." Id.

purpose. Upon the plaintiff's prima facie showing of disparate impact, the burden shifts to the defendant to justify its selection or promotion criteria on the ground of business necessity. Ordinarily, the employer will successfully rebut the prima facie case by proving that its criteria were job related. If the defendant meets its justification burden, the burden again shifts to the plaintiff to demonstrate that the employer's legitimate business interests could be served by a less discriminatory selection process.

The Conflict in the Courts

The current split of authority as to the standard governing Title VI violations was engendered by two decisions of the United States Supreme Court. In Lau v. Nichols, the Court, in approving an HEW regulation applying an impact standard, held that a prima facie violation of Title VI may be established by proof of racially disproportionate adverse impact. The Court's subsequent decision in Regents of the University of California v. Bakke,

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26 Fair Housing Litigation, supra note 13, at 128 n.4.
30 414 U.S. 563 (1974). In Lau, the plaintiffs claimed that the failure of the San Francisco public school system to provide English language instruction to non-English speaking students of Chinese ancestry violated Title VI by depriving them of a meaningful opportunity to participate in the educational program. Id. at 564-65.
31 Id. The Court held:
Discrimination is barred which has that effect even though no purposeful design is present: a recipient “may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination” or have “the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.” Id. at 568 (emphasis in original) (quoting 45 C.F.R. § 80.3(b)(2) (1979)).
32 438 U.S. 265 (1978). In Bakke, an admissions program of the medical school of the University of California at Davis reserved a specific number of places for disadvantaged minority students. Id. at 269-270 (Powell, J.). The Bakke Court considered whether that particular race-specific preference amounted to discrimination in violation of Title VI and the Equal Protection Clause. The particular program under review was found to be constitutionally impermissible, because the university could have adopted less discriminatory means to attain its goal of a diverse student body. Id. at 315-20 (Powell, J.). While Bakke contains dicta implicitly critical of Lau's impact test, see 438 U.S. at 350-
however, cast doubt on the continuing validity of the Lau discriminatory effects test. Examining the legislative history of the statute, the Bakke Court cited repeated assertions by the legislators that Title VI embodied “constitutional principles.” The Court reasoned in dicta that the standard controlling Title VI violations was identical to that applied to violations of equal protection under the fifth and fourteenth amendments. Since the constitutional standard is one of purposeful discrimination, the dicta in Bakke suggest that the appropriate standard under Title VI also is discriminatory intent.

Since Bakke, the circuit courts of appeal have divided as to the standard to be applied to Title VI violations. The Ninth Cir-

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53 (Brennan, White, Marshall, and Blackmun, JJ.), the Court did not overrule Lau. Indeed, the question of the standard of proof necessary to establish a prima facie violation of Title VI—addressed in Lau—was not under review in Bakke, since the university’s intent to discriminate was undisputed. Furthermore, there is no opinion in Bakke, including the two opinions which argue for an intent standard, which was joined in by a majority of the Court.

While the opinion of Justice Powell and that joined in by Justices Brennan, White, Marshall, and Blackmun (the Brennan group) favor an intent standard, they are susceptible of more than one interpretation. Justice Powell concluded that “Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.” Id. at 287 (Powell, J.). At least one court, however, has suggested that his conclusion does not necessarily imply that an impact standard is inappropriate under Title VI. Guardians Ass’n v. Civil Serv. Comm’n, 466 F. Supp. 1273, 1286 (S.D.N.Y. 1979), aff’d in part, rev’d in part, No. 79-7377 (2d Cir. July 25, 1980); see notes 100 & 101 and accompanying text infra. The Brennan group concluded that “as applied to the case before us, Title VI goes no further in prohibiting the use of race than the Equal Protection Clause of the Fourteenth Amendment itself.” Id. at 325 (Brennan, White, Marshall, and Blackmun, JJ.). It is submitted that the fact that they confined themselves in their opinion to “the case before us” is highly significant in evaluating the intended scope of their conclusion. Such an interpretation is bolstered by other dicta in the opinion. The Brennan group went on to note that “presumably, by analogy to our decisions construing Title VII, a medical school would not be in violation of Title VI under Lau because of the serious underrepresentation of racial minorities in its student body as long as it could demonstrate that its entrance requirements correlated sufficiently with the performance of minority students in medical school and the medical profession.” Id. at 352 (Brennan, White, Marshall, and Blackmun, JJ.). The Brennan group’s suggestion that the medical school would have to justify its entrance requirements, upon a mere showing of serious underrepresentation, that is disproportionate impact, suggests that these justices, in a nonaffirmative action setting may have held for an impact standard under Title VI.

348 U.S. at 284-87 (Powell, J.).

35 Id. at 287 (Powell, J.).

36 See notes 22-24 and accompanying text supra.

cuit has adhered to the *Lau* effects test.\(^{37}\) In contrast, the Sixth Circuit\(^{38}\) and lower federal courts in the First,\(^{39}\) Fifth,\(^{40}\) and Tenth\(^{41}\) Circuits have adopted the constitutional standard of discriminatory intent suggested by the *Bakke* Court. Notably, the Second Circuit has failed to endorse definitively either an intent or an impact standard. Relying on *Bakke*, that court has imposed an intent standard in Title VI challenges to school segregation\(^{42}\) and educational discrimination.\(^{43}\) In the employment discrimination context, however, the same court has employed an impact test, analogizing to Title VII.\(^{44}\) Furthermore, the Second Circuit re-

\(^{37}\) See Guadalupe Org., Inc. v. Tempe Elementary School Dist. No. 3, 587 F.2d 1022, 1029 & n.6 (9th Cir. 1978); De La Cruz v. Tormey, 582 F.2d 45, 61 & n.16 (9th Cir. 1978), cert. denied, 441 U.S. 965 (1979).

\(^{38}\) Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 691 (6th Cir. 1979), petition for cert. filed, 444 U.S. 965 (1979).


\(^{42}\) See *Ambach* was a class action alleging that the defendant-school officials had created a *de jure* segregated school facility. *Id.* at 708. Relying primarily on the dicta in *Bakke*, the Second Circuit established a purposeful discrimination standard for school desegregation cases under Title VI. *Id.* at 715-16. There are suggestions in *Ambach*, however, that its intent standard is limited to the school desegregation context. The court noted that the powers of the courts in actions by the Attorney General under Title IV, 42 U.S.C. §§ 2000c to 2000c-8 (1976), which deals comprehensively with school desegregation suits, are no greater than “existing powers . . . to enforce the Equal Protection Clause.” *Id.* at 715-16; *see* *Swann* v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1 (1971). The *Ambach* court concluded, therefore, that since *de facto* racial imbalances could not be remedied under Title IV, Congress could not have intended to give private plaintiffs a broader remedy under Title VI through an effects standard. 598 F.2d at 716.

\(^{43}\) Lora v. Board of Educ., 623 F.2d 248, 250 (2d Cir. 1980). The *Lora* court considered a claim of educational discrimination against handicapped children.

\(^{44}\) Board of Educ. v. Califano, 584 F.2d 576 (2d Cir. 1978), aff'd *sub nom.* Board of Educ. v. Harris, 444 U.S. 130 (1979). *Califano* was an action by a school board seeking to enjoin the Department of Health, Education, and Welfare from declaring it ineligible for federal assistance under the Emergency School Aid Act (ESAA), 20 U.S.C. §§ 1601-1619 (1976), due to teacher assignment disparities. 584 F.2d at 578. The court noted that employment discrimination in violation of ESAA also violated Title VI, and that a finding of discrimination under Title VI could be based on disproportionate impact. *Id.* at 589 (citing *Lau* v. Nichols, 414 U.S. 563, 568 (1974)). The court reasoned, moreover, that the constitutional standard of intent should not be controlling since Congress could lawfully condition the receipt of federal funds on the recipient's compliance with federal policies that go beyond constitutional requirements. 584 F.2d at 588 & n.38; *see* Regents of the Univ. of Cal. v. *Bakke*, 438 U.S. 265, 417 (1978) (Burger, C.J., and Stevens, Stewart and Rehnquist, J.J.). Affirming *Harris*, however, the Supreme Court did not determine whether an intent or impact test governed under Title VI. 444 U.S. at 143. *But see id.* at 162 (Stewart, J., dissenting).
recently declined to resolve the appropriate standard in municipal services cases under Title VI. Thus, Title VI caselaw furnishes no ultimate guidance as to the standard for violations of the statute. The legislative history of Title VI, moreover, is equally inconclusive.

Legislative History

The legislative history of Title VI consistently reflects Congress' objective to stop the flow of federal funds to discriminatory programs. Because Congress failed to define discrimination, however, it is unclear whether the legislature intended Title VI to encompass programs producing discriminatory effects, as well as those motivated by discriminatory intent. The debates suggest an impact-oriented standard. President Kennedy, for example, declared that the function of Title VI was to prevent the expenditure of federal funds, derived from taxpayers of all races, in a manner which "encourages, entrenches, subsidizes or results in racial discrimination." The lawmakers further expressed the intent that federal funds "be used to assist all Americans on an equal basis" and to provide them with "equal benefits without regard to the color of their skin." Moreover, Senator Humphrey indicated that Title VI's coverage extended beyond that of the Constitution, encompassing even situations where federal funds are used to support private segregated institutions.

Additional insight into congressional intent is provided by the legislative history surrounding the Stennis Amendment to the 1972 Emergency School Aid Act (ESAA). ESAA provides federal financial assistance "to meet the special needs incident to the elimination of minority group segregation . . . in elementary and sec-

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46 Bryan v. Koch, 627 F.2d 612 (2d Cir. 1980); see note 80 infra.
48 See 110 Cong. Rec. 5612 (1964) (remarks of Sen. Ervin); id. at 1619 (remarks of Rep. Abernethy); id. at 1632 (remarks of Rep. Dowdy); id. at 5251 (remarks of Sen. Talmadge); id. at 6052 (remarks of Sen. Sparkman).
51 Id. at 6661 (remarks of Sen. Kuchel).
52 Id. at 6544 (remarks of Sen. Humphrey).
ondary schools.” Reviewing the legislative history of the ESAA in *Board of Education v. Harris,* the Supreme Court concluded that Congress intended eligibility under ESAA to be gauged by a discriminatory impact standard. By applying the Stennis Amendment to Title VI cases dealing with racial discrimination in schools, it is arguable that Congress tacitly approved the same standard for Title VI violations.

The Supreme Court, however, has apparently perceived a constitutional standard of purposeful discrimination from the legislative history of Title VI. In *Bakke,* Justice Powell noted that the proponents of the statute repeatedly refused to define the term “discrimination,” believing that its meaning would evolve by reference to the Constitution or other existing law. Justice Brennan, after an equally exhaustive review of the statute’s legislative history, likewise concluded that Congress intended Title VI to incorporate a constitutional standard that would develop through judicial construction.

Thus, although persuasive arguments can be made for both the constitutional intent standard and the disproportionate impact standard, congressional intent is not clear. Moreover, the text of

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54 444 U.S. 130 (1979). In *Harris,* a compliance investigation under Title VI revealed that a disproportionate number of minority teachers were assigned by the defendant-school system to schools having high minority enrollments. *Id.* at 134-35. Since the board of education did not rebut or explain the statistical disparities, its applications for financial assistance were denied by HEW. The board then advanced several nondiscriminatory explanations for the statistical disparities, which were rejected by the lower courts as failing to rebut the prima facie case of discrimination. *Id.* at 137.
55 *Id.* at 141. Section 703 of the ESAA provides that, as a matter of federal policy, the “guidelines and criteria” established pursuant to the statute must “be applied uniformly” and “without regard to the origin or cause of such segregation.” Justice Blackmun concluded that that language suggested a standard bottomed on effect, not purpose. *Id.*
56 Justice Stewart, in a dissenting opinion, found the holding of the *Harris* majority inconsistent with *Bakke.* *Board of Educ. v. Harris,* 444 U.S. at 160 (Stewart, J., dissenting). Justice Stewart could not understand how the majority could conclude that a disproportionate impact standard was appropriate under the Stennis Amendment—intended by Congress to be applicable to both ESAA and Title VI—when five members of the *Bakke* Court had interpreted Title VI to prohibit only purposeful discrimination. *Id.* at 159-60 (Stewart, J., dissenting). If Congress had in fact intended the Stennis Amendment to create a uniform national standard proscribing action that led to disparate racial impact, Justice Stewart found it difficult to comprehend why that standard should not also govern Title VI. *Id.* at 160 (Stewart, J., dissenting). The language relied on by the majority, however, in imposing an impact test under ESAA, see note 53 and accompanying text *supra,* is virtually identical to the language relating to Title VI.
57 438 U.S. at 286 (Powell, J.).
58 *Id.* at 339-40 (Brennan, White, Marshall, and Blackmun, JJ.).
the statute does not prescribe a standard, and judicial interpretation is in conflict. Therefore, policy considerations assume greater importance. This Note will examine the competing policy alternatives within the framework of *Bryan v. Koch*.

**Bryan v. Koch: A Case Study in Municipal Services Litigation Under Title VI**

The Second Circuit's decision in *Bryan v. Koch* illustrates the dilemma faced by the courts in municipal services litigation: Persuasive arguments may be advanced, on the one hand, for respecting the integrity of the municipal decisionmaking process and, on the other hand, for permitting plaintiffs to challenge governmental decisions having a disproportionate racial impact.

In 1979, a Health Policy Task Force appointed by the mayor recommended that New York City could save an estimated $30 million by reducing excess capacity in its municipal hospital system.\footnote{Bryan v. Koch, 627 F.2d at 614.} The task force examined each of the city's 17 municipal hospitals against four criteria: (1) the hospital's size, range of services and patient caseload, (2) the quality of its plant and operations, (3) its present and predicted fiscal viability, and (4) its proximity to other facilities capable of serving its patients.\footnote{Id. at 618.} Sydenham, the smallest of the city's acute care facilities, had an average daily caseload of only 163 patients.\footnote{Id.} Its physical plant was obsolete and in need of refurbishing.\footnote{Id. at 618.} Since its per patient costs exceeded its Medicaid reimbursement rate by a larger margin than any other municipal hospital, Sydenham's operating deficit was disproportionately high.\footnote{Id.} Finally, Sydenham was located within 30 minutes of one municipal hospital and five voluntary hospitals capable of absorbing its patient population.\footnote{Id. But see notes 70-72 and accompanying text infra.} Based on these factors, the task force recommended that the hospital be closed.\footnote{627 F.2d at 618.} The HHC adopted this recommendation, and Sydenham was slated for closing in May of 1980.\footnote{Id. at 614-15.}
The plaintiffs, however, sought a preliminary injunction, claiming that the disproportionate racial impact resulting from the closing of Sydenham violated Title VI unless the defendant could establish that alternative measures having less disproportionate impact were unavailable. Specifically, almost two-thirds of Sydenham’s patients were admitted through the emergency room. Thus, a patient with critical injuries “would suffer adverse consequences if the nearest emergency room treatment available were at even slightly more distant locations.” There was evidence, moreover, that some of the surrounding voluntary hospitals admitted a lower percentage of Medicare and Medicaid patients and refused admission altogether to uninsured patients. Finally, the plaintiffs contended, the occupancy rates of nearby hospitals were higher than reflected in the task force report, and therefore there was no assurance that Sydenham’s patient population could be absorbed.

The district court in Bryan v. Koch applied an intent standard for prima facie violations of Title VI, requiring “at least some evidence of disparate impact probative of discriminatory motive.” Extrapolating from Bakke and Harris, the court concluded that at least seven justices of the Supreme Court would apply the constitutional standard of discriminatory intent to violations of Title VI. The court acknowledged that the statute’s implementing regulations were impact oriented and that such agency interpreta-

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67 See id.
68 Id. at 626 (Kearse, J., concurring in part, dissenting in part).
69 Id. at 617. The type of critical injuries envisaged by the district court included gunshot or knife wounds and drug overdoses. Id.
70 Id. at 627-28 (Kearse, J., concurring in part, dissenting in part).
71 Id. at 627 (Kearse, J., concurring in part, dissenting in part).
72 Id. at 627 & n.10 (Kearse, J., concurring in part, dissenting in part).
74 492 F. Supp. at 232. The district court concluded that Justices White, Brennan, Marshall, Blackmun, Powell, Stewart and Rehnquist would not be amenable to an impact standard under Title VI. Id.

The HEW regulations, for example, provide in pertinent part:

In determining the site or location of a facilities, an applicant or recipient may not make selections with the effect of excluding individuals from, denying
tions are generally entitled to deference by the courts." It determined, however, that an agency cannot promulgate a standard that conflicted directly with one enacted by Congress or authoritatively endorsed by the courts. Moreover, the district court asserted, a disparate impact standard, which shifts the burden of justification to the defendant, would impinge on municipal autonomy by providing "a vehicle by which HEW (and other Title VI agencies) could assert jurisdiction to review the merits of, and to require justification for, virtually all important decisions by federal recipients." Applying its intent-oriented standard, the court found no violation of Title VI since the closing of Sydenham was undertaken...
to achieve the legitimate, racially neutral objectives of decreasing municipal expenditures and increasing operating efficiency.\textsuperscript{79}

On appeal, the Second Circuit did not reach the issue of the standard of liability under Title VI. Instead, the court found that, even under an effects test,\textsuperscript{80} the defendant had successfully countered the plaintiffs' prima facie case\textsuperscript{81} by showing that its criteria were "reasonably related to the efficient operation of the City's municipal hospital system" and that the selection of Sydenham for closure was appropriate based on those criteria.\textsuperscript{82} Thus, the court held, the plaintiffs had not demonstrated likely success on the merits, and the lower court's denial of the preliminary injunction was affirmed.\textsuperscript{83}

The \textit{Bryan v. Koch} paradigm demonstrates clearly the basic policy considerations militating in favor of a disproportionate impact standard for prima facie violations of Title VI. Four such policy considerations may be articulated. First, proof of intent may be a difficult, if not an insurmountable, obstacle for the civil rights plaintiff.\textsuperscript{84} It seems essential, therefore, that a disproportionate im-

\textsuperscript{79} Id. at 238.
\textsuperscript{80} The majority concluded that the plaintiffs had shown no likelihood of success on the merits, even under a disproportionate impact standard, and held, therefore, that the district court did not err in denying the preliminary injunction. 627 F.2d at 620. Thus, the court stated that it was unnecessary for it to address the apparent conflict presented by previous Second Circuit decisions. \textit{Id.} at 616. See notes 42-44 supra. Compare \textit{Board of Educ. v. Califano}, 584 F.2d 576, 589 (2d Cir. 1978), \textit{aff'd sub nom. Board of Educ. v. Harris}, 444 U.S. 130 (1979) (disproportionate impact standard is appropriate under Title VI) \textit{with Lora v. Board of Educ.}, 623 F.2d 248, 250 (2d Cir. 1980) and \textit{Parent Ass'n v. Ambach}, 598 F.2d 705, 715-16 (2d Cir. 1979) (intent standard appropriate under Title VI).
\textsuperscript{81} 627 F.2d at 616. The majority posited several arguments, however, indicating that it would be receptive to an impact standard if the issue were properly before it. First, Judge Newman asserted, the Supreme Court's decision in \textit{Lau} had not been overruled and had been viewed as controlling in the Second Circuit, as well as by other circuit courts of appeal. \textit{Id.} Furthermore, since \textit{Lora} involved a school desegregation case, for which Title IV, 42 U.S.C. \textsection{} 2000c (1976), provides an intent standard, it need not be determinative in the municipal services context. 627 F.2d at 616. Third, even if an intent standard governed enforcement proceedings seeking a cut-off remedy, such a standard may not apply in a private action seeking an injunction. \textit{Id.} Finally, the HHC had contractually bound itself to comply with the HEW regulations imposing an effects test. \textit{Id.; see note 106 and accompanying text infra.}
\textsuperscript{82} 627 F.2d at 616-20.
\textsuperscript{83} \textit{Id.} at 620.
\textsuperscript{84} Cf. \textit{Marquez v. Ford Motor Co.}, 440 F.2d 1157, 1162 (8th Cir. 1971); \textit{Gates v. Georgia-Pacific Corp.}, 326 F. Supp. 397, 399 (D. Or. 1970), \textit{aff'd}, 492 F.2d 292 (9th Cir. 1974) (Title VII cases). In the wake of \textit{Washington v. Davis}, 426 U.S. 229 (1976), it was feared that the constitutional standard of intent would create a formidable, if not fatal, obstacle in constitutional challenges based on discriminatory impact. See L. Tribe, \textit{supra} note 5, at
pact standard be applied under Title VI in order to preserve the statute as an effective antidiscrimination weapon. Furthermore, fairness and judicial economy require that the litigant possessing the most probative evidence on a particular issue should bear the burden of production on that issue. Since the defendant alone was part of the decisionmaking process which resulted in the allegedly discriminatory course of action, it is in the best position to justify its decision. In addition, where a municipal decision produces a disproportionate racial impact, that decision can often be attributed to the effects of past discrimination. The need to redress the effects of past discrimination is a third important policy consideration and, indeed, appears to have influenced the Supreme Court in its landmark disproportionate impact decisions.

1032 n.32. This fear appears to have been borne out by the Supreme Court's decision in Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979), in which the Court overruled, sub silentio, a line of lower court cases holding that foreseeable segregative effects gave rise to a presumption of segregative intent, see Arthur v. Nyquist, 573 F.2d 134, 142 (2d Cir.), cert. denied, 449 U.S. 860 (1979); United States v. School Dist., 555 F.2d 127, 128 (6th Cir. 1977), cert. denied, 434 U.S. 1064 (1978); Oliver v. Michigan State Bd. of Educ., 508 F.2d 178 (6th Cir. 1974), cert. denied, 421 U.S. 963 (1975). See generally Note, Intent to Segregate: The Omaha Presumption, 44 GEO. WASH. L. REV. 775, 782 (1976). Penick held that while foreseeable disparate impact may be some evidence of racially discriminatory purpose, it is insufficient in itself to establish discriminatory intent. 443 U.S. at 464; Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 536 n.9 (1979). See also Personnel Adm'r v. Feeney, 442 U.S. 256 (1979), wherein the Court stated that discriminatory purpose "implies more than . . . 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.


See Bryan v. Koch, 627 F.2d at 619 (2d Cir. 1980); Expanding Scope of § 1981, supra note 85, at 432-33; Fair Housing Litigation, supra note 13, at 157-58.


Cf. Maltz, supra note 88, at 355 (loss of productivity resulting from employment of proportionate number of minorities is cost society must bear to compensate for effects of past discrimination). Another author has suggested that any governmental activity that disproportionately disadvantages blacks should be subject to a heavy burden of justification because of the continuing effects of past discrimination. Perry, supra note 88, at 1078-79.
under Title VII. Finally, since racial discrimination tends to be self-perpetuating, disproportionate racial consequences warrant a standard that will allow plaintiffs to avoid a directed verdict and make a more complete showing to the court of all relevant issues.

The legislative history of Title VI and the caselaw interpreting the statute do not preclude the application of a discriminatory effects standard for prima facie Title VI violations. The Bakke Court interpreted Congress' failure to define discrimination as signifying an intent that the standard evolve with that of the Constitution. The language in the congressional debates, however, indicating that Title VI enacted constitutional principles and that discrimination would be defined by reference to the Constitution does not resolve the issue of the proper standard under the statute. As noted in Bakke, the equal protection clause had not been applied to public racial discrimination at the time the Civil Rights Act of 1964 was enacted. Moreover, the Act preceded the Supreme Court's decision in Washington v. Davis, which established that the constitutional standard of discrimination was one of intent. It is arguable, therefore, that Congress did not intend Title VI to prohibit only intentional discrimination. Furthermore, this legislative reticence may equally imply that the implementing agencies were free to formulate their own standards of discrimination. Such a reading of the legislative history is bolstered by the fact that Congress has not acted in the face of impact-oriented regulations.
and that such agency interpretations are normally accorded deference by the courts.  

In addition, the Supreme Court's dicta in Bakke did not viti-ate the impact test enunciated in its earlier decision in Lau. First, the Court's apparent adoption of a discriminatory intent standard under Title VI may have been prompted by the fact that Bakke involved a challenge to an affirmative action program. It has been held that the validity of such a program turns on whether it was implemented to remedy past discrimination. Thus, it seems appropriate that a plaintiff challenging an affirmative action program under Title VI should bear the stricter burden of establishing discriminatory intent. It would be entirely consistent with the antidiscrimination principles of Bakke, however, to impose a more lenient impact standard outside the affirmative action context. Furthermore, it has been suggested that the real issue in Bakke was whether Title VI prohibits all facially discriminatory policies per se, or whether, like the equal protection clause, it prohibits only those racial classifications for which there is no compelling justification. Justice Powell's conclusion in Bakke that both Title VI and the fourteenth amendment prohibit only unjustifiable racial classifications would thus have no bearing on whether Title VI prohibits practices that involve no explicit racial classification but produce a disproportionate adverse impact on minorities.  

Finally, a recent plurality opinion of the Court, which cites Lau with approval in support of its decision, indicates that an
impact standard for Title VI may be predicated on contract principles.\textsuperscript{103} All entities receiving federal financial assistance under Title VI contractually agree to comply with the regulations promulgated by relevant implementing agencies.\textsuperscript{104} Several of these agencies have adopted an effects test.\textsuperscript{105} It appears reasonable, therefore, to impose an impact standard based on such a contractual undertaking.\textsuperscript{106}

The Impact Test in Municipal Services Cases

It is suggested that a prima facie case of disproportionate impact in municipal services cases under Title VI has two components. First, the challenged governmental action must create a substantial, statistically verifiable disparity between the positions of whites and minorities.\textsuperscript{107} Second, the disproportionate impact must have a sufficiently adverse effect on a minority group to warrant

that the MBE provision did not violate Title VI. \textit{Id.} at 2782 n.77; \textit{id.} at 2794 n.15 (Powell, J., concurring); \textit{id.} at 2795 n.1 (Marshall, J., joined by Brennan, J., and Blackmun, J., concurring). The Court invoked \textit{Lau} in support of its decision:

> There are relevant similarities between the MBE program and the federal spending program reviewed in \textit{Lau v. Nichols}, 414 U.S. 563 (1974). In \textit{Lau}, a language barrier "effectively foreclosed" non-English-speaking Chinese pupils from access to the educational opportunities offered by the San Francisco public school system. \textit{Id.} at 564-566. It had not been shown that this had resulted from any discrimination, purposeful or otherwise, or from other unlawful acts. Nevertheless, we upheld the constitutionality of a federal regulation applicable to public school systems receiving federal funds that prohibited the utilization of "criteria or methods of administration which have the effect . . . of defeating or substantially impairing accomplishment of the objectives of the [educational] program as respect individuals of a particular race, color, or national origin."

\textit{Id.} at 2775 (emphasis in original) (citation omitted).

\textsuperscript{103} See also \textit{Lora v. Board of Educ.}, 623 F.2d 248 (2d Cir. 1980) (Oakes, J., concurring).

\textsuperscript{104} \textit{Bryan v. Koch}, 627 F.2d at 616.

\textsuperscript{105} \textit{Id}; see note 75 supra.

\textsuperscript{106} See \textit{Fullilove v. Klutznick}, 100 S. Ct. 2758 (1980); \textit{United States v. Marion County School Dist.}, 625 F.2d 607 (5th Cir. 1980). In \textit{Marion County}, the court held that the United States could sue to enforce contractual assurances of compliance with Title VI's prohibition against discrimination in the operation of federally funded schools. \textit{Id.} at 617.

The decision is of particular significance, since the contractual assurance explicitly guaranteed compliance not only with Title VI, but also with the implementing regulations of the appropriate agency. The contractual assurance in question provided that the recipient agreed that it would:

> \[C\]omply with Title VI of the Civil Rights Act of 1964 (P.L. 88-352) and all requirements imposed by or pursuant to the Regulation of the Department of Health, Education, and Welfare issued pursuant to that title . . . .

\textit{Id.} (citation omitted).

\textsuperscript{107} See \textit{Bryan v. Koch}, 627 F.2d at 616-17.
shifting the burden of justification to the defendant.\textsuperscript{108}

\textit{Substantial Disproportion}

Two methods for determining impermissible disparate impact have developed under Title VII. Several federal agencies employ a "four-fifths" rule to determine whether an employer's selection procedures violate Title VII.\textsuperscript{109} Under the four-fifths rule, a prima facie violation of the statute is made out if the rate at which minorities are hired or promoted is less than four-fifths of the nonminority hiring rate.\textsuperscript{110} Similarly, the Supreme Court has found an actionable Title VII violation if the plaintiff proves a "substantial"\textsuperscript{111} or "significant"\textsuperscript{112} racial disparity in an employer's hiring or promotion practices.\textsuperscript{113} Like the Title VII tests, the disproportionate impact standard under Title VI must exclude negligible disparities which, if prohibited, might result in expensive and unwarranted administrative investigations and private litigation.\textsuperscript{114}

\textsuperscript{108} See id. at 617.
\textsuperscript{109} The Equal Employment Opportunity Commission, the Departments of Labor and Justice, the Civil Service Commission, and the Office of Revenue Sharing of the Treasury Department have jointly promulgated the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1979), which adopts the four-fifths rule. The uniform guidelines purport to incorporate "court decisions, the previously issued guidelines of the agencies, and the practical experience of the agencies, as well as the standards of the psychological profession." Id. § 1607.1(C). The uniform guidelines took effect on September 25, 1978 and supercede previously issued guidelines for employee selection procedures. Id.
\textsuperscript{110} Id. § 1607.4(D).
\textsuperscript{111} See Griggs v. Duke Power Co., 401 U.S. 424 (1971). In Griggs, the defendant-employer required all prospective employees either to have a high school education or to pass a general intelligence test. Striking down these selection criteria as violative of Title VII, the Supreme Court stated that "both requirements operate to disqualify Negroes at a substantially higher rate than white applicants . . . ." Id. at 426.
\textsuperscript{112} See Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975). In Albermarle, the Court held that a prima facie case of racial discrimination under Title VII required the plaintiff to show that "the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." Id. at 425.
\textsuperscript{113} The Supreme Court's requirement that the alleged disparity must be "substantial" or "significant" suggests that the size of the sample must be numerically significant. See Lau v. Nichols, 414 U.S. 563, 571-72 (Blackmun, J., concurring); Serna v. Portales Mun. School Dist., 499 F.2d 1147, 1154 (10th Cir. 1974).
\textsuperscript{114} 3 A. LARSON, EMPLOYMENT DISCRIMINATION § 74.51 (1977); Government's Memorandum of Law Discussing Standards in Title VI Actions at 23, Bryan v. Koch, 627 F.2d 612 (2d Cir. 1980). The least pronounced disparities sufficient to establish a prima facie case under Title VII have been minority failure rates that are approximately twice those of whites. See, e.g., United States v. Chicago, 385 F. Supp. 543, 550 (N.D. Ill. 1974). For a comprehensive compilation of cases illustrating the degrees of disparity that have sufficed in testing cases, see 3 A. LARSON, supra, § 74.52. For similar compilations in the areas of educa-
Because municipal services cases involve governmental policies and decisions that affect individuals only incidentally, it appears that a precise measurement, such as a four-fifths rule, is inappropriate.\textsuperscript{115} Thus, a more flexible approach based on a case-by-case determination of substantiality should apply.

It appears that a singular inquiry into the extent of the alleged disproportionate impact is insufficient in municipal services litigation under Title VI. In the employment situations governed by Title VII, a violation of the statute will invariably produce a result that is adverse, as well as disproportionate—the plaintiff will be foreclosed from opportunities for employment or advancement. In contrast, in the context of municipal services, several factors may mitigate the adversity of the result.\textsuperscript{116} While the impact of a municipal decision may be disproportionate, its overall effect may be inconsequential. Therefore, in municipal services cases, disproportionate impact will not be sufficiently adverse unless the plaintiffs have been "effectively foreclosed" from access to adequate public services.\textsuperscript{117}

Under this two-fold inquiry, it is clear that the plaintiffs in \textit{Bryan v. Koch} established a prima facie case of racial discrimina-

\textsuperscript{115} Interestingly, during the \textit{Bryan v. Koch} litigation, HEW considered adopting the four-fifths rule as its official policy for analyzing the impact on minority patients of hospital closures and reductions. Government's Memorandum of Law Discussing Standards in Title VI Actions at 23, Bryan v. Koch, 492 F. Supp. 212 (S.D.N.Y.), aff'd, 627 F.2d 612 (2d Cir. 1980).

\textsuperscript{116} For example, alternative facilities or procedures may ameliorate the disproportionate impact. \textit{See Bryan v. Koch}, 627 F.2d at 617 & n.2.

\textsuperscript{117} \textit{See Jackson v. Conway}, 476 F. Supp. 896 (E.D. Mo. 1979). In \textit{Jackson}, city officials proposed to close the acute in-patient and emergency room facilities at one hospital and consolidate those services with another hospital. The plaintiffs sought a preliminary injunction alleging, \textit{inter alia}, that the plan violated Title VI. \textit{Id.} at 898-99. In determining whether plaintiffs had demonstrated a sufficient probability of success on the merits to justify a preliminary injunction, the court held that they had failed to show that the consolidation of services would result in their being effectively foreclosed from hospital services. \textit{Id.} at 904. The court traced this "effective foreclosure" standard to \textit{Lau v. Nichols}, 414 U.S. 563 (1974), where the Supreme Court held that the failure of the San Francisco school system to provide English language instruction to Chinese students violated Title VI by effectively foreclosing them from participating in the educational program. 476 F. Supp. at 904; \textit{see supra} notes 30-31 and accompanying text. \textit{See also Larry P. v. Riles}, 48 U.S.L.W. 2298 (N.D. Cal. Oct. 16, 1979), wherein the court held that public school placement policies resulting in a grossly disproportionate overenrollment of black children in special classes for the educable mentally retarded violated Title VI since they effectively foreclosed the children from any meaningful education.
tion under Title VI. Statistical disparity was satisfied by proof that Sydenham Hospital's patient population was 98% minority, while only 66% of the patients served by the municipal hospital system as a whole were members of minority groups. In addition, the plaintiffs met the "effective foreclosure" standard by demonstrating that surrounding hospitals were either unable or unwilling to provide easily accessible emergency facilities to meet the needs of the community.

The Defendant's Burden of Justification

Under a traditional Title VII analysis, the defendant may refute the plaintiff's prima facie showing of disproportionate impact with proof of a nondiscriminatory justification. Successful rebuttal by the defendant under Title VI may be measured by three different standards.

Under Title VIII of the Civil Rights Act of 1968, the defendant sustains its burden of justification if it establishes a compelling governmental interest. In United States v. City of Black Jack, the Eighth Circuit formulated a three-stage analysis for ascertaining whether the asserted governmental interest met this standard. The Black Jack test requires a defendant-municipality to show that its ordinance advances a public interest; that the governmental interest served by the ordinance is lawful and substantial enough to outweigh the plaintiff's private detriment; and that the government's purpose could not be attained by less drastic means.

In contrast, the Second Circuit in Bryan v. Koch proposed hy-
pothetically a "rational relationship" standard at the rebuttal stage. Its inquiry was two tiered. First, the municipality must demonstrate that its criteria reasonably effectuated legitimate governmental objectives.\textsuperscript{125} Then, it must show that, based on those criteria, its decision was justified.\textsuperscript{126}

Recent equal protection decisions by the Supreme Court suggest that the court in a Title VI case may also entertain a balancing of the equities at the rebuttal stage.\textsuperscript{127} Under a balancing approach, the defendant sustains its burden of justification by proving that the importance of its governmental objectives outweighs the racially disproportionate impact resulting from the challenged policy.\textsuperscript{128} The elements of the defendant's rebuttal may include a consistent adherence by the municipality to neutral policies, a lack of alternative courses of action, regularity in the procedures leading to the challenged decision, and an absence of past discrimination against the plaintiffs.\textsuperscript{129}

\textsuperscript{125} Bryan v. Koch, 627 F.2d at 617.

\textsuperscript{126} Id. at 617-18. The Second Circuit noted that a legitimate public purpose would not justify the city's decision because it had chosen to close 1 of 17 municipal hospitals. In holding instead that the city's choice must be reasonably related to a legitimate objective, id. at 618, the court analogized to Title VII. In a Title VII suit, "an employment test with a disparate racial impact could not be justified . . . simply because it selected some employees; there would have to be a showing that the particular test chosen by the employer was a useful selector of employees qualified for the particular job." Id. at 618 n.3.

\textsuperscript{127} Discriminatory Purpose, supra note 91, at 1409 (1979); see Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979); Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Washington v. Davis, 426 U.S. 449 (1979). See also United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975) (in Title VIII case, if defendant establishes compelling governmental interest, that interest is balanced against housing opportunities foreclosed); Comment, Justifying a Discriminatory Effect Under the Fair Housing Act: A Search for the Proper Standard, 27 U.C.L.A. L. Rev. 398, 417 (1979) [hereinafter cited as Justifying Discriminatory Effect]. Even under a constitutional analysis, the court may weigh the extent of the disproportionate impact against the importance of the government's legitimate objectives in order to assess the likelihood that only neutral factors contributed to the decision. Discriminatory Purpose, supra note 91, at 1408.

\textsuperscript{128} Discriminatory Purpose, supra note 91, at 1405. One author has suggested that under a balancing test, the court must weigh the following factors:

\begin{enumerate}
\item the degree of disproportion in the impact;
\item the private interest disadvantaged;
\item the efficiency of the challenged law in achieving its objective and the availability of alternative means having a less disproportionate impact; and
\item the governmental objective sought to be advanced.
\end{enumerate}

Perry, supra note 21, at 559-60.

\textsuperscript{129} Discriminatory Purpose, supra note 91, at 1410, 1412 (1979). A fourth possible standard, imposing a variable burden of justification, has been suggested for actions under 42 U.S.C. § 1981 (1976). See Note, Section 1981: Discriminatory Purpose or Disproportionate Impact?, 80 Colum. L. Rev. 137, 167-69 (1980). Under this test, where the degree of harm caused by the disproportionate impact is high, the defendant must demonstrate that its
At first blush, it appears that the balancing approach is particularly suited to municipal services cases under Title VI. A balancing test not only accommodates many policy considerations that enter into the municipal decisionmaking process, but also acknowledges that many facially neutral policies having a disproportionate racial impact may nonetheless serve important societal interests. Additionally, since the interests of the parties under a disproportionate impact analysis are, to an extent, measurable, a balancing process is more feasible. Upon closer reflection, however, it becomes apparent that the balancing approach merely entails an examination of the extent of the disproportionate impact and the availability of alternatives. This Note has suggested that such an inquiry into the degree of the disparate impact is better undertaken in determining whether the plaintiff has made out a

action bears a "substantial and immediate relation to neutral ends." Id. at 168 n.195. Where the degree of harm is low, however, the defendant must merely demonstrate that its practices "reasonably advance neutral ends." Id. at 168. In assessing the extent of harm caused by disproportionate impact, the following factors would be important: the degree of disproportionate impact; the total number of individuals adversely affected by a decision; the existence of other procedures in the same area having a detrimental effect on the minority group in question; and whether that group suffers from the effects of past discrimination. Id. at 169. In determining whether a facially neutral procedure advances a legitimate governmental interest, the following factors are paramount: whether, and to what extent, important social ends are served by the decision; the availability of alternative courses of action that would serve the defendant's objectives without producing a disproportionate racial impact; and whether the disproportionate impact was foreseeable. Id.

It is submitted that such a variable standard is inappropriate in municipal services cases under Title VI. Under the stringent "substantial and immediate relation" standard, it is less likely that the municipality will be able to successfully rebut the plaintiff's prima facie case. Thus, the plaintiff may prevail merely upon a showing of substantial disproportionate impact, without having to establish that alternative courses of action were available to the defendant to effectuate its purposes. In municipal services cases, where the defendant must make difficult political and fiscal decisions, the plaintiff should not be able to prevail on such a narrow showing.

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130 See notes 84-91 and accompanying text supra.
131 E.g., Towns v. Beame, 386 F. Supp. 470 (S.D.N.Y. 1974). In Towns, the court reviewed a municipality's decision to close fire companies in certain areas of New York City. Id. at 471. Seven of the eight areas affected were inhabited predominantly by minorities. Id. at 472-73. This disparate impact was held to establish a prima facie case of unconstitutional discrimination. Id. at 473. The court concluded, however, that the defendant city had successfully rebutted the plaintiff's prima facie case by showing that its objective was to maximize fire protection, and thereby minimize loss of life, throughout the entire city. Id. at 475.
132 Justifying Discriminatory Effect, supra note 127, at 419-24. On the other hand, a factor such as intent is incapable of being quantified, and therefore does not lend itself to a balancing analysis. Id. at 423.
133 See notes 127-29 and accompanying text supra.
Furthermore, alternative courses of action are more properly advanced by the plaintiff to counter the defendant's showing of justification. Thus, it appears that some absolute, as opposed to balancing, standard of justification should govern.

As an absolute standard, the Black Jack compelling interest test may work a disservice in municipal services litigation. Because proof of a "compelling interest" is a heavy burden of justification, it decreases the likelihood that a defendant-municipality will be able to successfully rebut the plaintiff's prima facie showing of disparate impact. As a result, governmental decisions that serve legitimate and beneficial social ends may be invalidated merely upon proof of racially disproportionate effects. Thus, the compelling interest burden of justification appears better reserved for constitutional analyses of facially discriminatory governmental action.

The burden of justification proposed by the Second Circuit in Bryan v. Koch will permit the most equitable and comprehensive consideration of all pertinent issues in municipal services cases. Analogous to the burden of employers under Title VII to prove job-relatedness, the rational relationship standard ensures that the plaintiff will not prevail merely upon a showing of disparate impact. Municipalities, as a result, will not be deterred from adopting or implementing fiscally prudent and potentially beneficial policies. And, as under Title VII, the plaintiff will still have the opportunity to demonstrate that an alternative, less discriminatory policy would equally effectuate the municipality's legitimate objectives.

As the Second Circuit concluded in Bryan v. Koch, the city sustained its burden of proving a rational relationship. The closing of Sydenham was based on legitimate and articulable criteria. Those criteria, moreover, reasonably advanced the neutral ends of economy and efficiency in the provision of municipal

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134 See notes 109-15 and accompanying text supra.
135 See text at 151 infra.
136 Under an "absolute" approach, once the plaintiff has established a prima facie case, the court considers only "the defendant's interest, which it measures against a fixed standard, rather than against the plaintiff's countervailing interest."
137 See Towns v. Beame, 386 F. Supp. 470, 475 (S.D.N.Y. 1974); Perry, supra note 21, at 559-60.
138 See text accompanying notes 125-26 supra.
139 See notes 27-28 and accompanying text supra.
140 See Bryan v. Koch, 627 F.2d at 620.
141 See note 60 and accompanying text supra.
Consideration of Alternatives

The most telling analysis in *Bryan v. Koch* involved the extent to which a court should scrutinize and evaluate alternative methods by which the defendant could attain its objectives without producing a disproportionate racial impact. The plaintiffs urged the court to consider a broad range of alternatives whereby the city's fiscal resources could be preserved in a less discriminatory manner. A majority of the Second Circuit panel recognized that the HEW regulations required a consideration of alternatives and that the courts had entertained such an inquiry in cases under Title VI, Title VII, and Title VIII. While the court noted that a narrow inquiry into alternatives, analogous to that undertaken under Title VII, would be appropriate in Title VI cases, it rejected the broad examination of alternatives proposed by the plaintiffs. Such a broad inquiry, the court held, would abridge municipal discretion and substitute the judgment of the courts for that of the municipality in areas of competing political and economic alternatives. Moreover, the majority asserted, such judicial policymaking would be carried on without the participation of the city's elected officials and appointed specialists and, thus, with-

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142 627 F.2d at 618. The alternative measures proposed by the *Bryan v. Koch* plaintiffs included "hospital mergers, regionalization of services, increasing Sydenham's services to reduce its deficit, and increasing Medicaid reimbursement." *Id.* In rejecting the plaintiffs' proposals, Judge Newman noted that, at the time of the enactment of Title VI, most civil rights litigation was directed at facilities that either excluded minorities or admitted them on a "separate-but-equal" basis. *Id.* at 618. Therefore, the majority contended, it was unlikely that Congress anticipated that the statute would be used to challenge a local administrative decision to close a municipal facility. *Id.*

143 627 F.2d at 618-19; see NAACP v. Wilmington Medical Center, Inc., 491 F. Supp. 290, 343-45 (D. Del. 1980).

144 627 F.2d at 618-19; *e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

145 627 F.2d at 618-19; *e.g.*, Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 149 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978).

146 627 F.2d at 619. In a Title VII case, the court will not consider such broad alternatives as hiring additional employees or changing the method of production. *Id.* Instead, the Title VII defendant must merely show that its employment test was a useful selector of employees qualified for the particular job. *Id.*; *see*, *e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 433-36 (1971).

147 627 F.2d at 619. In addition, the court reasoned that there was no assurance that the alternative chosen would ultimately result in a greater benefit to the minority population. *Id.*
out the sanction of the electorate.\textsuperscript{148}

In contrast, the dissent suggested that a broad examination of alternatives should be part of the defendant’s burden of justification in municipal services cases. According to the dissent’s two-tiered test, a court first would determine whether the challenged decision had been reached in a rational manner.\textsuperscript{149} A rational decisionmaking process, in turn, would entail “consideration of appropriate alternatives in the light of a factual assessment of these alternatives.”\textsuperscript{150} If the decisionmaking process were found to be rational, the court would assess the substantive merits of the decision.\textsuperscript{151} A comparable burden of establishing alternatives as part of a defendant’s justification has been adopted by other federal courts at the trial and appellate levels.\textsuperscript{152}

\textsuperscript{148} Id.
\textsuperscript{149} Id. at 623. (Kearse, J., concurring in part, dissenting in part).
\textsuperscript{150} Id. (Kearse, J., concurring in part, dissenting in part). Judge Kearse stated, however, that the court should assess only the alternative “measures that might have been taken” within the HHC, and not the city’s entire range of budgetary options. Id. at 625. (Kearse, J., concurring in part, dissenting in part).
\textsuperscript{151} Id. at 623 (Kearse, J., concurring in part, dissenting in part). Applying its two-tiered burden of justification, the dissent found that the range of alternatives considered by the city in selecting Sydenham for closure was unreasonably narrow. Id. at 624 (Kearse, J., concurring in part, dissenting in part). The city had failed to evaluate the possibilities of merging hospitals or regionalizing services. Evidence was adduced at trial tending to show that such an evaluation could have been completed in three weeks. Furthermore, the city’s decision was based on insufficient information as to the actual effects of the closing and on outdated and inappropriate statistics regarding the capacity of nearby hospitals. Id. at 625-27 (Kearse, J., concurring in part, dissenting in part). According to the dissent, these lapses constituted a serious defect in the decisionmaking process. Id. at 625 (Kearse, J., concurring in part, dissenting in part).
\textsuperscript{152} See, e.g., Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978); NAACP v. Wilmington Medical Center, Inc., 491 F. Supp. 290, 316 (D. Del. 1980). In \textit{Rizzo}, the court found a violation of Title VIII, resulting from the discriminatory effect of the actions of city officials and agencies, which hindered construction of a low-income housing project for blacks. 564 F.2d at 129-30. The court held that “a justification must serve, in theory and practice, a legitimate, bona fide interest of the Title VIII defendant, and the defendant must show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact.” 564 F.2d at 149. The \textit{Rizzo} decision is of particular significance because its disproportionate impact standard was explicitly adopted recently in a municipal services case involving the relocation of a hospital. See \textit{NAACP v. Wilmington Medical Center, Inc.}, 491 F. Supp. 290, 315-16 (D. Del. 1980). The \textit{Rizzo} standard was deemed particularly appropriate in that case because of the similarities between a housing location decision and a hospital site determination. \textit{Id.} at 315. In applying the \textit{Rizzo} standard, the court narrowly construed the defendant’s burden of demonstrating a lack of adequate, less discriminatory alternatives to mean that he must show how his legitimate, nondiscriminatory interest justified the rejection of alternative hospital sites. \textit{Id.} at 316. This narrow consideration of alternative sites parallels the Second Circuit’s approach in \textit{Bryan v. Koch}, where the court required that the defen-
The arguments raised by the Bryan v. Koch majority in favor of a narrow approach to alternatives are persuasive. It appears, however, that a broad examination of alternatives would, as suggested by the dissent, better serve the purposes of municipal services litigation under Title VI. Several policy considerations support this approach. The fiscal inviability of health care institutions, for example, may partially be due to an inequitable, discriminatory allocation of municipal resources in the past. In addition, municipal institutions serving minority neighborhoods may be unprofitable in part because of the economic privation of the community that it serves. Thus, the effects of past discrimination may contribute to decisions to close or relocate municipal health care facilities. For this reason, a more comprehensive consideration of alternatives should be undertaken.

The antimajoritarian nature of an extensive inquiry into alternatives, however, requires that the plaintiff bear the burden of showing less discriminatory means of furthering the municipality's legitimate objectives. Moreover, by virtue of his claim, the Title VI plaintiff implicitly suggests that feasible, less discriminatory options exist. Additionally, if the onus was placed on the defendant to demonstrate the absence of less discriminatory alternatives, the defendant-municipality would be required to prove a negative. Therefore, an affirmative showing by the plaintiff of less discriminatory options is appropriate.

CONCLUSION

In light of the uncertainty engendered by the Supreme Court's decision in Bakke over the appropriate standard for a prima facie case under Title VI, the circuits are currently in conflict as to whether an intent standard or an impact standard is to apply. In the context of municipal services litigation under Title VI, this Note has examined the tension between the municipality's need to determine its own budgetary priorities free of judicial interference,
and the minority resident's right to question a municipality's decisions impacting disproportionately upon him. This Note has argued that while judicial authority is in conflict, compelling policy considerations militate in favor of a disproportionate impact standard.

A recent Second Circuit decision, *Bryan v. Koch*, articulated one possible disproportionate impact standard that this Note has examined with approval. Under this standard, a prima facie case of disproportionate impact would be established by two elements: first, a disparity between the positions of whites and minorities that is unfavorable to the latter; and second, an adverse impact upon the minority group significant enough to warrant a shift of the burden of justification to the defendant. Following the establishment of a prima facie case, the burden of justification would shift to the defendant to demonstrate that the decision sought to achieve legitimate objectives and that the criteria used by the defendant to achieve these legitimate objectives are reasonably related to their accomplishment.

Although the Second Circuit rejected a broad inquiry into alternatives having less discriminatory impact, this Note has suggested that policy considerations require such an inquiry. Thus, if the defendant is able to meet his initial burden of justification, the plaintiff may then establish that other equally feasible, less discriminatory options were available to the defendant. The defendant would then have the opportunity to explain why these alternatives were not appropriate.

The relatively lenient initial burdens of the parties accommodate the interests of both sides by ensuring that the plaintiff is not foreclosed from judicial relief without an adequate opportunity to present his case. Also, in order that the case may not summarily be terminated in the plaintiff's favor, the defendant's burden of justification is not unduly stringent. It is suggested that such an allocation of the parties' burdens is necessary to preserve the utility of Title VI as an effective weapon against discrimination without unduly infringing on the fiscal autonomy of municipalities.

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