In *Washington v. Davis*, the Court held that is necessary that one claiming harm based on the disparate or disproportionate impact of a facially neutral law prove intent or motive to discriminate.[1443] For a time, in reliance upon a prior Supreme Court decision that had seemed to eschew motive or intent and to pinpoint effect as the key to a constitutional violation, lower courts had questioned this proposition.[1444] Further, the Court had considered various civil rights statutes which provided that when employment practices are challenged for disqualifying a disproportionate numbers of blacks, discriminatory purpose need not be proved and that demonstrating a rational basis for the challenged practices was not a sufficient defense.[1445] Thus, the lower federal courts developed a constitutional "disproportionate impact" analysis under which, absent some justification going substantially beyond what would be necessary to validate most other classifications, a violation could be established without regard to discriminatory purpose by showing that a statute or practice adversely affected a class.[1446] These cases were

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[1443] 426 U.S. 229, 242 (1976) ("[A] law, neutral on its face and serving ends otherwise within the power of government to pursue, is not invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.") A classification having a differential impact, absent a showing of discriminatory purpose, is subject to review under the lenient, rationality standard. Id. at 247–48; Rogers v. Lodge, 458 U.S. 613, 617 n.5 (1982). The Court has applied the same standard to a claim of selective prosecution allegedly penalizing exercise of First Amendment rights. Wayte v. United States, 470 U.S. 598 (1985) (no discriminatory purpose shown). *See also* Bazemore v. Friday, 478 U.S. 385 (1986) (existence of single-race, state-sponsored 4–H Clubs is permissible, given wholly voluntary nature of membership).

[1444] The principal case was Palmer v. Thompson, 403 U.S. 217 (1971), in which a 5-to-4 majority refused to order a city to reopen its swimming pools closed allegedly to avoid complying with a court order to desegregate them. The majority opinion strongly warned against voiding governmental action upon an assessment of official motive, id. at 224–26, but it also drew the conclusion (and the *Davis* Court read it as actually deciding) that, because the pools were closed for both whites and blacks, there was no discrimination. The city's avowed reason for closing the pools—to avoid violence and economic loss—could not be impeached by allegations of a racial motive. *See also* Wright v. Council of City of Emporia, 407 U.S. 451 (1972).

[1445] Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). The *Davis* Court adhered to this reading of Title VII, merely refusing to import the statutory standard into the constitutional standard. Washington v. Davis, 426 U.S. 229, 238–39, 246–48 (1976). Subsequent cases involving gender discrimination raised the question of the vitality of *Griggs*, General Electric Co. v. Gilbert, 429 U.S. 125 (1976); Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), but the disagreement among the Justices appears to be whether *Griggs* applies to each section of the antidiscrimination provision of Title VII. *See* Dothard v. Rawlinson, 433 U.S. 321 (1977); Furnco Const. Co. v. Waters, 438 U.S. 567 (1978). *But see* General Building Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982) (unlike Title VII, under 42 U.S.C. § 1981, derived from the Civil Rights Act of 1866, proof of discriminatory intent is required).

[1446] *See* Washington v. Davis, 426 U.S. 229, 244 n.12 (1976) (listing and disapproving cases). Cases that the Court did not cite include those in which the Fifth Circuit wrestled with the distinction between *de facto* and *de jure* segregation. In