Golden Gate University Law Review

Volume 9
Issue 1 *Ninth Circuit Survey*

Article 2

January 1978

Davis v. Los Angeles: Plaintiff's Burden of Proof Under Section 1981

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DAVIS V. LOS ANGELES: PLAINTIFF'S BURDEN OF PROOF UNDER SECTION 1981

I. INTRODUCTION

In *Davis v. County of Los Angeles,*[1] [hereinafter *Los Angeles*] the plaintiffs brought suit alleging that the defendants[2] had been guilty of racial discrimination in hiring in violation of the fourteenth amendment,[3] 42 U.S.C. §§ 1981,[4] 1983,[5] and Title VII of the Civil Rights Act of 1964.[6] The plaintiffs represented a class including all present and future black and Mexican-

1. 566 F.2d 1334 (9th Cir. 1977), *rev'd on other grounds*, 39 CCH S. Ct. Bull. p. B 1654 (March 27, 1979). See note 166 *infra* for a discussion of the Supreme Court decision.

2. The defendants included Los Angeles County, the County Board of Supervisors and County Civil Service Commission.

3. Section 1 of the fourteenth amendment provides:

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

4. 42 U.S.C. § 1981 (1976) provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

5. 42 U.S.C. § 1983 (1976) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

6. 42 U.S.C. § 2000e-2 (1976) provides:

> (a) It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend

American applicants for positions as firemen with the Los Angeles County Fire Department.

The district court found that minorities were grossly underrepresented in the Fire Department in relation to their number in the population of Los Angeles County. The court also found that despite the Department's knowledge of the past discriminatory practices, it had not effectively acted to eliminate the result of such prior discrimination. Consequently, the court ordered accelerated hiring of racial minorities until the effects of past discrimination had been eradicated. Both sides appealed. The court of appeals sustained the district court's finding of a current violation of the plaintiffs' rights by the improper use of an unvalidated written test as a selection device after 1971. It also affirmed the district court's order of accelerated hiring.[7]

In affirming the district court's finding that the test violated the plaintiffs' rights under section 1981, the Ninth Circuit majority decided that a statistical showing of disproportionate impact alone, without proof that an employer purposefully discriminated, will establish a prima facie case of racial discrimination.[8]

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to derpive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

7. 566 F.2d at 1337. Nevertheless, the Ninth Circuit reversed and remanded for reconsideration of the proper ratio of accelerated racial hiring to be ordered, because it disagreed with the district court's findings that the plaintiffs had standing to challenge pre-1971 tests and that a 5'7" height requirement for job applicants had been sufficiently validated by the defendants. The issues of standing and accelerated hiring are beyond the scope of this note. *See* note 166 *infra*.

8. *Id.* at 1340. Once the prima facie case had been established, the burden of proof shifted to the defendants to show the tests were job-related. The Ninth Circuit held that the defendants failed to satisfy their burden. The court, applying the standard enunciated in Washington v. Davis, 426 U.S. 229 (1976), that proof of racially discriminatory intent or purpose is required to establish an equal protection violation under the fourteenth amendment, tacitly held that the plaintiffs failed to meet this burden since they presented only statistical evidence. Therefore, the fourteenth amendment claim failed. *Id.* at 1341 n.12. Moreover, it concluded that the § 1983 claim was barred because no individual defendants were named in the suit and that, like the fourteenth amendment cause of action, the § 1983 claim would have failed even if individual plaintiffs had been named because no purposeful discrimination had been proved. *Id.* at 1341. Finally, as to the Title VII claim, the majority only remarked that the continued threat to use the written test as part of the selection process constituted a violation of Title VII. *Id.* at 1341 n.14. The majority did not base liability exclusively on Title VII.

The dissent, having determined that the fourteenth amendment standard of proof was applicable to § 1981 claims, concluded that plaintiffs' § 1981 cause of action failed because no intent to discriminate had been shown. Thus, the dissent would have based liability exclusively on Title VII. *Id.* at 1347. The dissent noted, however, that (1) the pre-1972 hiring procedures could not be attacked under Title VII because they were not applicable to state public employers until March 24, 1972 and (2) arguably no Title VII relief was available because the defendants abandoned their plan to use the written exam

The dissent, on the other hand, argued that a prima facie case under section 1981 required proof of purposeful discrimination and since no intent to discriminate had been shown, the plaintiffs' section 1981 cause of action failed. The defendants appealed the Ninth Circuit decision and the case is presently before the United States Supreme Court.

The purpose of this note is to examine whether, under section 1981, a challenge to a facially neutral employment practice which has disproportionate impact on a protected class requires proof of intentional discrimination (the constitutional standard), or whether it requires only a showing of disproportionate impact (the Title VII standard). This note will suggest that principles of statutory construction as well as other factors indicate that proof of purposeful discrimination is required.

The Ninth Circuit's reasoning will be briefly summarized and its underpinnings analyzed. This will involve examination of the following areas: (1) the significance of *Washington v. Davis*[9] [hereinafter *Washington*]; (2) the intent requirement under section 1981 after *Washington*; (3) the construction of section 1981 in light of its relationship with other civil rights legislation; and (4) the conflicting policy considerations regarding the standards of proof. This note will also discuss the impact of alternative holdings regarding the standard of proof required under section 1981.

II. THE COURT'S ANALYSIS

The *Los Angeles* majority held that a cause of action alleging racially discriminatory hiring procedures brought under section 1981 requires only a showing of disproportionate impact and does not require proof of intent to discriminate. In reaching that conclusion, the majority initially determined that the Supreme Court in *Washington*, although holding that a prima facie case of unconstitutional employment discrimination requires proof of discriminatory intent, did not address the issue of the standard of proof under section 1981.[10] Thus, the Ninth Circuit was free to resolve the issue. Next, the majority articulated several reasons supporting its conclusion that only disproportionate

on January 8, 1972. *Id.* at 1347 n.2. The dissent's analysis of the Title VII claim may have provided the reason for the majority's failure to rely solely on the Title VII violation.

9. 426 U.S. 229 (1976).

10. 566 F.2d at 1339.

impact was required. First, every court has construed section 1981 to bar employment discrimination. Second, the courts have traditionally utilized Title VII standards in section 1981 cases. Third, the Supreme Court has noted that "Title VII and § 1981 embrace parallel or overlapping remedies against discrimination . . . ."[11] Thus, in the absence of an express contrary pronouncement from the Supreme Court, the majority would continue to apply the Title VII standard of proof to section 1981. It reasoned that to do otherwise would produce undesirable substantive law conflicts and would dilute a potent remedy against racial discrimination.

The dissent, agreeing with the majority, also found that *Washington* did not decide the issue of the standard of proof under section 1981. It noted that in light of *Washington*, the majority's analysis was inadequate in merely assuming that the Title VII standards were applicable to section 1981. The dissent asserted that the proper inquiry was to determine whether the legislative history indicates "that it [section 1981] *should* track the Fourteenth Amendment's standards of proof rather than those of Title VII."[12] Arguing that section 1981 is historically linked to the fourteenth amendment, the dissent concluded that the fourteenth amendment standard of proof should control.[13] Additionally, other factors indicated that proof of intent was required: (1) such a requirement would be consistent with the Supreme Court's statements concerning section 1982, a statute also historically linked to section 1981;[14] (2) practical reasons require proof of intent in section 1981 cases, but not in Title VII cases;[15] (3) an opposite result would allow *Washington*'s holding to be circumvented by simply pleading section 1981;[16] and (4) an opposite result would have unfavorable and far reaching consequences.[17]

III. SIGNIFICANCE OF *WASHINGTON V. DAVIS*

In *Washington*, the Supreme Court considered the burden of proof for employment discrimination claims brought under the fourteenth amendment. The Court refused to apply the

11. *Id.* at 1340, *quoting* Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 & n.7 (1973).

12. 566 F.2d at 1348.

13. *See* text accompanying notes 64-90 *infra*.

14. *See* text accompanying notes 91-93 *infra*.

15. 566 F.2d at 1350.

16. *Id.*

17. *See* text accompanying notes 138-40 *infra*.

Title VII standard to constitutional claims holding that such claims require proof of discriminatory intent. In doing so, the Court disapproved prior lower court cases which had applied the Title VII standard to equal protection claims. The Supreme Court's treatment of these lower court cases shows that *Washington* did not decide the issue of the burden of proof for section 1981 claims. Nevertheless, this treatment provides insight into the standard the Court may apply in the future.

Before *Washington*, appellate and district court reaction to the issue of a plaintiff's burden of proof generally presupposed a uniform approach to employment discrimination claims. Thus, the courts adopted the standards developed under Title VII of the Civil Rights Act of 1964.[18] The circuit courts[19] based this assumption on two basic analogies: (1) because section 1981 involves the same issues as Title VII, Title VII standards apply;[20] and (2) because section 1981 and section 1983 involve the same issues as the fourteenth amendment, and because the fourteenth amendment involves the same issues as Title VII, Title VII standards apply to claims under section 1981 or the fourteenth amendment.[21] Most courts did not discuss the applicable standard at all.

18. 78 Stat. 259, 42 U.S.C. § 2000e (1976). Since The Civil Rights Act of 1866, c. 31, § 1, 14 Stat. 27 (currently codified at 42 U.S.C. §§ 1981-1988) was rarely used until the Court held § 1982 reached private discrimination in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), the lower courts' initial applications of § 1981 to private employment discrimination, *see* Waters v. Wisconsin Steel Works of Int'l Harvester Co., 427 F.2d 476 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970); Sanders v. Dobbs House Inc., 431 F.2d 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1977) (citing *Waters*) (the first circuit court cases to allow a § 1981 private employment discrimination suit), took place after enactment of Title VII of The Civil Rights Act of 1964. Since § 1981 did not become recognized as an alternate ground for attacking employment discrimination until six years after the 1964 Act, the only judicial tools for determining § 1981 standards available to the courts were those developed in Title VII cases. *See* Carter v. Gallagher, 452 F.2d 315, 323 (8th Cir.) (on rehearing en banc), *cert. denied*, 406 U.S. 950 (1972). *See also* cases cited at notes 21 & 22 *infra*.

19. The Fifth Circuit had, on the other hand, developed a standard for public employment tests which followed the constitutional test later enunciated in *Washington*. *See* Wade v. Mississippi Coop. Ext. Serv., 528 F.2d 508, 518 (5th Cir. 1976); Tyler v. Vickery, 517 F.2d 1089, 1096-97 (5th Cir. 1975) *cert. denied*, 426 U.S. 940 (1976). The Fifth Circuit treated public employment tests differently because before the 1972 amendments to Title VII state and local governments were not covered under that provision. In so doing, the court in *Wade* stated: "We do this, recognizing that nonapplication of the Title VII guidelines in a Section 1981 suit against a public employer is now an anachronism, in light of the 1972 amendment to Title VII that extend the coverage of that statute to state and local governments." 528 F.2d at 518. *Wade* relied on Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975), and Allen v. Mobile, 466 F.2d 122 (5th Cir. 1972). *Tyler* did not involve § 1981 and *Allen* was a per curiam opinion lacking in any analysis.

20. *See* Barnett v. W.T. Grant Co., 518 F.2d 543 (4th Cir. 1975); Watkins v. United Steel Workers of Am. Local No. 2369, 516 F.2d 41 (5th Cir. 1975).

21. Douglas v. Hampton, 512 F.2d 976 (D.C. Cir. 1975); Harper v. Kloster, 486 F.2d 1134 (4th Cir. 1973); Bridgeport Guard., Inc. v. Members of Bridgeport Civ. Serv.

They merely used Title VII precedent regardless of the basis of the claim.[22]

The few cases that had addressed the question of what standard to apply under section 1981 were disapproved by the *Washington* majority in footnote twelve of their opinion.[23] The disapproval was limited "to the extent that those cases rested on or expressed the view that proof of discriminatory purpose is unnecessary in making out an *equal protection violation* . . . ."[24] The Court obviously expressed no opinion as to the burden of proof under section 1981.

Nevertheless, the *Washington* Court's treatment, combined with the reasoning in four of the disapproved cases,[25] evidences that the Court may have believed that Title VII standards were appropriate under section 1981. Each of those cases involved discrimination claims brought under section 1983 and section 1981.[26] They applied the Title VII standard of proof, treating the

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Comm'n, 482 F.2d 1333 (2d Cir. 1973); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972); Chance v. Bd. of Examiners, 458 F.2d 1167 (2d Cir. 1972); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971). One case also treated a § 1983 employment claim analogous to Title VII. *See* Vulcan Soc'y of N.Y. City Fire Dept., Inc. v. Civ. Serv. Comm'n, 490 F.2d 387 (2d Cir. 1973).

22. Courts which analyzed the merits of the claims rarely discussed the § 1981 claim separately from either the Title VII claim or the equal protection claim. *See* Barnett v. W.T. Grant Co., 578 F.2d 543 (4th Cir. 1975); Harper v. Kloster, 486 F.2d 1134 (4th Cir. 1973); Chance v. Bd. of Examiners, 458 F.2d 1167 (2d Cir. 1972). *Cf.* Watkins v. United Steel Workers of Am., Local No. 2369, 516 F.2d at 50, 53; Douglas v. Hampton, 512 F.2d at 981; Bridgeport Guard., Inc., v. Members of Bridgeport Civ. Serv. Comm'n, 482 F.2d at 1337; Castro v. Beecher, 459 F.2d at 733; Carter v. Gallagher, 452 F.2d at 323 (treating independently, but summary analysis).

23. Washington v. Davis, 426 U.S. at 244 n.12. The circuit court cases dealing with employment discrimination were: Chance v. Bd. of Examiners, Castro v. Beecher, Bridgeport Guard., Inc. v. Members of Bridgeport Civ. Serv. Comm'n and Douglas v. Hampton. The *Washington* majority also cited *Tyler v. Vickery*, 517 F.2d 1089 (5th Cir. 1975), as a case analogously contrary to the other cases. *Tyler* involved a claim based on the fourteenth amendment and did not involve § 1981. For a discussion of *Tyler see* note 19 *supra*. For a discussion of the significance of cases not disapproved in *Washington's* footnote 12, see text accompanying notes 29-35 *infra*.

24. Washington v. Davis, 426 U.S. at 245 (emphasis added).

25. Bridgeport Guard., Inc. v. Members of Bridgeport Civ. Serv. Comm'n, 482 F.2d (2d Cir. 1973); Harper v. Kloster, 486 F.2d 1134 (4th Cir. 1973); Chance v. Bd. of Examiners, 458 F.2d 1167 (2d Cir. 1972); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972) (all suggesting that Title VII standards should govern the analysis under § 1981, § 1983 and the fourteenth amendment). The other circuit court case, Douglas v. Hampton, 512 F.2d 976 (D.C. Cir. 1975), did not involve a claim based on § 1981, but applied Title VII standards to a claim based solely on the fourteenth amendment.

26. For the text of §§ 1981 and 1983, see notes 4, 5 *supra*. The one case, cited favorably by *Washington*, Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975), which refused to apply Title VII standards of proof to an equal protection claim, did not involve § 1981.

statutory issues involved as equal protection claims.[27] Those courts correctly treated section 1983 as an equal protection claim, but ignored the independent status of section 1981.[28] To the extent that the lower court opinions failed to recognize this distinction, *Washington* does not foreclose the application of the Title VII standard to section 1981 claims. Moreover, the limited disapproval of these cases suggests that if the Court was not reserving the issue, it was implicitly approving use of the Title VII standards under section 1981.

Furthermore, conspicuously absent from *Washington's* footnote twelve are two cases which applied the Title VII standard to section 1981: *Barnett v. W.T. Grant*[29] and *Carter v. Gallagher*."[30] In *Barnett*, the appellate court specifically held that discriminatory impact would establish a prima facie case under both Title VII and section 1981.[31] Possibly, *Washington's* failure to disapprove of *Barnett*, together with its qualified disapproval

27. *See* cases cited at note 22 *supra*.

28. The text of § 1983, unlike § 1981, creates no rights not already provided elsewhere by the Constitution or federal laws. *See* Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970); Monroe v. Pape, 365 U.S. 167 (1961); Santiago v. Philadelphia, 435 F. Supp. 136 (D. Pa. 1977); Cook v. Cox, 357 F. Supp. 120 (E.D. Va. 1973). Both the fourteenth amendment and § 1983 are directed only to state action. United States v. Guest, 383 U.S. 745 (1966) (fourteenth amendment creates rights only where there has been involvement of a state or one acting under its authority) (There is also an equal protection component to the fifth amendment directed to the federal government. Shapiro v. Thompson, 394 U.S. 618, 642 (1969); Bolling v. Sharpe, 347 U.S. 497 (1954)) (concerning § 1983 *see* District of Columbia v. Carter, 409 U.S. 418 (1973) (§ 1983 deals only with those deprivations which are accomplished under color of state law) Although § 1981 and § 1982 share a common legislative history, *see* text accompanying notes 66-82 *infra*, § 1983 and § 1981 do not since, unlike § 1981, § 1983 is derived from the Act of April 20, 1871, c.22, § 1, 17 Stat. 13.

In pressing a § 1983 claim, a deprivation of some right not enumerated in § 1983 must be asserted. It is therefore clear that these appellate courts were dealing with a deprivation of the fourteenth amendment right to equal protection. *See* Harper v. Kloster, 486 F.2d at 1137 (affirming lower court's holding of violation of equal protection. 357 F. Supp. 1211-13); Douglas v. Hampton, 512 F.2d at 981; Bridgeport Guard., Inc., v. Members of Bridgeport Civ. Serv. Comm'n, 482 F.2d at 1337; Castro v. Beecher, 459 F.2d at 1337. It is unclear why the lower courts did not recognize that § 1981 represented a distinct cause of action. Given lower court treatment of Title VII, the fourteenth amendment and § 1981 as synonymous in the employment discrimination context, it is not surprising. Moreover, the *Washington* opinion indicates that the particular basis of a discrimination claim will be significant.

29. 518 F.2d 543 (4th Cir. 1975). *Cf.* Pennsylvania v. Operating Engineers, Local Union 542, Slip Op. (E.D. Pa. January 2, 1979) (Post *Washington* case holding Title VII Standard applicable under § 1981 on basis of prior case law without mentioning *Washington*).

30. 452 F.2d 315 (8th Cir.) (en banc), *cert. denied*, 40 U.S. 950 (1972).

31. 518 F.2d at 549.

of cases which involved both section 1981 and the fourteenth amendment, suggests that the Court thought that section 1981 should be treated different from the fourteenth amendment. This suggestion leads to the inference that the Title VII standard is applicable to section 1981.[32]

In *Carter*, the plaintiffs proceeded under sections 1981, 1983 and the fourteenth amendment. Without discussing the fourteenth amendment,[33] the Eighth Circuit held that the Title VII standard was applicable to section 1981. Like *Barnett, Carter* suggests that if the *Washington* Court felt that the Title VII standard was not applicable to section 1981, it would have disapproved of *Carter.*

At the very least, the omission of *Barnett* and *Carter* indicates that the Court did not embrace the reasoning of the lower courts that had analyzed both sections 1981 and 1983 in terms of equal protection; for if it had embraced such reasoning, it would have been compelled to disapprove of both cases. Further, their analysis of the statutory grounds, including section 1981, without applying the constitutional standard suggests that the Title VII standard is applicable to section 1981 claims.[34] Nevertheless, it is still arguable that the Court was reserving the issue.

Generally, courts attempt to address only those issues necessary for a decision.[35] Nevertheless, *Washington* majority could have disapproved the use of the Title VII standard in all non-Title VII claims, and not just in equal protection claims.

A narrow reading of *Washington* suggests that the Supreme Court was reserving the question of the burden of proof under

32. This inference may be negated since the scope of the claim in *Barnett* was identical under both Title VII and § 1981. Thus, the Court may have felt that it was unnecessary to disapprove of *Barnett.* However, even with identical scope, the relief under § 1981 could be in excess of any recovery under Title VII. *See* note 157 *infra* and accompanying text. It is unlikely that the Court failed to appreciate this point and possible that it viewed § 1981 and the fourteenth amendment differently.

33. 452 F.2d at 323.

34. Washington v. Davis, 426 U.S. 229, 248-52. *See* Justice Stevens' concurrence. *Id.* at 255. It can also be argued, however, that the Court was only assuming a prima facie case had been made for purposes of demonstrating that the tests involved were job-related. Consequently, the statutory claims necessarily failed.

35. Any discussion on an issue not directly before the Court would be dictum. *See* Cohens v. Virginia, 19 U.S. 264, 398-99 (1861) (6 Wheat.) (on dictum).

section 1981; an expansive reading suggests that the court thought Title VII standards were applicable to section 1981.

IV. INTENT REQUIREMENT UNDER SECTION 1981 AFTER WASHINGTON V. DAVIS

The lower courts discussing the necessity of proving purposeful or intentional discrimination under section 1981 after *Washington* have reached mixed results. Some courts have noted the issue without discussing it.[36] The cases proclaiming that plaintiffs proceeding under section 1981 need not show discriminatory purpose provide insufficient analysis to support that construction.[37] At least the courts construing section 1981 to require proof of discriminatory purpose have set forth some reasoning to support their conclusion.[38] Their reasoning, however, mirrors the

36. In Richardson v. Pennsylvania Dept. of Health, 561 F.2d 489 (3d Cir. 1977), the Third Circuit noted this issue. The defendant urged that: "[Section] 1981 having its separate genesis in The Civil Rights Act of 1866, should be construed consistently with Title VII since, like that title, it is a statutory grant of substantive and remedial rights, rather than a remedy for the enforcement of minimum constitutional requirements." *Id.* at 493. The court responded by stating that "[i]t is not clear whether the Supreme Court intended such a distinction to survive Washington v. Davis, but there is no need to meet that question now." *Id.*

37. Several courts have reached the same conclusion as the *Los Angeles* majority. In Kinsey v. First Regional Secs., Inc., 557 F.2d 830 (D.C. Cir. 1977), the Court of Appeals for the D.C. Circuit in dictum stated that a plaintiff proceeding under Title VII or § 1981 need not meet the *Washington* constitutional standard. *Id.* at 838 n.2. The *Kinsey* court, however, did not analyze the issue. The same result was reached in Woods v. City of Saginaw, 13 E.P.D. ¶ 11,299 (E.D. Mich. 1976). The *Woods* court rejected defendant's argument that the complaint brought under § 1981 was fatally defective for failure to allege a racial discriminatory purpose, because the court found that "Washington v. Davis, as relied upon by the defendants, refers only to constitutional claims." *Id.* at 5990. The *Woods* court's tacit logic seems to be that since *Washington* did not explicitly decide whether the proof of discriminatory intent is required under § 1981, it should not deviate from the historical position that only a disproportionate impact need be shown. Additionally, the court, in Winston v. Smith Information Exch., 437 F.2d 456 (D. D.C. 1977), stated that "[t]he principles for allocating burden in Title VII cases are equally applicable to actions brought under 42 U.S.C. § 1981." *Id.* at 473. The *Winston* court, however, failed to consider the effect of *Washington* on this issue. Although these cases support the position taken by the *Los Angeles* majority, they are unpersuasive because their analysis of the issue in light of *Washington* is either inadequate or non-existent.

38. Several district court cases support the position that a plaintiff proceeding under § 1981 must show purposeful discrimination. *See* Croswell v. O'Hara, 443 F. Supp. 895, 897 (E.D. Pa. 1978); Milburn v. Girard, 441 F. Supp. 184, 188 (E.D. Pa. 1977); Lewis v. Bethlehem Steel Corp., 440 F. Supp. 949, 962-66 (D. Md. 1977); Croker v. Boeing Co., 437 F. Supp. 1138 (E.D. Pa. 1977); Johnson v. Hoffman, 424 F. Supp. 490, 493-94 (E.D. Md. 1977), *aff'd sub nom.* Johnson v. Alexander, 572 F.2d 1219 (8th Cir. 1978).

The majority, *sub silento,* ignored these district court opinions noting only that four other courts of appeal have considered this question. Two court's of appeals decisions, one decided before *Los Angeles,* the other one after, implied that proof of purposeful discrimination must be shown under § 1981. In City of Milwaukee v. Saxbe, 546 F.2d 693 (7th Cir. 1976), the city brought an action against the United States Attorney General alleging that the defendants were engaging in discriminatory enforcement of the law in violation

reasoning of the dissent in *Los Angeles* and thus is only valid if the dissent's reasoning is valid.

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of the fifth amendment, the fourteenth amendment, § 1981 and § 1983, and various other statutes. The city did not allege intentional discrimination. The Seventh Circuit held that, in the light of *Washington*, no fifth amendment claim had been asserted since the city failed to allege a racially discriminatory purpose. *Id.* at 705. Concerning the § 1981 claim, the court stated: "Our holding that no Fifth Amendment claim has been asserted necessarily compels the conclusion that no § 1981 claim has been made out." *Id.* Thus, the court implicitly held that a § 1981 claim, like a fifth or fourteenth amendment claim, required proof of discriminatory intent in order to state a claim for which relief could be granted. *See* Croker v. Boeing Co., 437 F. Supp. 1138, 1181 (1977), *citing Saxbe* for the proposition that "the constitutional standards must also be applied to § 1981."

Neither the majority nor the dissent discussed the Seventh Circuit's opinion in *Saxbe*. The majority, however, did examine the Seventh Circuit's reasoning in United States v. City of Chicago, 549 F.2d 415 (7th Cir. 1977). In *Chicago*, the Seventh Circuit reversed a district court finding that the defendants' hiring and promotion policies violated the equal protection clause of the fourteenth amendment because there was no evidence that the defendants engaged in purposeful discrimination. *Id.* at 135. The plaintiffs had also alleged a violation of § 1981. The *Chicago* court, however, did not mention § 1981 in reversing the district court. Its specific holding was that the "policies of the Chicago Police Department did not violate the Constitution." *Id.* While the majority is correct in assuming the Seventh Circuit did not decide the applicable standard of proof under § 1981 in *Chicago*, it erred in failing to consider *Saxbe* in which the Seventh Circuit held that § 1981 requires proof of purposeful discrimination.

Moreover, an Eighth Circuit case, Johnson v. Alexander, 572 F.2d 1219 (8th Cir. 1978), also supports the proposition that § 1981 requires discriminatory intent. In *Johnson*, the court affirmed the district court decision rendered in Johnson v. Hoffman, 424 F. Supp. 490 (E.D. Mo. 1977), quoting the district court's reasoning that § 1981 requires purposeful discrimination. *Id.* at 1223. Although the Eighth Circuit did not expressly approve this reasoning, the court, in repudiating the plaintiff's contention that the district court should have incorporated amended Title VII standards into his § 1981 claim, did state: "[W]e agree with the district court that neither Title VII nor its standards are applicable . . . ." *Id.* at 1224. Hence, the court of appeals implicitly agreed with the district court ruling that proof of discriminatory intent is required.

Although the *Johnson* court acknowledged that a number of cases have held that Title VII standards are applicable to suits brought by blacks under § 1981, the court implicitly agreed with the district court that *Washington* devitalized these cases. *Id.* at 1223 n.23. Moreover, the *Johnson* court offered some concluding observations on the screening device in question which allegedly had a disproportionate impact on blacks.

> [T]he screening criteria involved in this case were not discriminatorily motivated. They were not designed to keep racial or ethnic minorities out of the armed services, nor are they doing so. The criteria do not automatically or permanently deny to any otherwise eligible person an opportunity to join the armed service of his choice. They simply recognize the fact that a young person who has had numerous adverse encounters with law enforcement officers, or who has dropped out of school at an early stage of his education, or who cannot hold a job or get along with other people may be unlikely to perform satisfactorily in tightly structured military life.

Id. at 1224. These concluding remarks may countenance a judicial trend of disfavor of employment discrimination actions where no proof of purposeful discrimination is present.

As *Johnson* and *Saxbe* demonstrate, the Seventh and Eighth Circuits now disagree with the Ninth Circuit as to whether under § 1981 purposeful discrimination need be shown.

In addition to the lower court's treatment, the Supreme Court's action in *Chicano Police Officer's Ass'n v. Stover*[39] suggests that the "Court may well believe that constitutional standards apply in section 1981 cases."[40] In *Stover,* Chicano members of a city police department challenged the department's hiring and promotion procedures as racially discriminatory. The complaint alleged that defendants had violated sections 1981, 1983, and 1985 as well as the equal protection clause.[41] In *Stover,* the Tenth Circuit held that "the measure of a claim under the Civil Rights Act is in essence that applied in a Title VII of the Civil Rights Act of 1964."[42] Moreover, the Tenth Circuit stated: "Relief may be had from artificial, arbitrary and unnecessary barriers to employment when they operate invidiously on the basis of racial or other impermissible classifications. While the employer's intent may be examined, the plaintiff needs only to show that the challenged procedures have a discriminatory result."[43] On appeal, the Supreme Court remanded to the court of appeals for consideration in light of *Washington.*

The *Los Angeles* dissent argued that if the Supreme Court intended that the Title VII standard should apply to section 1981, the Court would have denied *certiorari* and allowed the judgment to stand on the basis of section 1981.[44] It seems that the Tenth Circuit accepted this proposition when, on remand from the Supreme Court, it remanded the case to the trial court to determine whether the defendants purposefully discriminated.[45] What the Supreme Court meant by its remand, however, was not expressly decided by the Tenth Circuit. Furthermore, neither the district court nor the circuit court had ever specifically found a section 1981 violation; rather they found a violation of the "Civil Rights Act." The Supreme Court's action may have been necessitated by the Tenth Circuit's failure to distinguish the causes of action under section 1981 and section 1983 when it equated the "Civil Rights Act" and "Title VII." It is clear that section 1983 requires proof of discriminatory intent.[46] Thus, the Supreme Court may only have meant to reverse on this point. The Court's

39. 526 F.2d 431 (10th Cir. 1973), *cert. granted, vacated and remanded,* 426 U.S. 944 (1976).

40. 566 F.2d at 1337 n.4.

41. The circuit court did not discuss the possibility of any Title VII claim.

42. 526 F.2d at 438.

43. *Id.* (citations omitted).

44. 566 F.2d at 1347 n.4.

45. 552 F.2d at 918. *See* 566 F.2d at 1337 n.4.

46. See note 28 *supra* and accompanying text.

action in *Stover* is inconclusive concerning the requirement of proof of intentional discrimination under section 1981. Nevertheless, it may augur the Court's willingness to apply the constitutional standard to section 1981.

An examination of these cases shows that most courts agree with the *Los Angeles* dissent that section 1981 requires proof of intent. In fact, both the Seventh and Eighth Circuit concur that intent is required.[47] Nevertheless, the reasoning of the dissent and of its supporting cases must be examined to determine the validity of their conclusion. Section V will scrutinize this reasoning.

V. CONSTRUCTION OF SECTION 1981

Until 1968 the Civil Rights Act of 1866 remained dormant as a tool to redress disrcimination.[48] The Act is presently codified at 42 U.S.C. §§ 1981-1982. The Supreme Court in *Jones v. Alfred H. Mayer Co.*[49] revitalized the Act by holding that section 1982[50] prohibits private racial discrimination in the sale or rental of real property.[51] Thereafter the Court has afforded sections 1981 and 1982 a similar construction.[52] Furthermore, the Court in construing the Act has held that: (1) compensatory damages are recoverable under section 1982;[53] (2) sections 1981 and 1982 confer similar rights upon white persons;[54] (3) Title VII of the Civil Rights Act of 1964 does not preempt any sections of the 1866 Act;[55] and (4) since section 1981 contains no specific statute of limitations, the controlling period is the most appropriate one provided by the particular state law.[56]

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47. *See* note 38 *supra* and accompanying text.

48. *Jones* has been credited with "exhum[ing] the Civil Rights Act of 1866 from a century of desuetude." Comment, *The Expanding Scope of Section 1981: Assault on Private Discrimination and a Cloud on Affirmation Action*, 90 HARV. L. REV. 412 (1976) [hereinafter *Expanding Scope*].

49. 392 U.S. 409 (1968).

50. Section 1982 provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

51. 392 U.S. at 413.

52. *See* Runyon v. McCrary, 427 U.S. 160, 171 (1976); Tillman v. Wheaton-Haven Rec. Ass'n., 410 U.S. 431, 440 (1973).

53. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 238-40 (1969).

54. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 285-96 (1976).

55. Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 461-66 (1975).

56. Runyon, 427 U.S. at 179-82; Johnson, 421 U.S. at 462. For a partial list of state statutes of limitation applicable to § 1981 suits see Annot., 49 L. Ed.2d 1349, 1356 (1976).

Accordingly, confronted with a very general and broad statutory grant of civil rights the Court has begun, through the process of interpretation and construction, the task of delineating the scope and application of the 1866 Act. Perhaps more importantly, it is, in effect, fashioning the procedures necessary for the Act's enforcement. As the Court which modernized the 1866 Act recognized, "the fact that 42 U.S.C. § 1982 is couched in declaratory terms and provides no explicit method of enforcement does not, of course, prevent a federal court from fashioning an effective equitable remedy."[57] Consequently, deciding the question of what standard of proof to apply under section 1981, "is a phase of fashioning remedial details where Congress has not spoken but left matters for judicial determination within the general framework of familiar legal principles."[58]

Although no Supreme Court case has dealt with plaintiff's burden of proof under section 1981, the Court has experience in resolving major questions of interpretation and construction of that section. In construing section 1981, the Court has relied on: (1) the historical relationship of section 1981 to other civil rights legislation;[59] (2) the relationship of its scope to other such legislation;[60] and (3) policy considerations.[61] An examination of these three interpretive aids indicates that the constitutional standard should be applied to section 1981.

A. The Historical Relationship of Section 1981 to Other Civil Rights Legislation

As a general principle, various legislative acts on the same subject matter are construed consistently.[62] Where the acts are closely related, the application of this rule is more justified and the construction of one piece of legislation has the greatest probative force on the construction of another.[63] Since the standard required to prove a section 1981 violation was not explicitly stated

57. 392 U.S. at 414 n.13.

58. Holmbert v. Armbrecht, 327 U.S 392, 395 (1946).

59. *See* Tillman v. Wheaton-Haven Rec. Ass'n, 410 U.S. 431, 439-40 (1973).

60. *See* notes 96-98 *infra*.

61. *See* text accompanying notes 124-49 *infra*. As to interpretation and construction *see generally* Kernochan, *Statutory Interpretation: An Outline of Method*, 3 Dalhousie L.J. 333, 349-60 (1976); Witherspoon, *The Essential Focus of Statutory Interpretation*, 36 Ind. L.J. 423, 426-27 (1961); Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 535-46 (1947).

62. *See* Sands, 2A, 3 Statutes and Statutory Construction § 51.02 at 290 and § 72.05 at 393 (1973).

63. *Id.* at 299.

by Congress, one method of resolving the issue is to determine which act most clearly relates to section 1981 and to apply that act's standard of proof.

The *Los Angeles* dissent concluded that "section 1981 enjoys a unique historical and conceptual relationship to the Fourteenth Amendment which is not shared by Title VII."[64] Thus, the standards of proof for the fourteenth amendment and for section 1981 should be the same. The majority made no real inquiry into the historical relationship of section 1981 with other acts.[65] However, section 1981 seems most closely related to section 1982 and therefore section 1981 should track section 1982's standards of proof.

To understand this relationship, it is necessary to trace the historical background of section 1981, section 1982, the thirteenth amendment and the fourteenth amendment.[66] The thirteenth amendment,[67] ratified in 1865, granted Congress the power to enact legislation to abolish slavery and involuntary servitude. Pursuant to that power, Congress enacted The Civil Rights Act of 1866.[68] Section 1 of the 1866 Act provided citizens with two

64. 566 F.2d at 1349.

65. The majority noted only that "Title VII and § 1981 embrace 'parallel or overlapping remedies against discrimination.'" 566 F.2d at 1340, *quoting* Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1973).

66. For a detailed historical analysis see Comment, *Towards an Integrated Society—The New Section 1981*, 1976 ARIZONA STATE L.J. 549, 550-52 [hereinafter *New Section 1981*]; Note, *Section 1981 and Private Discrimination: A Historical Justification for a Judicial Trend*, 40 GEO. WASH. L. REV. 1024, 1036-39 (1972) [hereinafter *Judicial Trend*]. *See also*, Reiss, *Requirements for an "Independent Remedy": The Civil Rights Acts of 1866 and 1871 as Remedies for Employment Discrimination*, 50 So. CAL. L. REV. 961, 970-72 (1977), Comment, *Civil Rights—The Supreme Courts Terrible Swift Sword: The Civil Rights Act of 1866 and the Reconstruction of Private Schools*, 52 WASH. L. REV. 955, 963 (1977).

67. Section 1 of the thirteenth amendment provides: "Neither slavery nor involuntary servitude as a punishment for crime whereof the party shall have been duly convicted, except shall exist within the United States, or any place subject to their jurisdiction." Section 2 provides: "Congress shall have power to enforce this article by appropriate legislation."

68. Section 1 of The Civil Rights Act of 1866 provided:

> That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all

basic rights: (1) the right to make and enforce contracts and (2) the right to hold and convey property. There was, however, considerable doubt concerning the constitutionality of this legislation.[69] This doubt coupled with the fear that the 1866 Act could be repealed led to the passage of the fourteenth amendment.[70]

Following its passage, Congress enacted The Civil Rights Act of 1870.[71] Section 18 of the 1870 Act[72] reenacted all of section 1 of the 1866 Act and thus, protected both the right to contract *and* the right to convey property. Section 16 of the 1870 Act,[73] apparently redundant,[74] also protected the right to contract.

> laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27. The portion of the Act dealing with contract rights is similar to § 1981. The portion dealing with property rights is similar to § 1982.

69. *See* Hurd v. Hodge, 334 U.S. 24, 32-33 (1948); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 436 (1968).

70. *Id.*

71. Act of May 31, 1870 ch. 114, §§ 16, 18, 16 Stat. 144.

72. Section 18 provided:

> And be it further enacted, That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted; and sections sixteen and seventeen hereof shall be enforced according to the provisions of said act.

16 Stat. 140, 144 (1870).

73. Section 16 provided:

> And be it further enacted, That all persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding. No tax or charge shall be imposed or enforced by any State upon any person immigrating thereto from a foreign country which is not equally imposed and enforced upon every person immigrating to such State from any other foreign country; and any law of any State in conflict with this provision is hereby declared null and void.

16 Stat. 140, 144 (1870).

74. The language of § 16 was substantially similar to that of § 1 of the 1866 Act. The major difference was that § 16 employed the broader term "person" as opposed to the word "citizen" used in the 1866 Act. Since the fourteenth amendment also employs the term "person," this language difference has lead to the argument that § 16 could not be derived from the 1866 Act.

The redundancy was eliminated when the federal statutes were revised and codified in 1874.[75] At that time, the contract rights were deleted from section 16, the 1870 precursor to section 1982, leaving only property rights protected. Section 18, the 1870 precursor to section 1981, continued to protect contract rights in the 1874 revision. The wording of those statutes has not been changed since the 1874 revision.[76]

The margin notes to the 1874 revision stated that section 1981 derived from the 1870 Act,[77] but that section 1982 derived from the 1866 Act.[78] The present historical notes appended to sections 1981 and 1982 follow these notes. The present historical notes are in error because both sections originated in the 1866 Act which protected both contract rights and property rights.

Arguably, however, section 1981 has three possible historical relationships with other acts. First, section 1981 is historically related to section 1982, both having descended from The Civil Rights Act of 1866, passed pursuant to Congress' power under the thirteenth amendment. Second, section 1981 is related to the fourteenth amendment having descended from The Civil Rights Act of 1870. Third, it is related to both acts and based on power derived from both amendments. Recent Supreme Court opinions indicate that the first relationship is most likely, although the third has not been excluded. The second has been foreclosed.

The Supreme Court's statements concerning the origin of sections 1981 and 1982 have not been consistent. These sections' historical underpinnings were discussed for the first time in twenty years in *Jones v. Alfred H. Mayer.* The *Jones* Court found that "[i]n its original form 42 U.S.C. § 1982 was part of § 1 of The Civil Rights Act of 1866."[79] While *Jones* specifically dis-

75. Act of June 20, 1874, ch. 333, 18 Stat. 347.

76. In 1878, § 2 of Title XXVII was changed to § 1977, while § 1 was changed to § 1978. Presently, § 1977 is codified at § 1981; § 1978 at § 1982.

77. Title XXVI, § 2 of the Revision of the United States Statutes as Drafted By the Commissioner Appointed for that Purpose (1873), which became the Revised Statute of 1874.

78. Title XXVI, § 1.

79. 392 U.S. at 422 (footnote omitted). Although it conceded that Congress supported the fourteenth amendment to eliminate doubts about The Civil Rights Act of 1866, the Court rejected the argument that the "scope of the 1866 Act was altered when it was re-enacted in 1870," *id.* at 434, after the ratification of the fourteenth amendment. Thus, the Court held that § 1982 prohibits private racial discrimination in sale and rental of property. *Id.* at 413. Furthermore, the Court acknowledged that § 1982 was enacted pursuant to the enabling clause of the thirteenth amendment, and held that Congress had

cussed section 1982, the Court asserted that section 1981 also derived from the 1866 Act.[80] In two subsequent cases, *Tillman v. Wheaton-Park Rec. Ass'n*[81] and *Johnson v. Railway Express Agency,*[82] the Court made conflicting statements concerning the origin of section 1981. Although the Court has more often indicated that the section arose historically from the 1866 Act, it has occasionally suggested that the 1870 Act was its source.[83]

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the power to enact § 1982 pursuant to that clause. *Id.* at 437-39. *See also* Hurd v. Hodge, 33 U.S. 24, 32-33 (1948). For a discussion concerning the uncertainty about the scope of the thirteenth amendment, *see* Note, *The "New" Thirteenth Amendment: A Preliminary Analysis,* 82 HARV. L. REV. 1294, 1296-1300 (1969).

80. 392 U.S. at 441 n.8. Since the *Jones* decision, most lower courts have treated the two sections as similar in scope. *See* Macklin v. Spector Freight Sys., Inc., 478 F.2d 979, 994 (D.C. Cir. 1973); Brady v. Bristol-Meyers, Inc., 459 F.2d 621, 623 (8th Cir. 1972); Brown v. Gaston County Dyeing Mach. Co., 457 F.2d 1377, 1385 (4th Cir.), *cert. denied,* 409 U.S. 982 (1972); Young v. ITT, 438 F.2d 757, 760 (3d Cir. 1971); Waters v. Wisconsin Steel Works of Int'l Harvester Co., 427 F.2d 476, 481-83 (7th Cir.), *cert. denied,* 400 U.S. 911 (1970); Olzman v. Lake Hill Swim Club, Inc., 495 F.2d 1333, 1339 (2d Cir. 1974). Moreover, most lower courts have assumed that the two sections should be interpreted similarly. *See* Sanders v. Dobbs House, Inc., 431 F.2d 1097, 1099 (5th Cir. 1970), *cert. denied,* 401 U.S. 948 (1971); Waters v. Wisconsin Steel Works of Int'l Harvester Co., 427 F.2d 476, 482 (7th Cir. 1970); Cornelius v. Benevolent Protection Order of Elks, 382 F. Supp. 1182, 1197-98 (D. Conn. 1974); Calpepper v. Reynolds Metals Co., 296 F. Supp. 1232, 1243 (N.D. Ga. 1969), *rev'd on other grounds,* 421 F.2d 888 (5th Cir. 1970). For a criticism of the *Jones* decision see Jones v. Alfred H. Mayer Co., 392 U.S. at 449 (Harlan, J., dissenting); C. FAIRMAN, VI HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REVISION 1864-88, at 1207-57 (1971) [hereinafter FAIRMAN]; Casper, *Jones v. Alfred H. Mayer: Clio, Bemused and Confused Muse,* 1968 SUP. CT. REV. 89 [hereinafter Casper]; Henkin, *Foreword: On Drawing Lines—The Supreme Court. 1967 Term,* 82 HARV. L. REV. 63 (1968) [hereinafter Henkin]; 53 MINN. L. REV. 641 (1969); 8 CONN. L. REV. 571, 575-76 (1976).

81. 410 U.S. 431 (1973).

82. 421 U.S. 454 (1975).

83. In *Tillman,* an association operating a community swimming pool limited the use of the pool to white persons. The plaintiff claimed that this conduct violated § 1981, § 1982 and § 2000a. In determining whether the association was exempt as a private club under § 201(e) of The Civil Rights Act of 1964, the Court applied the same construction to § 1981 as to § 1982 because of their historical relationship. Furthermore, the court stated: "The operative language of both § 1981 and § 1982 is traceable to the Act of April 9, 1866 c. 31, § 1, 14 Stat. 27." 410 U.S. at 439. Thus, the Court suggested that § 1981 was tied to § 1982, arising historically from the 1886 Act, and implicitly based upon the thirteenth amendment.

Arguably, the Court's parallel construction of § 1981 and § 1982 can be limited to the facts of *Tillman,* since the Court stated it saw "no reason to construe these sections differently when applied, on these facts, to the claim of Wheaton-Haven that it is a private club." *Id.* at 440. Thus, the Supreme Court construed the two similarly but only to the extent that the exemption could be read into either statute. *See* 8 CONN. L. REV. 571, 578 (1977). Moreover, the opinion contains other ambiguities concerning the historical relationship of § 1981 and § 1982. In a footnote the Court stated that § 1981 is derived from the Revised Statutes § 1977 (1874) which codified the Act of 1870. This statement conflicts with the Court's statement that § 1981 arose from the Act of 1866. 410 U.S. at 439 n.1. *See New Section 1981, supra* note 66, at 571-71. Nevertheless, it seems that *Tillman* did reaffirm the relationship between § 1981 and § 1982 and clearly stood for the

Runyon v. McCrary[84] clarified the origin of section 1981. The first issue before the Court was "whether § 1981 prohibits private, commercially operated, non-sectarian schools from denying admission to prospective students because they are Negroes . . . ."[85] In answering the question in the affirmative, the Court precluded the possibility that the section 1981 could be based solely on the fourteenth amendment which has a state action requirement. The Court stated: "It is now well established that *§ 1 of the Civil Rights Act of 1866, 14 Stat. 27, 42 U.S.C. § 1981,* prohibits racial discrimination in the making and enforcement of private contracts."[86]

In an extended footnote,[87] the Court discussed the historical note appended to the present 42 U.S.C. § 1981 which indicates that section 1981 is derived solely from the 1870 Act. The note omits any reference to section 18 of the 1870 Act, which reenacted section 1 of the 1866 Act, or reference to the 1866 Act itself. The majority concluded that the omission by the commissioners preparing the draft revision was because of either inadvertence or an assumption that the language of the 1866 Act was superfluous.[88] Thus, *Runyon* holds that section 1981 derives from section 1 of the 1866 Act.

The Court, however, did not completely foreclose the possibility that section 1981 was also based on the fourteenth amendment. Although the Court consistently referred to section 1981 as

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proposition that § 1981 was at least partially based on the thirteenth amendment. *See generally* 1977 DET. C.L. REV. 401, 404; Brooks, *Use of The Civil Rights Acts of 1866 and 1871 to Redress Employment Discrimination*, 62 CORNELL L. REV. 258, 261 (1977) [hereinafter Brooks]; 10 TULSA L. REV. 292, 294-95 (1974), 7 CUMBERLAND L. REV. 527, 532 (1977); 31 ARK. L. REV. 314, 316 (1977).

In *Johnson*, the Court initially indicated in a quote from Congress that the 1866 Act was § 1981's source. Congress noted "that the remedies available to the individual under Title VII are co-extensive with the individual's right to sue *under the provision of the Civil Rights Act of 1866, 42 U.S.C. § 1981* . . . ." 421 U.S. at 459 (emphasis added). Next, the Court, in an apparent contradiction, declared that "Title 42 U.S.C. § 1981 . . . [is] the present codification of § 16 of the century-old Civil Rights Act of 1870, 16 Stat. 144 . . . ." *Id.* There were three possible reasons for these conflicting statements: (1) the Supreme Court was confused as to the origin of § 1981; (2) one of the two statements was inadvertent; or (3) the Court was indicating that § 1981 had a dual origin.

84. 427 U.S. 160 (1976).

85. *Id.* at 168.

86. *Id.* (footnote omitted) (emphasis added).

87. *Id.* at 168 n.8. For an extended discussion of the Court's reasoning in the footnote and the dissent's rebuttal, see *New Section 1981*, *supra* note 66, at 582.

88. In *Georgia v. Rachel*, 384 U.S. 780, 790-91 (1965), the Court had previously expressed the view that § 16 of the 1870 Act was a reenactment of § 1 of the 1866 Act. Assuming that view was correct, the revisor's assumption was correct.

derived from the 1866 Act, it gave one indication that section 1981 was also drawn from the Act of 1870. The Court assumed *arguendo* that there was a significant purpose in changing the wording of the 1866 Act in 1870. Nevertheless, the Court asserted that there was no basis for inferring that Congress did not understand that section 1981 would be drawn from both Acts. *Runyon* then leaves open the possibility that section 1981 derives from section 16 of the 1870 Act.[90]

Regardless of the Court's accuracy in determining the historical origins of section 1981, its origins affirm that discriminatory intent is required. First, if The Civil Rights Act of 1866 is the sole source of section 1981, proof of discriminatory intent should be required. In *Jones*, the Supreme Court made the following statements regarding the language of section 1982, which are relevant for ascertaining the standard of proof under section 1981.

> On its face, therefore, § 1982 appears to prohibit *all* discrimination against Negroes in the sale or rental of property-discrimination by private owners as well as discrimination by public authorities. Indeed . . . it must encompass *every racially motivated* refusal to sell or rent and cannot be confined to officially sanctioned segregation in housing . . . .
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> * * * *
>
> [T]he structure of the 1866 Act, as well as its language, points to the conclusion . . . that § 1 was meant to prohibit *all racially motivated* deprivations of the rights enumerated in the statute . . . .[91]

89. All the Court's statements in the text indicated that § 1981 was derived solely from the Act of 1866 and passed pursuant to Congress' power under the thirteenth amendment. 427 U.S. at 168-75.

90. Justice White dissented in *Runyon*, arguing that § 1981 derived solely from the 1870 Act, which was passed under the fourteenth amendment, on the basis of the historical note which indicated that § 1981 derived from § 16 of the 1870 Act. 427 U.S. at 195-202 (White, J., dissenting). Justice White's position is supported by Casper, supra note 80; Comment, *Private Discriminations under The 1866 Civil Rights Act: In Search of Principled Constitutional and Policy Limits*, 7 U. TOL. L. REV. 139, (1975). *Contra*, *Judicial Trend*, *supra* note 66, at 1025-33; Kohl, *The Civil Rights Act of 1866, Its Hour Come Round at Last: Jones v. Alfred H. Mayer Co.*, 55 VA. L. REV. 272 (1969); Larson, *The New Law of Race Relations*, 1969 WIS. L. REV. 470, 489-90. Both Justice Powell and Justice Stevens, concurring in *Runyon*, stated that in their view *Jones* wrongfully decided the legislative history of The Civil Rights Act of 1866, but both agreed *Jones* settled the question of the applicability of § 1981 to private discrimination. 427 U.S. at 186-89 (Powell, J., concurring); *id.* at 189-92 (Stevens, J., concurring).

91. 392 U.S. at 421-22, 426 (emphasis added). In McDonald v. Santa Fe Trail Transp.

Section 1982 derives solely from The Civil Rights Act of 1866. The Supreme Court has stated that sections 1981 and 1982 should be construed consistently and that both have the same operative terms.[92] Thus, if section 1981 derives solely from the 1866 Act (as does section 1982), it seems that the burden of proof under section 1981 should be racially motivated conduct.[93]

Second, even if section 1981 is based on both the 1866 Act and the 1870 Act, it still follows that proof of intent is required. As shown above, the 1866 Act requires proof of discriminatory purpose. *Washington* requires proof of intent under the fourteenth amendment. Thus, the 1870 Act, passed pursuant to the fourteenth amendment, logically must also require such proof. Therefore, if section 1981 is based on both Acts, it requires the same intent since each Act respectively would require intent.

It is patent that section 1981 is not historically related to Title VII of the Civil Rights Act of 1964, since Title VII was enacted approximately one hundred years after section 1981.[94] They should not be construed similarly because they are not historically related.[95] Since section 1981 is historically related to section 1982 and perhaps the fourteenth amendment, it should be

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Co., 427 U.S. 273 (1976), decided the same term as *Runyon*, the Supreme Court repeatedly pointed to The Civil Rights Act of 1866 as the source of § 1981. *Id.* at 286-87. Moreover, the Court examined the legislative history of the 1866 Act, rather than that of the 1870 Act, to determine that § 1981 prohibits racial discrimination against whites as well as nonwhites. *Id.* at 287-93.

92. *See* Runyon v. McCrary, 427 U.S. 160, 173 (1976); Tillman v. Wheaton-Haven Rec. Ass'n, 410 U.S. 431, 439-40 (1973).

93. *See* Lewis v. Bethlehem Steel Corp., 440 F. Supp. 949, 964-65 (D. Md. 1977). This logic may be subject to criticism since the *Jones* language is dictum as to the precise issue of a discriminatory intent requirement. In each case considered by the Court under either section proof of discriminatory purpose has been offered. Nevertheless, although the Court has not explicitly decided the issue, the *Jones* language seems to clearly express the Court's position.

94. In fact, it has been argued that the 1964 Act repealed by implication the 1866 Act and that Title VII was intended to be the sole statutory remedy for employment discrimination. Acknowledging that the two provide "separate, distinct, and independent" remedies against racial discrimination in employment, the Supreme Court rejected this argument in *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. at 461, 466. For an interesting comparison, contrast the Supreme Court's statements concerning the legislative history of The Civil Rights Act of 1866 in Jones, 392 U.S. at 422-37, with its statements concerning Title VII in Griggs v. Duke Power Co., 401 U.S. 424, 430-36 (1971).

95. Like the majority in *Los Angeles*, the lower courts have construed the substantive provisions of § 1981 the same as those of Title VII. *See, e.g.*, Brown v. Gaston County Dyeing Mach. Co., 457 F.2d 1377 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972); Brady v. Bristol-Myers, Inc., 459 F.2d 621 (8th Cir. 1972).

construed like these Acts to require proof of discriminatory intent.

B. The Relationship of the Scope of Section 1981 to Other Civil Rights Legislation

When the Court has previously confronted specific interpretive problems concerning section 1981, it has relied upon areas of law which involve analogous claims.[96] For example, in determining the applicable statute of limitation and the measure of recovery under section 1981, the Court looked to these other areas,[97] and, in so doing, acknowledged the propriety of relying on "a closely analogous claim."[98]

Title VII, the fourteenth amendment, sections 1982 and 1983 all present closely analogous claims from which an appropriate standard of proof can be found for section 1981. All represent a concern to end discrimination.[99] All but section 1982 can be used to redress employment discrimination[100] and the standard of proof associated with each could present a workable standard under section 1981.[101]

No legislation is uniquely similar to section 1981. Nevertheless, the fourteenth amendment appears more analogous than the others. The discussion below will review the similarities and differences between section 1981 and (1) Title VII, (2) the fourteenth amendment, and (3) section 1982.

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96. *See* Johnson v. Ry. Express Agency, 421 U.S. 454 (1975); Sullivan v. Little Hunting Park Inc., 396 U.S. 229 (1969); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1967).

97. In *Runyon* the Court, in deciding which particular Virginia statute of limitations was applicable to the § 1981 claim, analyzed the problem in terms of which statute was most closely analogous to the § 1981 claim. *See* 427 U.S. at 180-82. Additionally, holding that compensatory damages were recoverable under § 1982, the Court in *Sullivan* relied on analogous situations in civil rights suits based on the fourth and fifth amendments. *See* 396 U.S. at 238-40.

98. *See* Johnson v. Ry. Express Agency, 421 U.S. at 462; Runyon v. McCrary, 427 U.S. at 180. Applying state statute of limitations to federal claims, where the federal statute does not provide for one, is not a recent development. *See* Holmbert v. Armbrecht, 327 U.S. 392, 395 (1946). Yet, it does underscore the readiness of the Court to use previously developed judicial strategies in the enforcement of federal statutes. The Court in *Johnson* distinguished two prior cases, noting that in both those cases there "was a substantial body of relevant federal procedural law to guide the decision to toll the limitation period . . . ." 421 U.S. at 466 & n.12.

99. *See* Washington v. Davis, 426 U.S. 229 (1976); Griggs v. Duke Power Co., 401 U.S. 424 (1970); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1967).

100. Section 1982 deals only with discrimination arising from property transactions.

101. Before *Washington*, all save § 1982, applied the Title VII standard to employment discrimination cases. *See, e.g.*, cases cited at notes 19, 21 & 22 *supra*. *See also* text accompanying notes 19-30 *supra*.

Title VII and section 1981 have the following similarities: (1) both are statutes;[102] (2) their power derives from sources other than just the fourteenth amendment;[103] (3) each reaches private as well as official conduct;[104] and (4) they prohibit employment discrimination.[105] Unlike section 1983 and the fourteenth amendment, Title VII and section 1981 reach private conduct—Title VII ostensibly by its reliance on the commerce clause,[106] and section 1981 by its reliance on the thirteenth amendment.[107]

None of these similarities, however, is peculiar to Title VII and section 1981. Section 1982, which is aimed at racially *motivated* conduct, is also based on the thirteenth amendment[108] and reaches private conduct.[109] Both section 1983 and the fourteenth amendment are equally applicable to redress employment discrimination where state action is involved.[110]

Although Title VII and section 1981 have much in common, their differences are more striking than their similarities. Section 1981 protects only race, while Title VII protects race, religion, sex, and national origin.[111] Moreover, section 1981 is not limited to employment discrimination.[112] Although Title VII is a comprehensive statute replete with extensive administrative machinery,[113] section 1981 is a stark pronouncement of equality of legal and contractual rights. The burden of proof under Title VII has been developed in the narrow confines of employment discrimination prohibited by Title VII.[114] If the Title VII standard is utilized under section 1981, the fourteenth amendment will become effectively superfluous when race is involved, since section 1981 coverage embraces fourteenth amendment coverage.

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102. *See* note 36 *supra* and accompanying text.

103. *See* text accompanying notes 66-90 *supra* (as to § 1981). *See also* note 106 *infra* (as to Title VII).

104. *See* text accompanying notes 66-90 *supra*. *See also* United States v. Original Knights of the Ku Klux Klan, 250 F. Supp. 330 (1965).

105. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1970); Waters v. Wisconsin Steel Works of Int'l Harvester Co., 502 F.2d 1309 (7th Cir. 1974).

106. *See* Heart of Atlanta Motel v. United States, 379 U.S. 241, 249-58 (1964) (involving the Public Accommodation Provision of The Civil Rights Act of 1964, Title II).

107. *See* text accompanying notes 66-90 *supra*.

108. For the origins of § 1982, see text accompanying notes 66-90 *supra*.

109. Jones v. Alfred H. Mayer Co., 392 U.S. at 413.

110. *See* text accompanying note 28 *supra*.

111. *See* authorities cited at note 153 *infra*.

112. *See* note 154 *infra* and accompanying text.

113. *See* 42 U.S.C. §§ 2000e-5-16 (1976).

114. *See* Tyler v. Vickery, 517 F.2d 1089, 1096 (5th Cir. 1975).

Similarities between section 1981 and the fourteenth amendment include: (1) their provision for equal benefit or protection of the laws[115] and (2) their broad scope which reaches beyond employment discrimination.[116] Additionally, both cover discrimination on the basis of race, alienage, or suspect classes,[117] while Title VII also covers sex and religion.[118] In fact, where a contractual situation exists, section 1981 has the effect of an equal protection clause without a state action requirement. However, section 1981 reaches private conduct and contractual relations, yet the fourteenth amendment does not.[119]

Sections 1981 and 1982 both evolved from Section 1 of the Civil Rights Act of 1866.[120] Each is based on the thirteenth amendment and, therefore, reaches private as well as official conduct. The rights granted by each section are expressed in similar language: "same right . . . as is enjoyed by white citizens."[121] Section 1982, however, deals solely with property rights. Section 1981 sweeps far beyond, probably including the scope of 1982.[122]

In conclusion, if the sole criterion for determining the appropriate standard of proof was the similarity of the analogous claim, the fourteenth amendment should govern simply because both section 1981 and the fourteenth amendment cover a whole range of areas beyond employment discrimination.[123] Furthermore, Title VII presents the least suitable source for determining the burden under section 1981 since it presents the least analogous claim.

C. Conflicting Policy Considerations

The determinative factor will probably be policy considera-

115. For the text of these provisions see notes 4 & 5 *supra*.

116. *See* text accompanying note 154 *infra*.

117. *See* note 153 *infra* (concerning section 1981); Meloon v. Helgemoe, 436 F. Supp. 528 (D. N.H. 1977) *aff'd* 546 F.2d 602, *cert. denied*, 98 S. Ct. 2858 (1978); Klain v. Pennsylvania State Univ., 434 F. Supp. 571 (D. Pa. 1977) *aff'd Mem.* 577 F.2d 726 (1978) (concerning the fourteenth amendment).

118. *See* Willingham v. Macon Tel. Pub. Co., 482 F.2d 535 (5th Cir. 1973)(en banc); Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970) *aff'd by equally divided Court* 402 U.S. 689 (1971)(per curiam).

119. *See* authorities cited at note 28 *supra*.

120. See text accompanying notes 66-90 *supra*.

121. For the text of both provisions see notes 4 & 50 *supra*.

122. Since most property transactions involve contracts, discrimination in such transactions would fall under § 1981.

123. *Compare* text accompanying notes 138-40 *infra with* text accompanying notes 141-46 *infra*.

tions rather than legislative history. The propriety of extensive use of legislative history in judicial interpretation of federal statutes has often been questioned.[124] In fact, in interpreting The Civil Rights Act of 1866, the Supreme Court has deemphasized the use of legislative history as a guide to modern application of the Reconstruction Act.[125] Documentation of the vehement congressional debates concerning the Act provides little guidance today.[126] Indeed, the expansion of section 1981 to proscribe employment discrimination against whites[127] manifests the marginal relevance of the legislative history in interpreting section 1981.[128] Obviously, most of the congressional debate related to the rights of blacks and not whites.[129] The Supreme Court itself conceded that "the immediate impetus for the bill was the necessity for further relief of the constitutionally emancipated former Negro slaves . . . ."[130] Nevertheless, the court refused to confine the scope of section 1981 to discrimination against blacks.

Any construction of section 1981 should be based upon modern social policy.[131] As Justice Stevens stated in *Runyon,* "even if *Jones* did not accurately reflect the sentiment of the reconstruction Congress, it surely accords with the prevailing sense of justice today."[132]

Present policy concerning discrimination in employment is clear. The official policy of the United States is to effectuate equal opportunity in employment.[133] Numerous official acts have been issued which further this policy.[134] The Civil Rights Act of

124. *See* Schwegmann Bros. v. Calvert. Corp., 341 U.S. 384, 395-97 (1951) (Jackson, J., concurring). *See, e.g.*, 52 COLUM. L. REV. 125 (1952); Henkin, *supra* note 80 (arguing for expansion of the thirteenth amendment to reflect changing values).

125. *See The Expanding Scope, supra* note 48, at 420.

126. *Compare* the *Jones'* majority analysis of the Congressional debates *with* the examination by the dissenters. 392 U.S. at 422-35 and at 457-72. *See also* the legislative history debate in *Runyon.* 427 U.S. at 168-71 and at 195-202. *See also* 29 U. FLA. L. REV. 318, 324 (1977). For a criticism of the Court's version of the legislative intent behind the 1866 Civil Rights Act, see FAIRMAN, *supra* note 80.

127. *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).

128. *See* Runyon v. McCrary, 427 U.S. 160, 189 (1976) (Stevens, J., concurring); "There is no doubt in my mind that the construction of the statute [The Civil Rights Act of 1866] would have amazed the legislators who voted for it."

129. *See* 51 TULANE L. REV. 730, 735 (1977).

130. 427 U.S. at 289.

131. *See Expanding Scope, supra* note 48. *See also* Sullivan, 396 U.S. at 238-40.

132. 427 U.S. at 191 (Stevens, J., concurring).

133. "It is the policy of the United States to insure equal employment opportunities . . . without discrimination because of race, color, religion, sex or national origin." Federal Antidiscrimination in Employment Act, 5 U.S.C. § 7151 (1976).

134. *See, e.g.,* Federal Antidiscrimination in Employment Act, 5 U.S.C. §§ 1752-

1866 also aids this policy because it can be utilized to redress employment discrimination. The 1866 Act, along with the other enactments, is essential to curtail the inertia of the discriminatory tradition.[135]

In order to effectuate the policy against racial discrimination in employment, the burden of proof under section 1981 should be disproportionate impact rather than discriminatory purpose. Such a standard is a practical necessity since a defendant will rarely admit that an employment decision was based upon race. Once the plaintiff has made out his prima facie case, the burden would shift to the defendant to show that the qualification which excludes a disproportionate number of a protected class serves a business necessity and is job related. One commentator has argued that shifting the burden under section 1981 is warranted because: (1) it comports with the evidentiary principle that the party with the best access to the evidence should bear the burden and (2) it best advances the substantive policies of section 1981.[136] As the majority in *Los Angeles* noted, requiring proof of discriminatory intent "would dilute what has been a potent remedy for the ills of countless minority employees subjected to the unlawful discriminatory conduct of their employers."[137]

Finding other policy arguments more persuasive, the Supreme Court has implicitly rejected such policy arguments. In *Washington*, the Court held that to establish a prima facie case of unconstitutional employment discrimination, discriminatory intent or purpose must be shown rather than, or in addition to, a statistical showing of disproportionate impact. Because previous Supreme Court precedent did not dictate the appropriate standard of proof, the *Washington* court considered policy decisions determinative.[138] The controlling factor was the Court's trepidation about the consequences of employing a disproportionate impact standard in constitutional claims.

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens

1754, 7154 (1976), Title VII of The Civil Rights Act of 1964, *as amended*, Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e to 2000e-17 (1976).

135. *See* Brooks, *supra* note 83, at 260.

136. *Expanding Scope*, *supra* note 48, at 431-33.

137. 566 F.2d at 1340.

138. For a thorough discussion see Schwemm, *From Washington to Arlington Heights and Beyond: Discriminatory Purpose in Equal Protection Litigation*, 1977, U. ILL. L.F. 961 [hereinafter Schwemm].

> one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.[139]

The Court also noted that such a standard might invalidate sales tax, bail schedules, utility rates, bridge tolls, license fees, minimum wage laws and professional licensing.[140]

Yet, the *Washington* Court's fear that a disproportionate impact standard would invalidate a wide range of statutes is not justified. First, before *Washington*,[141] the lower courts had applied the Title VII standard, enunciated in *Griggs v. Duke Power Co.*,[142] to employment discrimination under the fourteenth amendment. No such statutes were overturned. Furthermore, no reported decision indicated that any statutes would be overturned. In fact, the lower courts had applied a flexible test, finding that proof of "discriminatory effect did not necessarily result in a demand for a compelling justification . . . ."[143] As one commentator has advanced,[144] several of the Supreme Court's own decisions[145] suggest that the Court's trepidation was warrantless. These cases establish that a standard of discriminatory effect does not always favor a discrimination claim over governmental interests. Thus, it seems that the fear advanced in *Washington* was both theoretical and speculative.[146]

The Supreme Court's analysis in *Washington* is in sharp contrast to its analysis in *Griggs*. The *Griggs* Court concentrated on discriminatory effects[147] in its attempt to achieve Title VII's purposes of eliminating the result of past as well as present employment discrimination. The *Washington* court, however, refused to accept that the race of unsuccessful black applicants entitled

139. 426 U.S. at 248.

140. *Id.* at 248 n.14.

141. *See* Schwemm, *supra* note 138, at 990.

142. 401 U.S. 424 (1971).

143. Schwemm, *supra* note 138, at 990.

144. *See id.* at 992.

145. San Antonio Independent School Dist. v. Rodriquez, 411 U.S. 1 (1973); Jefferson v. Hackney, 406 U.S. 535 (1972); Jones v. Valtierra, 402 U.S. 137 (1971).

146. For an extensive discussion criticizing the Supreme Court's policy arguments in *Washington*, see Schwemm note *supra* 138. *See also*, *Has the Supreme Court Abandoned the Constitution*, Saturday Review (May 28, 1977).

147. *See* Schwemm, *supra* note 138, at 997-98.

them to special consideration. Thus, the Court abandoned one of the major reasons offered in *Griggs* for analyzing employment discrimination claims in terms of effect rather than purpose.

Despite these criticisms, apparently the Court will not further the policy of equal employment opportunity when it perceives a danger of invalidation of a substantial amount of legislation. Section 1981 extends far beyond the field of public employment to the expansive area of public and private contractual relationships.[148] Thus, if discriminatory intent is not required under section 1981, many of the same consequences feared by the *Washington* Court may result. Assuming that the Court fails to realize the fallacy of its reasoning, this fear will predominate over the goal of reaching equal opportunity in employment.

Such a result will be unfortunate, for, as Judge Wright remarked:

> The complaint that analytically no violation of equal protection vests unless the inequalities stem from a deliberately discriminatory plan is simply false. Whatever the law was once, it is a testament to our maturing concept of equality that, with the help of Supreme Court decisions in the last decade, we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.[149]

Similarly, in areas protected by section 1981, the deleterious effect is the same whether produced intentionally or unintentionally.

D. Summary

The above discussion discloses that: (1) section 1981 is historically related to section 1982 and perhaps to the fourteenth amendment, but not to Title VII; (2) the fourteenth amendment presents the most analogous claim, Title VII the least; and (3) the policy behind the *Washington* decision is applicable to section 1981. Each of these observations suggests that the constitutional standard should be carried over to section 1981. Furthermore, the majority of the cases, discussing this issue after *Washington,* bol-

148. *See* note 154 *infra* and accompanying text.

149. Hobsen v. Hansen, 269 F. Supp. 401, 497 (D.D.C. 1967), *aff'd sub. nom.* Smuck v. Hobsen, 408 F.2d 175 (D.C. Cir. 1966) (en banc)(footnotes omitted).

ster this conclusion. On the other hand, *Washington's* treatment of previous lower court cases implies that Title VII standards may be used in section 1981 claims. A thorough examination negates this implication and, as recognized by the *Los Angeles* dissent, leads to the conclusion that a prima facie case of employment discrimination under section 1981 requires proof of purposeful discrimination.

VI. IMPACT OF HOLDING

The impact of the *Los Angeles* holding that Title VII standards of proof apply to section 1981 actions will ultimately depend on the disposition in the Supreme Court.[150] Whether the Court holds that the Title VII standard or that the constitutional standard controls,[151] civil rights litigation will be greatly af-

150. See note 166 *infra* on the effect of the Supreme Court's decision.

151. The Constitution requires that a plaintiff show purposeful discrimination to prevail on an employment discrimination claim. Washington v. Davis, 426 U.S. at 239. Disproportionate impact, however, is still relevant to show intent. "It is also not infrequently true that the discriminatory impact . . . may for all practical purposes demonstrate unconsitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds." *Id.* at 242. *See* Castaneda v. Partida, 430 U.S. 482, 493 (1977); Turner v. Fouche, 396 U.S. 346, 359 (1970); Sims v. Georgia, 389 U.S. 404, 407 (1967) (In these cases dealing with racial discrimination in the selection of juries, the Supreme Court has indicated that a finding of purposeful discrimination is rare and rests on the nature of the jury selection task. Arlington Heights v. Metro. Housing Corp., 429 U.S. 252, 266 & n.13 (1977)) *see also* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1221 n.51 & 1268 (1970). In other contexts, *see* Gomillion v. Lightfoot, 364 U.S. 339 (1960); Lane v. Wilson, 307 U.S. 268 (1939); Guinn v. United States, 238 U.S. 347 (1915); Myers v. Anderson, 238 U.S. 368 (1915); Yick Wo v. Hopkins, 118 U.S. 356 (1886). On discriminatory purpose *see generally* Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95; Brest, *In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976); Ely, *supra*, 79 YALE L. J. 1205 (1970); Note, *Legislative Purpose and Federal Constitutional Adjudication*, 83 HARV. L. REV. 1887 (1970); Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L. J. 123 (1972); Note, *Proof of Racially Discriminatory Purpose under the Equal Protection Clause: Washington v. Davis, Arlington Heights, Mt. Healty, and Williamsburgh*, 12 HARV. C.R.-C.L. L. REV. 725 (1977); Schwemm, *supra* note 138. Noting the distinction between purpose and motive, see A. BICKEL, THE LEAST DANGEROUS BRANCH, 208-21 (1962); Heyman, *The Chief Justice, Racial Segregation, and the Friendly Critics*, 49 CALIF. L. REV. 104, 115-16 (1961); Samford, *Toward a Constitutional Definition of Racial Discrimination*, 25 EMORY L.J. 509, 515-16 (1976). For a lengthy discussion of disproportionate impact in racial discrimination, see Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. Pa. L. Rev. 540 (1977) [hereinafter Perry]. *See also* Simpson, *A Method for Analyzing Discriminatory Effects Under the Equal Protection Clause*, 29 STAN. L. REV. 663 (1977).

The Supreme Court in Arlington Heights v. Metro Housing Corp., 429 U.S. 252 (1977) laid out factors it thought relevant to show purposeful discrimination: (1) disproportionate impact, *id.* at 266, *citing* Washington v. Davis, *supra* at 242; (2) historical background of a decision relating to the law, the requirement, or the conduct, *id.* at 267, *citing* Keyes v. School Dist. No. 1, Denver Colo., 413 U.S. 189, 207 (1973); Griffin v. School Bd., 377 U.S. 218 (1964); Davis v. Schnell, 81 F. Supp. 872 (S.D. Ala.), *aff'd per curiam*, 336 U.S. 933

fected.[152] The significance arises from the fact that section 1981 differs from Title VII. Section 1981: (1) protects a more limited class of plaintiffs;[153] (2) prohibits discrimination in areas other than employment;[154] (3) covers more employers;[155] (4) does not

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(1949); (3) specific sequence of events leading up to the challenged decision, *citing* Reitman v. Mulkey, 387 U.S. 369, 373-76 (1967); Grosjean v. Am. Press Co., 297 U.S. 233, 250 (1936); and (4) legislative history of a law. The Court cautioned that this list is not exhaustive. 429 U.S. at 268.

Presenting the possibility that the Supreme Court may have implicitly adopted the Title VII burden of proving a prima facie case for § 1981 but placed a new, different burden on the employer, the court in *Los Angeles* stated: "It is at least arguable that by not requiring the defendants to meet the job-relatedness standards of Title VII, the court [in *Washington*] implicitly held that employers sued under § 1981 may escape liability by showing something less than job-relatedness." 566 F.2d at 1341 n.13. The Court in *Washington* stated that an employer is only required to show that testing requirements were predictive of successful training without showing the training was related to job performance. *See* 426 U.S. at 249-51.

152. Justice Stevens, however, suggested in *Washington* that the line between discriminatory intent and discriminatory impact is not a clear one and that objective proof of discriminatory impact may be the most probative evidence of intent. 426 U.S. at 253-54 (Stevens, J., concurring). *But see* Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189, 233 (1972) (Powell, J., concurring in part and dissenting in part). Justice Powell noted that there are "intractable problems involved in litigating [the issue of intent.]" *Id.*

153. Section 1981 is limited to a prohibition of discrimination on the basis of race, *see* Runyon v. McCrary, 427 U.S. 160 (1976); Georgia v. Rachel, 384 U.S. 780 (1966); or alienage, *see* Yick Wo v. Hopkins, 118 U.S. 356 (1886); Takashashi v. Fish & Game Comm'n, 324 U.S. at 419 n.7; Graham v. Richardson, 403 U.S. 365, 377 (1971). It does not prohibit discrimination on the basis of national origin, *see* Vazquez v. Werner Continental, Inc., 429 F. Supp. 513, 514-15 (N.D. Ill. 1977); Budinsky v. Corning Class Works, 425 F. Supp. 786, 787-89 (W.D. Pa. 1977); Gradillas v. Hughes Aircraft Co., 407 F. Supp. 865, 867 (D. Ariz. 1975).

Cuban Americans, however, have been held to be a racial group and thus protected by § 1981. Cubas v. Rapid Am. Corp., 420 F. Supp. 663, 665-66 (E.D. Pa. 1976). *See also* Ortega v. Merit Ins. Co., 433 F. Supp. 135, 138-39 (N.D. Ill. 1977); Enriquez v. Honeywell, Inc., 431 F. Supp. 901, 904-06 (W.D. Okla. 1977) (§ 1981 protects persons of Hispanic origin on basis of race); Gomez v. Pima County, 426 F. Supp. 816, 818-19 (D. Ariz. 1976) (Mexican Americans protected because of race, not national origin). It does not prohibit discrimination on the basis of sex, *see* Runyon v. McCrary, 427 U.S. 160, 167 (1976); or religion, *see* Runyon v. McCrary, 427 U.S. 160 (1976). It does not protect poor people. *See* Ybarra v. City of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974) (under § 1983).

154. Section 1981 prohibits discrimination in: (1) the admittance of prospective students in private schools, *see* Runyon v. McCrary, *supra*, at 172; (2) allowing an alien resident awaiting deportation to enter into a contract for fire insurance, *see* Roberto v. Hartford Fire Ins. Co., 177 F.2d 811, 814 (7th Cir.), *cert. denied*, 339 U.S. 920 (1949); (3) police investigations, *see* NAACP v. Levi, 418 F. Supp. 1109, 1117 (D. Colo. 1976); Raffety v. Prince George's County, 423 F. Supp. 1045 (D. Md. 1976). *Cf.* New York v. Baker, 354 F. Supp. 162, 167-68 (S.D. N.Y. 1973) (rejecting § 1981 for discriminatory prosecution, but on basis of lack of proof); (4) the renting of apartments, *see* Stevens v. Dobs Inc., 483 F.2d 82 (4th Cir. 1973), *later opp.*, 373 F. Supp. 618 (E.D. N.C. 1973); Male v. Crossroads Assocs., 337 F. Supp. 1190 (S.D. N.Y.), *aff'd* 469 F.2d 616 (2d Cir. 1971); (5) sale of buildings, *see* Williams v. Matthews Co., 499 F.2d 819, 825 (8th Cir.), *cert. denied*, 419 U.S. 1021 (1974); Clark v. Universal Builders, Inc., 409 F. Supp. 1274, 1278 (N.D. Ill. 1976); (6) granting of state or local permits or licenses, Yick Wo v. Hopkins, 118 U.S. 356 (1886); (7) the running of public or private parks, Tillman v. Wheaton-Haven Rec. Ass'n,

require exhaustion of administrative remedies; (5) is not subject to Title VII time restrictions;[156] and (6) allows more extensive recovery.[157] Additionally, section 1981 may confer the right to a jury trial.[158] If the Court requires proof of intent under section 1981, a plaintiff, unable to prove intent, will be limited to the use of Title VII with its restrictions and requirements. On the other hand, if the Court upholds the Ninth Circuit's decision, a plaintiff may rely on Title VII, section 1981, or both, depending on which statute is more advantageous.

The effect of a ruling on the burden of proof under section

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supra; Olzman v. Lake Hills Swim Club, Inc., 495 F.2d 1333, 1339 (2d Cir. 1974); Scott v. Young, 421 F.2d 143, 145 (4th Cir.), *cert. denied,* 398 U.S. 929 (1970); (8) service by a restaurant, Hernandez v. Erienbusch, 368 F. Supp. 752, 755 (D. Ore. 1973); and (9) the selection of juries, *see* cases cited at note 151 *supra*.

155. Although the federal government is not subject to an employment discrimination suit under § 1981, *see* Brown v. General Services Administration, 425 U.S. 820, 828-29 (1976) (holding that § 717 of The Civil Rights Act of 1964 is the sole remedy for claims of discrimination in federal employment), no employer can claim to be exempt from § 1981 because they employ fewer than fifteen employees, employ persons for fewer than twenty weeks out of the year, are public officials who appoint subordinates to policy making positions, or is a non-profit private membership club. *See* Johnson v. Ry. Express Agency, 421 U.S. at 460 (§ 1981 not subject to the limitations which are imposed by Title VII).

156. Johnson v. Ry. Express Agency, 421 U.S. 454, 462 (1974); Cutliff v. Greyhound Lines, Inc., 558 F.2d 803, 804 (5th Cir. 1977), Goss v. Revlon, Inc., 548 F.2d 405 (2d Cir. 1976); Long v. Ford Motor Co., 496 F.2d 500 (6th Cir. 1974); Dumas v. Mt. Vernon, 436 F. Supp. 866, 870 (S.D. Ala. 1977). A cause of action cognizable only under Title VII requires that a complaint be filed with the Equal Employment Opportunity Commission within 180 days of the discriminatory act. 42 U.S.C. § 2000e-5(e) (1976). Failure to file a timely complaint will preclude jurisdiction of the courts. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974); McDonnell Dougals Corp. v. Green, 411 U.S. 792, 798 (1973). After 180 days the Commission usually issues a "right to sue letter." 42 U.S.C. § 2000e-5(f)(i) (1976). Suit must be filed within 90 days of receipt of this letter. *Id.* Under § 1981 a plaintiff merely must file a complaint within the period provided by the most analogous state statute of limitation. *See* Johnson v. Ry. Express Agency, *supra*.

157. Recovery under Title VII other than attorney's fees is limited to backpay. 42 U.S.C. § 2000e-5(g). *See* Richerson v. Jones, 551 F.2d 918, 925-26 (3d Cir. 1977); Pearson v. Western Elec. Co., 542 F.2d 1150, 1151-52 (10th Cir. 1976). For a discussion of "back pay" awards, see Note, *"Back Pay" Awards Under Title VII of the Civil Rights Act of 1964*, 26 RUTGERS L. REV. 741 (1973). Any backpay award is limited to the wages accruing two years before the filing of the complaint with the EEOC. 42 U.S.C. § 2000e-5(g) (1976). *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 410 n.3 & 420 n.13 (1975).

A party may, however, be entitled to attorneys' fees under Title VII. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 415 (1975); Waters v. Wisconsin Steel Works of Int'l. Harvester Co., 502 F.2d 1309 (7th Cir. 1974), *cert. denied,* 425 U.S. 997 (1976).

Under § 1981 backpay awards are not limited to two years, *see* Johnson v. Ry. Express Agency, 421 U.S. at 462, and furthermore compensatory and punitive damages may be awarded. *Id.* at 460; Allen v. Amalgamated Transit Union, 554 F.2d 876 (8th Cir. 1977); Gore v. Turner, 563 F.2d 159, 163-65 (5th Cir. 1977); Sethy v. Alameda County Water Dist., 545 F.2d 1157, 1160 (9th Cir. 1976).

158. *See* Miller v. Saxbe, 396 F. Supp. 1260, 1262 (D.D.C. 1975).

1981, however, will be limited to those cases where proof of discriminatory impact is involved in a claim of discrimination. For example, discriminatory impact is generally not involved where the discriminatory conduct gives rise to only an individual claim[159] or is not caused by a facially neutral practice.[160] Where "discriminatory treatment" is involved, proof of discriminatory intent has even been required under Title VII.[161] Impact is only important where a practice, requirement, or conduct exists that is neutral on its face but disproportionately affects a protected class.[162]

The significance of the resolution will affect a wide range of discrimination beyond the scope of Title VII. If the Title VII standard is adopted, plaintiffs, denied a benefit available to a like situated class, will be allowed to show that this denial disproportionately affects their class.[163] If the constitutional stan-

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159. For example, when an employee discharge is *not* based on a seniority system or on the failure to meet a (neutral but) racially selective requirement, there is no issue of disparate impact, just the isolated action of discharge. *See, e.g.*, Sanders v. Dobbs Houses, 431 F.2d 1097 (5th Cir. 1970); Townsend v. Exxon Co., 420 F. Supp. 189 (D. Mass. 1976). These are situations of discriminatory treatment not discriminatory impact. See note 160 *infra*.

160. Even under Title VII, a claim of discriminatory treatment as opposed to discriminatory impact will require proof of intent. Teamsters v. United States, 431 U.S. 324 (1978). The Court explained:

> "Disparate treatment" such as alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin.
>
> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.

Id. at 335-36 n.15. The Court did note, however, that under some facts either theory could be applied. *See generally* Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Discrimination*, 71 MICH. L. REV. 59 (1972).

As set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), "a plaintiff claiming disparate treatment may establish a prima facie case of employment discrimination by showing: (1) that plaintiff belongs to a racial minority; (2) that he applied for and was qualifed for a job for which the employer was seeking applicants; (3) that he was rejected; and (4) after rejection the position remained open and the employer continued to seek applicants from persons of plaintiff's qualifications." *Id.* at 798.

It is unclear whether a Supreme Court decision on disparate impact under § 1981 will affect use of the Title VII requirements to establish a prima facie case of disparate treatment under § 1981.

161. *Id.*

162. The facts of *Los Angeles* present a classic example.

163. It should be noted that disproportionate impact under § 1981 has almost exclusively arisen in the employment context. For one author's view on where use of dis-

dard is required under section 1981, plaintiffs, who can show only substantial[164] disparate impact, may not maintain such actions.

Finally, it is fair to assume that any holding reached as to section 1981 will have equal force to actions under section 1982. The effect may be minimal, however, since any claim cognizable under section 1982 is also cognizable under section 1981,[165] and since section 1982 apparently already requires proof of intent.

VII. CONCLUSION

Davis v. County of Los Angeles presented the Ninth Circuit with an excellent forum to further the goals of equal opportunity in employment. Although the decision did further those goals, a close reading of the opinion indicates that the rationale may not be based on sound legal principles. Unlike the Supreme Court, which may choose to ignore legislative history and even its own precedent, the Ninth Circuit must follow the dictates of the higher court. *Los Angeles* now awaits decision[166] in a court hostile to the judicial expansion of civil rights and, like the circuit court decision in *Washington*, is probably doomed to a similar fate. Although the Ninth Circuit opinion is vulnerable to criticism, the issue may have been settled with the rise of the Burger Court and its decision in *Washington v. Davis*.

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proportionate impact is applicable and not applicable *see* Perry, *supra* note 151, at 566-80. *But see* Washington v. Davis, 426 U.S. 229, 248 (1976).

164. The degree of disparity necessary to establish a prima facie case will vary from case to case. *See, e.g.*, Note, 26 DEPAUL L. REV. 650, 654 n.23 (1977) (listing decisions in which prima facie cases were established, and the degree of disparateness in each).

165. *See* note 122 *supra*.

166. As this article went to press, the United States Supreme Court rendered its decision in Los Angeles v. Davis. 39 CCH S. Ct. Bull. p. B 1654 (March 27, 1979). In a five to four decision, the majority held that the plaintiffs' claim had become moot, and thus did not address the merits of the appeal. In his dissenting opinion, Justice Powell noted: "We should reach rather than seek a questionable means of avoiding, the important question—heretofore unresolved by this Court— whether cases brought under 42 U.S.C. § 1981, like those brought directly under the Fourteenth Amendment, require proof of racially discriminatory intent or purpose." *Id.* at B 1667 (Powell, J., dissenting).

The issue of the standard of proof under § 1981 remains unresolved. Justice Powell, however, recognized that:

> The Court's disposition today will leave the decision of the Court of Appeals on the merits as the most pertinent statement of the governing law, even if that decision is not directly binding. Therefore, any future litigation against the County is likely to be controlled by the decision of that court.

Id. at B 1676-77.