NOTE

RACIALLY DISPROPORTIONATE IMPACT OF FACIALLY NEUTRAL PRACTICES—WHAT APPROACH UNDER 42 U.S.C. SECTIONS 1981 AND 1982?

During the past ten years the Supreme Court has rendered several important decisions concerning the elements of a prima facie case of race discrimination.[1] One of the still unanswered questions in this area is whether a plaintiff alleging a violation of 42 U.S.C. sections 1981[2] or 1982[3] must

1. *See* Castaneda v. Partida, 430 U.S. 482 (1977) (discriminatory intent proved by a showing that Mexican-Americans constituted only 39 percent of those called for grand jury duty over an 11 year period in a county with a 79 percent Mexican-American population); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) (proof of racially discriminatory intent or purpose is required to show a violation of the equal protection clause); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) (section 1981 prohibits racial discrimination against white as well as non-white persons); Runyon v. McCrary, 427 U.S. 160 (1976) (section 1981 prohibits private, commercially operated, non-sectarian schools from denying admission to prospective students because they are black); Washington v. Davis, 426 U.S. 229 (1976) (proof of racially discriminatory intent or purpose is required to show a violation of the equal protection clause as applied through the fifth amendment); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (establishing four-pronged test for prima facie case of disparate treatment under Title VII); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (Title VII forbids the use of neutral practices with racially disproportionate effects unless they are job related); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (section 1982 provides a remedy against purely private acts of race discrimination).

2. 42 U.S.C. § 1981 (1970), entitled "Equal rights under the law," provides that:

> 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.

Despite the passage of Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253, which was designed as a comprehensive plan to combat discrimination in employment, section 1981 (which is most widely applicable to employment contracts) nonetheless remains an important statute. In Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975), the Court held that Title VII had neither repealed nor restricted section 1981. See note 51 *infra*. Section 1981 is an independent remedy that can be applied to contracts outside of the employment area, *see, e.g.*, Runyon v. McCrary, 427 U.S. 160 (1976) (contractual relationship of private school and prospective student), and can also be used to fill in the gaps left by the three major exemptions of Title VII: employers of less than 15 employees, 42 U.S.C. § 2000e(b) (1970), private membership clubs with less than 25 employees, *id.*, and religious groups employing workers in religion-oriented jobs, *id.* § 2000e-1.

Furthermore, section 1981's procedures and remedies are often preferable to those of Title VII. In contrast to Title VII, a section 1981 plaintiff may file a complaint immediately without having to exhaust any administrative remedies. Furthermore, the section 1981 statute of

always prove discriminatory intent or, instead, may in appropriate circumstances rely solely upon a showing of racially disproportionate impact.[4] It is

limitations is based on the most relevant state statute of limitations, which, in some cases, may be several years longer than that of Title VII. *See* 2 A. LARSON, EMPLOYMENT DISCRIMINATION § 48.10, at 10-2 (1975). Moreover, although Title VII authorizes the court to utilize a broad range of equitable remedies, *see id.* §§ 54.00-55.00, the only legal relief available to the litigant is an award of up to two years worth of back pay. *See id.* §§ 55.30, .37. Compensatory and punitive damages are not available under Title VII. *See id.* § 55.00. Under section 1981, on the other hand, the full range of legal and equitable remedies, including compensatory and punitive damages, is available. *See* Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 460 (1975).

3. 42 U.S.C. § 1982 (1970), entitled "Property rights of citizens," provides that:

> 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.

Despite the passage of the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 81, section 1982 is still important because it is applicable to transactions involving personal as well as real property and it is capable of reaching those transactions exempted from the reach of Title VIII: the sale or rental of a single family dwelling if effected without the services of a professional realtor or public advertising and if the owner of the dwelling does not own an interest in more than three such dwellings and has not invoked such an exemption within the previous twenty-four month period; the rental of rooms or units in a dwelling, in which the owner resides and in which not more than four families reside independently of each other, 42 U.S.C. § 3603(b) (1970); and the rental of rooms by religious groups and private clubs to their own members, *id.* § 3607.

Section 1982 does not provide clear-cut advantages over Title VIII with respect to procedures and remedies. 42 U.S.C. § 3610 (1970) does establish a very restrictive procedure similar to the complex procedure of Title VII. However, 42 U.S.C. § 3612 (1970) provides an alternative for the individual, allowing him to immediately file a federal district court action which may proceed without regard to any administrative proceedings initiated under section 3610. *See* Miller v. Poretsky, 409 F. Supp. 837 (D.D.C. 1976); Johnson v. Decker, 333 F. Supp. 88 (N.D. Cal. 1971).

Despite their slightly different derivations, see note 46 *infra*, sections 1981 and 1982 have been given a parallel interpretation by the Supreme Court. The Court first indicated that it would do so in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), in which it explicated section 1982. The Court discussed an older decision in which the Supreme Court had held that the predecessor to section 1981 was applicable only to state action. Instead of merely distinguishing that case, the Court expressly overruled it, thus establishing a parallel interpretation for the two sections. *See id.* at 441 n.78. This initial disposition was solidified by the Court's decision in Runyon v. McCrary, 427 U.S. 160 (1976). *See id.* at 190 (Stevens, J., concurring) ("it would be most incongruous to give those two sections a fundamentally different construction").

The language "as is enjoyed by white citizens" that is contained in both sections 1981 and 1982 was interpreted by the Court in McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 285-96 (1976), as the definition of the quality of the rights bestowed. This language does not limit the protection of these two statutes to non-whites. Rather, it establishes a broad principle that guarantees to whites as well as minorities that they shall enjoy the same right to contract and hold property as is enjoyed by those persons who exercise the greatest legal freedom in those areas—traditionally, white citizens. See text accompanying notes 60-66, *infra*.

4. An allegation of racial discrimination may take either of two forms. The first is an allegation of disparate treatment—that the defendant has treated the plaintiff less favorably than others because of the plaintiff's race. The second form, disproportionate impact, alleges a less obvious type of racial discrimination. It charges that the defendant has discriminated against the plaintiff by utilizing, in a racially neutral manner, a selection device or criterion that, although racially neutral on its face, nonetheless operates to the detriment of a disproportionate number of minority persons. The most common facially neutral selection device is the employment test. But neutral practices also include such things as requirements for minimum height

now settled that a plaintiff may state a cause of action under Title VII of the Civil Rights Act of 1964[5] simply by proving that he was damaged by the operation of an employment practice that, although neutral on its face, is shown to have a racially disproportionate impact.[6] Conversely, in order to state a claim under the equal protection clause a plaintiff must produce proof of the defendant's intent to discriminate.[7]

This Note will contrast the Title VII and constitutional approaches to allegations of racially disproportionate impact, examine the language and legislative histories of sections 1981 and 1982 through a review of the Supreme Court's treatment of those statutes, and discuss the relevant legal arguments on the issue of which standard should be applied to disproportionate impact cases under sections 1981 and 1982. The Note will conclude that the Title VII approach should be adopted for such cases.

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and weight, minimum educational attainment, absence of an arrest record and maintenance of a good credit rating.

A case involving disparate treatment necessarily contains an allegation of *real* or *subjective* intent to discriminate. At the heart of a charge that the defendant treated the plaintiff less favorably than others because of the plaintiff's race is the assumption that the defendant knew the plaintiff's race and that this knowledge motivated the challenged action. Recent Supreme Court decisions clearly establish that in order to state a cause of action under the equal protection clause or Title VII, a plaintiff alleging disparate treatment must produce proof of invidious motivation. *See* International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (Title VII); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) (equal protection clause).

Although the Court has not directly addressed the issue of intent under sections 1981 and 1982, dicta in recent disparate treatment cases under section 1981 indicate that the Court will apply the same approach in these cases that it has taken in equal protection and Title VII disparate treatment cases. In Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), the Court discussed section 1982 with reference to its origin in section one of the Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, and concluded that "the structure of the 1866 Act, as well as its language, points to the conclusion urged by the petitioners in this case—that § 1 was meant to prohibit all *racially motivated* deprivations of the rights enumerated in the statute." 392 U.S. at 426 (emphasis added; emphasis on "all" deleted). This is a strong indication of the Court's thinking as to the character of the actions prohibited by the Act, and is solidified by a similar discussion found in Runyon v. McCrary, 427 U.S. 160 (1976), another case involving allegations of disparate treatment. There the Court, while discussing section 1981 by reference to section 1 of the 1866 Act, stated that

> [j]ust as in *Jones* a Negro's § 1 right to purchase property on equal terms with whites was violated when a private person refused to sell to the prospective purchaser *solely because he was a Negro*, so also a Negro's § 1 right to "make and enforce contracts" is violated if a private offeror refuses to extend to a Negro, *solely because he is a Negro*, the same opportunity to enter into contracts as he extends to white offerees.

Id. at 170-71 (emphasis added). This result seems to be mandated by the definition of a disparate treatment charge; that the defendant acted as he did *because of* plaintiff's race necessarily implies action motivated by discriminatory feelings—that is, subjective intent.

5. 42 U.S.C. §§ 2000e to 2000e-17 (1970 & Supp. V 1975).

6. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971). See notes 21-31 *infra* and accompanying text.

7. *See* Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977). See notes 8-20 *infra* and accompanying text.

I. DISPROPORTIONATE IMPACT UNDER THE EQUAL PROTECTION CLAUSE AND TITLE VII

In *Washington v. Davis*[8] the Supreme Court strongly disapproved the notion that a showing of racially disproportionate impact, standing alone, would state a prima facie violation of the equal protection clause. After noting that the fifth and fourteenth amendments serve the important purpose of preventing racial discrimination in "official conduct,"[9] the Court expressed a concern that the furtherance of that purpose by use of the Title VII standard would be far outweighed by the concomitant disruption in the functioning of government.[10] Application of a disproportionate impact standard under the equal protection clause "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."[11]

Disproportionate impact was thus said to be relevant, but only for the purpose of proving the presence of subjective discriminatory intent.[12] Since direct evidence of subjective intent is rarely present, "an invidious discriminatory purpose [must] often be inferred from the totality of the relevant

8. 426 U.S. 229, 239 (1976).

9. *Id.* at 239.

10. *Id.* at 248.

11. *Id.*

12. *Id.* at 242. The statement in *Davis* that "our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact," *id.* at 239, should not be taken to mean that disproportionate impact by itself can never prove discriminatory intent. The Court in *Davis* went on to make clear that in some situations a showing of disproportionate impact will be so suspicious as to constitute proof of intent:

> Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact . . . may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds.

Id. at 242. What emerges from the cases following *Davis* is the principle that the showing of disproportionate impact will be accorded different probative value on the issue of intent according to the circumstances under which it occurs. In Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), the Court held that invidious purpose could not be attributed to a local zoning board simply because its denial of a rezoning request would effectively scuttle a low income housing project and thus have a disproportionate impact on blacks. *See id.* at 268-71. In several school integration cases the Court has held that the disparate racial compositions of various schools within the same district must be corroborated by other evidence showing that this pattern resulted from intentionally segregative actions of the school board. *See* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977); United States v. School Comm'rs of Indianapolis, 429 U.S. 1068 (1977) (per curiam) (vacating and remanding for further consideration in light of *Arlington Heights*). But with respect to jury selection, the Court has held that discriminatory intent was proved by a showing that Mexican-Americans constituted only 39% of those called for grand jury duty over an 11-year period in a county with a 79% Mexican-American population. *See* Castaneda v. Partida, 430 U.S. 482 (1977).

facts."[13] Evidence of disproportionate impact is merely one of the relevant facts to be considered, and, like any other evidence, it varies in probative value according to the particular facts and circumstances. The Court noted that in a few instances, such as the exclusion of blacks from juries, the showing of disproportionate impact by itself "may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds."[14]

The Court has expanded this approach to the equal protection clause beyond the area of employment discrimination, applying it to zoning[15] and school desegregation.[16] In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[17] the Court outlined several circumstantial factors that might be used to establish the presence of subjective discriminatory intent. The historical background of the defendant may be revealing, particularly if it contains other instances of racial discrimination that are similar to the challenged action.[18] "The specific sequence of events leading up to the challenged [action] also may shed some light on the [defendant's] purpose."[19] Departures from normal procedures may lend credence to the plaintiff's charges.[20] In short, a wide variety of circumstances, including disproportionate impact, may in a particular case logically tend to prove the existence of discriminatory intent.

Several years prior to *Davis*, in *Griggs v. Duke Power Co.*,[21] the Supreme Court had stunned the business world[22] by announcing that Title VII forbids the use of "practices that are fair in form, but discriminatory in operation"[23] unless the employer meets the heavy burden of proving that the

13. 426 U.S. at 242.

14. *Id.* See note 12 *supra*.

15. *See* Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause").

16. *See* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 413 (1977) ("The finding that the pupil population in the various Dayton schools is not homogeneous, standing by itself, is not a violation of the Fourteenth Amendment in the absence of a showing that this condition resulted from intentionally segregative actions on the part of the Board").

17. 429 U.S. 252 (1977).

18. *Id.* at 266-68.

19. *Id.*

20. *Id.*

21. 401 U.S. 424 (1971).

22. For a discussion of the impact of *Griggs* on the use of employment tests, see 3 A. LARSON, *supra* note 2, at § 75.22.

23. 401 U.S. at 431. The Court examined the statute's legislative history and concluded that the purpose of Congress was "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Id.* Accordingly, the Court held that

> good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups

practice is job related.[24] The plaintiff alleging disproportionate impact need not show that the practice was motivated by discriminatory intent. In fact, absence of discriminatory intent or presence of good intent will not save a challenged practice if the employer cannot demonstrate that the practice relates to job performance.[25]

An explanation for the irrelevance of subjective intent may be found by examining the nature of the alleged wrongdoing. In a case of disparate treatment, the discrimination is produced by the invidiously motivated wrongful act of the individual defendant. By contrast, in the disproportionate impact situation, the defendant's actions are taken without discriminatory motivation,[26] and are directed toward the screening out of incompetent job applicants. That the neutral test utilized screens out a disproportionate percentage of blacks[27] is not a result of any individual wrongful act of the

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> and are unrelated to measuring job capability . . . . Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.

Id. at 432.

24. The process of proving job relatedness is referred to as validation. Validation can be accomplished by three methods: criterion, content and construct. Criterion validation compares the individual's performance according to the test or other neutral selection device with that individual's subsequent job performance. Content validation simply looks at the test itself and evaluates the relevance of the qualities measured to the job function. The classic example is the typing test for secretaries. Construct validation is an elusive concept that seems to be just content validation directed at psychological or other similarly intangible characteristics. For a thorough discussion of validation see 3 A. LARSON, *supra* note 2, at §§ 77.00-78.00.

25. *See Griggs*, 401 U.S. at 432.

26. Justice Stevens has expressed the belief that not all cases will fit neatly into one of these two categories: "[T]he line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume." *Davis*, 426 U.S. at 254 (Stevens, J., concurring). This is true with respect to alleged contitutional violations, for which proof of disproportionate impact is evaluated as proof of discriminatory intent. The probative value of that showing of impact will vary according to the circumstances in which it occurs, see note 12 *supra*, and thus there will be no bright line between situations in which a showing of impact alone will suffice and those situations in which evidence of impact must be buttressed by other evidence of the defendant's intent.

But this statement is misleading to the extent that it implies that some Title VII cases may properly assume either category at any time as a procedural and evidentiary matter. Under Title VII, impact and intent are two distinct theories. Due to the liberal rules of alternative pleading, both may be considered in the same case with respect to the same set of facts. The two theories should not, however, be indiscriminately mixed together. A showing of the disproportionate impact of a neutral device states a prima facie case. Corresponding to this lesser initial burden for the plaintiff is the job relatedness defense available to the defendant. A plaintiff alleging disparate treatment must meet a higher standard to state a prima facie case by producing evidence of discriminatory intent. And, under this theory of liability the defendant does not have the defense of job relatedness. Disproportionate impact may, of course, be used as part of the plaintiff's evidence on the issue of intent. But this should not be confused with the fact that there exists a separate theory under which liability may follow from just a showing of disproportionate impact.

27. The disproportionate impact approach announced in *Griggs*, see note 23 *supra*, should be regarded as applicable only when the neutral criterion operates to the disadvantage of a

defendant. Rather, this effect—poor performance on a standardized test—can be directly linked to the historically inferior educational and cultural opportunities available to blacks[28]—a societal rather than an individual wrong.[29] Thus the *Griggs* approach can be seen as being designed to minimize the present effects of past evils, the socially fostered vestiges of slavery. For this purpose the subjective intent of the individual defendant is irrelevant.[30] The focus is on the inherent inequality of the facially neutral test and the issue is whether, as a matter of social policy, the use of the test in each particular situation is desirable. If there are facts that might justify the use of the test, the defendant must provide them. Because the use of practices with discriminatory effect is disfavored, the defendant's obligation has been structured as a burden of proof that, if not met, will cause the prohibition of continued use of the test.[31]

This discussion also sheds some light on the *Davis* decision.[32] The Supreme Court there declined to apply the *Griggs* approach because to do so would raise serious issues of public policy that are traditionally the province of the legislature. Given the pervasive and disruptive consequences that such a shifted burden of proof could have for the functioning of the

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minority. When the *Griggs* Court discussed neutral practices with racially disproportionate effects, it did so with the assumption that the effects would be discriminatory against the minority. "The objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." 401 U.S. at 429-30. Consequently the Court referred to "employment procedures or testing mechanisms that operate as 'built-in headwinds' for *minority* groups." *Id.* at 432 (emphasis added).

28. *See Griggs*, 401 U.S. at 430.

29. *Cf.* S. REP. No. 415, 92d Cong., 1st Sess. 14-15 (1971) (distinguishing institutional and individual discrimination).

30. *See Davis*, 426 U.S. at 254 (Stevens, J., concurring): "I do not rely at all on the evidence of good-faith efforts to recruit black police officers. In my judgment, neither these efforts nor the subjective good faith of the District administration, would save Test 21 if it were otherwise invalid."

31. Another way of reaching this explanation of the irrelevance of the defendant's intent is through analysis of the structure of the *Griggs* litigation. The case came to the Supreme Court after the lower courts had found that the neutral practice had been adopted without any discriminatory intent. *See* 401 U.S. at 432. The crucial point that the Court failed to note was that job relatedness would not even have been in issue had the lower courts found that the practice had been adopted with discriminatory intent. That this is true is due to the structure of the burdens of proof involved. The plaintiff has the initial burden of making out a prima facie case of discrimination by showing a disparity drawn along racial lines. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). In order to avail himself of the job relatedness defense, the defendant must first prove that the neutral procedure which produced the disparity was adopted without any discriminatory purpose. The defendant's subjective intent, having already been determined, is not then relevant to the job relatedness defense. This remaining issue is strictly a policy determination of whether the business necessity of the neutral device in the particular situation outweighs the desire of society to eliminate the vestiges of slavery.

32. See text accompanying notes 8-14 *supra*.

government,[33] the Court felt that the *Griggs* approach should only be applied to those areas indicated by Congress.[34] The question thus becomes whether Congress intended that a *Griggs*-type approach be used under sections 1981 and 1982. The following discussion will examine the Supreme Court's treatment of these two statutes in an attempt to discover the relevant legislative intent.

II. TREATMENT OF SECTIONS 1981 AND 1982 BY THE SUPREME COURT

For almost a century, sections 1981 and 1982 lay dormant because they were assumed to have been intended to apply only to state action.[35] Then, in 1968, the Supreme Court breathed new life into these disregarded statutes by holding that section 1982 was applicable to purely private actions. Writing for a majority of seven in *Jones v. Alfred H. Mayer Co.*,[36] Mr. Justice Stewart reaffirmed that section 1982 was derived from the Civil Rights Act of 1866,[37] sidestepped previous Supreme Court cases dealing with the statute,[38] and held, on the basis of the legislative history of the 1866 Act, that that statute was intended by Congress to reach private as well as public acts of racial discrimination.[39] Mr. Justice Harlan, joined in his dissent by Justice White, agreed that section 1982 had originated in the 1866 Act,[40] but disputed that the conclusions of the majority could be drawn from the plain language of the statute[41] or from the legislative history of the 1866

33. See text accompanying note 11 *supra*.

34. "In our view, extension of the [disproportionate impact] rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription." 426 U.S. at 248.

35. Larson, *The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment*, 7 HARV. C.R.—C.L. L. REV. 56, 57 (1972).

36. 392 U.S. 409 (1968).

37. *Id.* at 422.

38. *Id.* at 417-20. Hurd v. Hodge, 334 U.S. 24 (1948), was distinguished as having not involved *purely* private actions; dicta in *Hurd* stating that section 1982 was directed only toward "governmental action," *id.* at 31, was discounted. Dicta to the same effect in two older cases, State of Virginia v. Rives, 100 U.S. 313, 317-18 (1880), and the Civil Rights Cases, 109 U.S. 3, 16-17 (1883), were similarly distinguished by reference to the actual holdings of the cases. 392 U.S. at 420 n.25.

Justice Harlan took exception to this cavalier treatment of the Court's own precedents. *Id.* at 450-52 (Harlan, J., dissenting). He pointed out that the Court had, less than two decades after the passage of the Civil Rights Act of 1866, quite clearly characterized that act in dictum as being directed only at state action: "This law is clearly corrective in its character, intended to counteract and furnish redress against State laws and proceedings, and customs having the force of law, which sanction the wrongful acts specified . . . ." Civil Rights Cases, 109 U.S. 3, 16-17 (1883), *quoted in* 392 U.S. at 451 (Harlan, J., dissenting).

39. 392 U.S. at 422-36.

40. *Id.* at 453.

41. Sections 1981 and 1982 are both phrased so as to grant to all persons "the same right . . . as is enjoyed by white citizens" to do enumerated acts. See notes 2 & 3 *supra*. Justice Harlan pointed out that "there is an inherent ambiguity in the term 'right' as used in § 1982." 392 U.S. at 452-53.

Act.[42] Justice Harlan's opinion argued that the 39th Congress was prompted to pass the 1866 Act by concern about discriminatory actions that were primarily state-connected, either as official governmental acts or as acts performed with the acquiescence and support of governmental authority.[43]

The next important development occurred in *Johnson v. Railway Express Agency, Inc.*,[44] in which the Court in dictum approved the holdings of several circuit courts of appeals[45] that section 1981 also applied to purely private acts. The Court's treatment of this issue was superficial and did not focus on the origin of section 1981, about which there is considerable controversy.[46] In fact, successive paragraphs on the same page of the

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> The "right" referred to may either be a right to equal status under the law, in which case the statute operates only against state-sanctioned discrimination, or it may be an "absolute" right enforceable against private individuals. To me, the words of the statute, taken alone, suggest the former interpretation, not the latter.

Id. at 453 (footnote omitted).

42. 392 U.S. at 454-73.

43. *Id.* at 449-80; *see* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 289 (1976), *quoted in* text accompanying note 65 *infra*.

44. 421 U.S. 454 (1975).

45. Those decisions are listed at 421 U.S. at 459 n.6. *But see* Runyon v. McCrary, 427 U.S. 160, 172 (1976) (characterizing this aspect of *Johnson* as a holding rather than a dictum).

46. The genesis of both section 1981 and section 1982 was section 1 of the Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, which was passed pursuant to the enforcement clause of the thirteenth amendment. *See* Runyon v. McCrary, 427 U.S. 160, 201-02 (1976) (White, J., dissenting); *Jones*, 392 U.S. at 437-38. However, there is authority for the proposition that the current form of section 1981 is derived from the Enforcement Act of 1870, ch. 114, § 16, 16 Stat. 140, 144, which was enacted under the fourteenth amendment. *See Runyon*, 427 U.S. at 202 (White, J., dissenting). Section 16 of the 1870 Act states:

> [T]hat *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.

(emphasis added). Thus, it contains language that is identical to the current text of section 1981 (emphasized in the above quotation, with the exception that section 1981 reads "to no other" in place of "none other"). See note 2 *supra*. On the other hand, the language of section 1 of the 1866 Act states:

> 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 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.

Comparison reveals that it is slightly different from the current text of section 1981. But, on the other hand, section 18 of the 1870 Act, ch. 114, § 18, 16 Stat. 144, expressly re-enacts the whole of the 1866 Act and stipulates that the provisions of section 16 of the 1870 Act, *supra*, should be "enforced according to the provisions of [the 1866 Act.]" *Id.* This confusing situation was not

opinion identify the 1866 Act[47] and section 16 of the Enforcement Act of 1870[48] as the source of section 1981.[49] Because the Court's holding was that the filing of an administrative complaint with the Equal Employment Opportunity Commission (EEOC)[50] does not toll the section 1981 statute of limitations, much of the majority's opinion was devoted to establishing that section 1981 is independent of and unaffected by the Civil Rights Act of 1964.[51] The justices who had dissented in *Jones* joined in the opinion, feeling that the narrowness of the actual holding had preserved for another day the issue of the applicability of section 1981 to private acts.[52]

This acquiescence was not present, however, in the recent case of *Runyon v. McCrary*,[53] in which the five-member majority held that section 1981 prohibits a private, commercially operated, non-sectarian school from denying admission to prospective students because of their race.[54] The Court held that section 1981 is derived from section 1 of the Civil Rights Act of

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clarified by the codification of federal laws that was undertaken in the early 1870's. Regarding the codification generally see *Runyon*, 427 U.S. at 168 n.8. That effort culminated in the enactment of Revised Statutes of 1874, §§ 1977 and 1978, the immediate predecessors of 42 U.S.C. §§ 1981 and 1982, respectively. *See Jones*, 392 U.S. at 422 n.28. The codification committee, in the "historical note" appended to each section, indicated that R.S. § 1977 was derived from section 16 of the 1870 Act while R.S. § 1978 was drawn from section 1 of the 1866 Act. The correctness of this annotation and the source of section 1981 have spawned considerable controversy. See notes 57-59 *infra* and accompanying text.

47. See note 46 *supra*.

48. See note 46 *supra*.

49. *See* 421 U.S. at 459.

50. Regarding EEOC procedures, see 2 A. LARSON, *supra* note 2, at §§ 48.00-50.00.

51. *See* 421 U.S. at 459-61. The Court convincingly showed that "[d]espite Title VII's range and its design as a comprehensive solution for the problem of invidious discrimination in employment," *id.* at 459, the law had neither repealed nor narrowed earlier civil rights statutes.

> "[T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes." Alexander v. Gardner-Denver Co., 415 U.S., at 48. In particular, Congress noted "that the remedies available to the individual under Title VII are co-extensive with the indiv[i]dual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and that the two procedures augment each other and are not mutually exclusive." H.R. REP. No. 92-238, [92d Cong., 1st Sess.] P. 19 (1971). Later, in considering the Equal Employment Opportunity Act of 1972, the Senate rejected an amendment that would have deprived a claimant of any right to sue under § 1981. 118 CONG. REC. 3371-3373 (1972).

Id.

52. *See* Runyon v. McCrary, 427 U.S. 160, 192, 195 n.5, 213-14 (1976) (White, J., dissenting).

53. 427 U.S. 160 (1976).

54. *Id.* at 168, 172. The Court first established that the conduct complained of "amount[ed] to a classic violation of § 1981." *Id.* at 172. It then held that, as applied in this case, section 1981 did not unconstitutionally infringe upon the right of free association, *id.* at 175-76, the right to privacy, *id.* at 177-79, or the right of parents to direct their child's education, *id.* at 176-77. For further discussion of these issues, see Comment, *Section 1981 After* Runyon v. McCrary: *The Free Exercise Right of Private Sectarian Schools to Deny Admission to Blacks on Account of Race*, 1977 DUKE L.J. 1219; Note, *Section 1981 and Private Groups: The Right to Discriminate Versus Freedom from Discrimination*, 84 YALE L.J. 1441 (1975).

1866,[55] which was interpreted in *Jones* as providing a remedy against purely private acts of racial discrimination.[56] The historical note appended to section 1981 that designates section 16 of the Enforcement Act of 1870[57] as its source was dismissed as the result of a clerical error.[58] The majority then argued that the entire issue of the origin and applicability of section 1981 had been settled in previous decisions.[59]

In *McDonald v. Santa Fe Trail Transportation Co.*,[60] decided the

55. 427 U.S. at 168-70.

56. See notes 36-43 *supra* and accompanying text.

57. See note 46 *supra*.

58. 427 U.S. at 168 n.8.

59. *Id.* at 168-72. Justice White, dissenting, argued that the portion of *Johnson* relied on by the majority was dictum. *Id.* at 213-14. He also claimed that other cases cited by the majority had never addressed the issue of the applicability of section 1981 to private actions. *See id.*

Justice White further argued that the codification of the Revised Statutes in 1874 had repealed, by clear and unambiguous language, all statutes not included within the Revised Statutes. The historical note clearly identified section 16 of the 1870 Act as the source of R.S. § 1977 and this could not properly be dismissed so easily as clerical error. *See* 427 U.S. at 205-10. Furthermore, he noted that the language of section 1981 is identical to that of section 16 of the 1870 Act but slightly different from that of section 1 of the 1866 Act. *See id.* at 195-97 n.6; note 46 *supra*. Also, Justice White stressed that section 1981 refers to "all persons" while section 1982 is directed toward "all citizens." He noted that "persons" includes aliens, who clearly were not among those whom Congress sought to protect from the badges and incidents of slavery. Thus, he concluded that section 1981 must be derived from section 16 of the 1870 Act, which refers to persons, rather than from section 1 of the 1866 Act, which refers to citizens. 427 U.S. at 195-97 n.6, 202-05. See note 46 *supra*.

Justice White's substantive analysis of section 1981 turned on an examination of the right to contract. He argued that "it is and always has been central to the very concept of a 'contract' that there be 'assent by the parties . . . .'" 427 U.S. at 194. Thus, he reasoned:

> The right to make contracts, enjoyed by white citizens, was therefore always a right to enter into binding agreements only with willing second parties. Since the statute only gives Negroes the "same rights" to contract as is enjoyed by whites, the language of the statute confers no right on Negroes to enter into a contract with an unwilling person no matter what that person's motivation for refusing to contract. What is conferred by 42 U.S.C. § 1981 is the *right*—which was enjoyed by whites—"to make contracts" with other willing parties and to "enforce" those contracts in court.

Id. (emphasis in original).

Justice White also noted that the Court had, within two decades of the enactment, twice referred in dictum to R.S. § 1977 (section 1981) as being directed only toward equality under the law—that is, toward state related actions. *See* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886); Civil Rights Cases, 109 U.S. 3, 16-17 (1883), *quoted in Runyon*, 427 U.S. at 202-04 (White, J., dissenting).

The White argument drew the support, but not the votes, of Justices Powell and Stevens. Justice Powell stated that

> [i]f the slate were clean I might well be inclined to agree with Mr. Justice White that § 1981 was not intended to restrict private contractual choices. Much of the review of the history and purpose of this statute set forth in his dissenting opinion is quite persuasive. It seems to me, however, that it comes too late.

427 U.S. at 186 (Powell, J., concurring). Mr. Justice Stevens was even stronger in his support of Justice White, stating that "[f]or me the problem in these cases is whether to follow a line of authority which I firmly believe to have been incorrectly decided." *Id.* at 189 (Stevens, J., concurring).

60. 427 U.S. 273 (1976).

same day as *Runyon*, the Court expanded the scope of section 1981 even farther by holding that it forbids private acts of racial discrimination that are directed against white persons.[61] The Court rejected the argument that the phrase "as is enjoyed by white citizens"[62] that is contained in section 1981 should limit the statute's protection to non-whites.[63] That phrase was construed as being the standard used to illustrate the character of the rights being protected.[64] And while the Court acknowledged that "the immediate impetus for the bill was the necessity for further relief of the constitutionally emancipated former Negro slaves,"[65] it concluded that the purpose of Congress was to establish a principle of racial equality benefitting all persons—"a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves."[66]

From the discussions in the foregoing cases three facts may be ascertained. First, the 39th Congress was prompted to act by concern for the plight of blacks who needed protection from actions by whites that were often state-sanctioned and always intentional. Second, the purpose of Congress in enacting the Reconstruction civil rights statutes was to establish a forward-looking principle of racial equality broader than that strictly necessary to eliminate the reactionary white conduct of that era. And finally, the statutes that were enacted are phrased in very broad language that is capable of being interpreted to cover situations that were not or could not have been considered by the enacting Congress, but which nevertheless may be included consistently with the remedial purpose underlying the statutes. This conflict between the enacting Congress' conceptualization of the statutes' coverage and the process of liberal statutory interpretation to effectuate the statutes' underlying purpose is the major issue relevant to the applicability of the *Griggs* disproportionate impact approach under sections 1981 and 1982.

III. USE OF THE *GRIGGS* APPROACH UNDER SECTIONS 1981 AND 1982

The strongest argument against permitting a showing of disproportionate impact to state a prima facie case under sections 1981 and 1982 is that the legislative history of the statute from which these sections are derived [67] evidences a congressional intent to outlaw only those actions that were

61. *Id.* at 287.
62. This phrase appears in both sections 1981 and 1982. See notes 2-3 *supra*.
63. 427 U.S. at 286-96.
64. *Id.* at 287.
65. *Id.* at 289.
66. *Id.* at 296.
67. *See Jones*, 392 U.S. at 449-77 (Harlan, J., dissenting).

performed with invidious discriminatory motivation. The Supreme Court has already effected a "construction of the statute that would have amazed the legislators who voted for it;"[68] further stretching of the much disputed legislative history would be simply disingenuous.[69] Did the Congress in 1866 or 1870 intend to render illegal and actionable conduct of private individuals that, although racially neutral on its face, incidentally and unintentionally resulted in racially disproportionate impacts upon contractual relationships? The question seems to barely survive the asking. The Reconstruction Congress was concerned with securing for recently emancipated blacks the status of citizenship and the basic rights appurtenant thereto.[70] The Acts were meant to deal with the most egregious forms of

68. *Runyon*, 427 U.S. at 189 (Stevens, J., concurring).

69. [T]he language of the impassioned Reconstruction Era congressional debates is of limited value today. Moreover, as many critics have pointed out, the seminal decision in *Jones* has moved the Court so far from the original meaning of the 1866 Act that to return to legislative intent for refinement of section 1981's current applicability would be pointless.

Comment, *Civil Rights—42 U.S.C. § 1981: Keeping a Compromised Promise of Equality to Blacks*, 29 U. FLA. L. REV. 318, 324 (1977) (citations omitted).

70. Heated congressional debate occurred before the first sentence of the Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866), was amended so as to declare explicitly and unequivocally that Negroes are citizens. One Senator voiced the opinion that the thirteenth amendment had removed "the only obstacle in the way of citizenship" and that they had thus become citizens automatically, although he acknowledged the difficulties presented for that argument by the Supreme Court's Dred Scott decision, Scott v. Sandford, 60 U.S. (19 How.) 393 (1856), in which the Court held that the framers had not intended broadly phrased constitutional provisions to include Negroes. *See* 36 CONG. GLOBE 506-07 (1866) (remarks of Sen. Johnson). But the vast majority of congressmen assumed that Negores were not citizens. *See, e.g., id.* 497-98 (remarks of Sen. Van Winkle). Furthermore, several legislators contended that Congress did not possess the power to make Negroes citizens and that a specific constitutional amendment was necessary. *See, e.g., id.* 499 (remarks of Sen. Cowan) (the thirteenth amendment empowered Congress to legislate only to enforce the liberation of the slaves and no more); *id.* 523-24 (remarks of Sen. Davis) (the congressional power to make persons citizens by naturalization applies only to persons formerly foreigners who renounce allegiance to a foreign power; it does not apply to non-citizens who have no prior foreign allegiance).

The very basic nature of S. 61, 39th Cong., 1st Sess. (1866), the bill that became the 1866 Act, is illustrated by the comments of the bill's sponsor, Senator Trumbull, and its most outspoken opponent, Senator Davis. Senator Trumbull characterized the bill as "the most important measure . . . since the . . . constitutional amendment abolishing slavery." He stated that

> this measure is intended to give effect to that declaration and secure to all persons within the United States practical freedom. There is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect . . . . Of what avail will it now be that the Constitution of the United States has declared that slavery shall not exist, if in the late slaveholding States laws are to be enacted and enforced depriving persons of African descent of privileges which are essential to freemen?
>
> It is the intention of this bill to secure those rights.

36 CONG. GLOBE 474 (1866). The fundamental character of the rights in question is apparent in light of the attacks levelled by Senator Davis. He contended that "the whole subject of free negroes and of slave negroes" was constitutionally the province of the states. *Id.* at 530. He stated that "[t]his is a Government and a political organization by white people. It is a principle of that Government and that organization before and below the Constitution, that nobody but

reactionary white conduct;[71] they were not intended to fashion an evidentiary presumption designed to root out more subtle forms of discrimination.[72] Even if it is accepted that the legislative history of the two Acts supports the Supreme Court's view that these laws were intended to regulate private behavior,[73] it cannot seriously be argued that that legislative history also supports the contention that Congress meant these laws to outlaw any conduct with unintended racially disproportionate effects upon contracts. A reading of the relevant congressional debates reveals absolutely nothing that would lend credence to such a notion.[74] On the contrary, these sources give every indication that these laws were intended only to outlaw those actions undertaken with invidious, discriminatory motivation.[75]

The four lower federal courts that have addressed this issue since the *Davis* decision, while taking two separate paths to reach the same conclusion, have held that subjective intent must be proved under section 1981.[76] Two of the courts were faced with suits filed against municipal governments

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white people are or can be parties to it." *Id.* He contended that the power to amend the Constitution did not include within it the "power to revolutionize," to "subvert" and to "change our form of Government" by making Negroes citizens. *Id.*

71. The debates on the Freedmen's Bureau Bill, S. 60, 39th Cong., 1st Sess. (1866), and the Civil Rights Bill, S. 61, 39th Cong., 1st Sess. (1866), are illustrative of this point. Supporters of these measures recounted instances of beatings and murders of freedmen. *See, e.g.*, 36 CONG. GLOBE 339 (1866) (remarks of Sen. Creswell) ("combinations of returned rebel soldiers have been formed for the express purpose of persecuting, beating most cruelly, and in some cases actually murdering the returned colored soldiers of the Republic"). Also reported were conspiracies to maintain, through the use of economic forces, the dependent and subservient condition of the Negroes. For example, see the published agreement subscribed to by the farmers of the James River, Virginia area that is included in the remarks of Representative Eliot. *Id.* at 517. This agreement bound the signers to deal with freedmen laborers according to a set of regulations that governed nearly every possible aspect of the employment relationship and that forbade the hiring of a laborer who had been discharged by another of the signers. The congressmen also placed great emphasis on the unabashed passage of laws designed to circumvent the thirteenth amendment and establish a system of de facto peonage. *See id.* 322, 340, 474-75, 516-17, 1123.

72. What was strived for was an equality of opportunity, particularly in the pursuit of the basic necessities of life. The relatively limited character of the Civil Rights Bill is illustrated by the fact that the bill's sponsor, Senator Trumbull, was repeatedly forced to reiterate that it applied only to civil rights and did not include the question of Negro suffrage, *see, e.g.*, 36 CONG. GLOBE 606 (1866), and would not have the effect of invalidating state anti-miscegenation statutes, *see, e.g., id.* 505, 600.

73. See notes 36-39, 44-45 *supra* and accompanying text.

74. See the pages listed in the index, 36 CONG. GLOBE VIII (Civil Rights Bill, S. 61, 39th Cong., 1st Sess. (1866) (Senate)), XIX (Freedmen's Bureau Bill, S. 60, 39th Cong., 1st Sess. (1866) (Senate)), LVIII (Civil Rights Bill (House)), LXVIII (Freedmen's Bureau Bill (House)) (1866).

75. See note 71 *supra*.

76. *See* City of Milwaukee v. Saxbe, 546 F.2d 693, 705 (7th Cir. 1976); Croker v. Boeing, Co., 437 F. Supp. 1138, 1181 (E.D. Pa. 1977); Guardians Ass'n v. Civil Service Comm'n, 431 F. Supp. 526 (S.D.N.Y. 1977); Johnson v. Hoffman, 424 F. Supp. 490, 494 (E.D. Mo. 1977).

and, without analysis, assumed *Davis* to be the controlling precedent.[77] Two other courts analyzed the language and history of section 1981 and concluded that its interpretation should parallel that of the fourteenth amendment.[78]

In *Johnson v. Hoffman*,[79] a black who was refused induction into the armed forces under a regulation that permitted rejection on a finding of frequent encounters with law enforcement agencies filed suit seeking to have the regulation invalidated as unconstitutional and violative of Title VII and section 1981 because of its disproportionate impact upon blacks. The District Court for the Eastern District of Missouri held that the armed forces were not subject to Title VII and that the regulation was constitutional under *Davis* because there was no showing of discriminatory intent.[80] The court then analyzed the language and history of section 1981 and held that the question of intent was controlled by the constitutional standards of *Davis*.[81] After reciting the language of section 1981, the court concluded that "[t]he clear import of this statute is to provide for equal treatment under the law."[82] The court noted that section 1981 was based upon section one of the Civil Rights Act of 1866,[83] but placed much greater emphasis upon the fact that Congress later incorporated much of the statute's language into the fourteenth amendment.[84] This circumstance, coupled with the actual language of section 1981, led the court to conclude that "claims under § 1981 parallel claims under the Fourteenth Amendment."[85]

In *Croker v. Boeing Co.*,[86] a class action employment discrimination case involving claims of both disparate treatment and disproportionate impact, the District Court for the Eastern District of Pennsylvania adopted the arguments made by the court in *Hoffman*.[87] The court further stated that "[t]he language of § 1981, that 'all persons . . . [should] have the same right . . . to the full and equal benefit of all laws' clearly is parallel to the equal protection clause of the Fourteenth Amendment."[88]

This asserted parallelism of section 1981 and the fourteenth amend-

77. *See* City of Milwaukee v. Saxbe, 546 F.2d 693, 705 (7th Cir. 1976); Guardians Ass'n v. Civil Service Comm'n, 431 F. Supp. 526, 533-34 (S.D.N.Y. 1977).

78. *See* Croker v. Boeing Co., 437 F. Supp. 1138, 1181 (E.D. Pa. 1977); Johnson v. Hoffman, 424 F. Supp. 490, 494 (E.D. Mo. 1977).

79. 424 F. Supp. 490 (E.D. Mo. 1977).

80. *Id.* at 493-94.

81. *Id.* at 494.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. 437 F. Supp. 1138 (E.D. Pa. 1977).

87. *Id.* at 1181.

88. *Id.*

ment seems convincing until one recalls the subject of the dispute between the majority and dissenting justices in *Jones* and *Runyon*. In those two cases the majorities, in order to avoid the fourteenth amendment's state action requirement and apply the statutes to private parties, were forced to the conclusion that sections 1981 and 1982 were enacted pursuant to the thirteenth amendment.[89]

Upon closer inspection, however, the decisions in *Jones* and *Runyon* do not undermine the fourteenth amendment-oriented arguments of *Hoffman* and *Croker*. The decision that those statutes were not enacted pursuant to the fourteenth amendment's enforcement clause determines only that they are not, because of their origin, automatically subject to that amendment's state action requirement. This determination does not logically preclude a finding that the statutes are closely related to the fourteenth amendment; likewise it does not compel a conclusion that the standards for interpretation of these statutes must be different than the standards of the fourteenth amendment. Had the Supreme Court held the statutes applicable only to state action, proof of discriminatory intent would be indispensable.[90] But the opposite holding with respect to applicability to private action does not necessitate the opposite result with respect to intent, because the burden of proving intent may be derived otherwise than as a concomitant of state action.[91] Thus it is logically consistent to find that the intent of Congress was to direct both sections 1981 and 1982 and the fourteenth amendment against intentionally discriminatory actions, even though the former were enacted independently of the latter.

However, the *Hoffman* and *Croker* courts did not actually attempt to examine the relevant legislative history to discern the congressional intent respecting section 1981. Instead they seized upon a similarity of wording, and mechanically applied *Davis*. This approach is really just a variant of that taken by the two courts that, when faced with a section 1981 suit against a public official, seized upon the similarity of defendants as a reason to apply *Davis*.[92] Although it would be logically consistent with the decisions in *Jones* and *Runyon* to find that congressional intent was to direct section 1981 only against intentional actions, thus giving the statute an interpretation parallel to that of the fourteenth amendment in *Davis*, these lower courts took illogical short cuts and failed to determine such congressional intent.

89. See notes 36-43, 53-59 *supra* and accompanying text.

90. *See Davis*, 426 U.S. at 238-48.

91. With respect to certain crimes, intent is an essential element according to the common law. In other cases the legislature may expressly specify that intent must be proved. At other times the requirement of proof of intent is derived from the intention of the legislature as revealed through the process of statutory interpretation.

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

A second illogical short cut was taken by the court in *Croker*. There the court justified its application of *Davis* to section 1981 by stating that if disproportionate impact could state a claim under section 1981 then "the Supreme Court's decision in *Davis* would be meaningless, since section 1981 is applicable in every case in which constitutional claims of employment discrimination are asserted."[93] In a practical sense, it is true that a decision holding intent unnecessary to state a claim under section 1981 would mean that plaintiffs would thereafter proceed under that statute rather than under the equal protection clause. But that signifies only that the constitutional standards have been superseded by more stringent statutory standards; it does not render meaningless the decision that elucidated those constitutional standards. *Davis* remains meaningful both as an explication of equal protection standards and as a procedurally proper decision. With regard to the latter it must be noted that the parties had assumed *Griggs* to be controlling and thus the grant of certiorari was limited to the issue of whether the court of appeals had misapplied that case.[94] The Supreme Court disregarded this framing of the issue and exercised its power to "notice a plain error not presented" by the arguments.[95] In doing so, it was not necessary or proper for the Court to render an opinion as to the merits of the plaintiff's section 1981 claim.[96] Thus, the argument of the *Croker* court is not sound.

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93. 437 F. Supp. at 1181.

94. *See Davis*, 426 U.S. at 238. The plaintiffs in *Davis* alleged that an aptitude test given to applicants for the District of Columbia police force had a disproportionate impact upon blacks and demanded relief under a municipal statute, section 1981 and the equal protection clause as applied through the fifth amendment. *See id.* at 233. After the suit had been filed, the coverage of Title VII was extended to include federal and state government employers. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. §§ 2000e, 2000e-1 to -6, -9, -13 to -17 (Supp. V 1975)). The district court, treating the suit as one under Title VII and the fifth amendment, *see* Davis v. Washington, 348 F. Supp. 1, 15-16 (D.D.C. 1972), held that the test was "reasonably and directly related" to the requirements of the police training program, *id.* at 18. The District of Columbia Circuit agreed that the plaintiffs' evidence of disproportionate impact had shifted to the defendant the burden of proving that the challenged aptitude test was job related. Davis v. Washington, 512 F.2d 956, 959-61 (D.C. Cir. 1975). But the circuit court disagreed with the district court's conclusion that the defendant had met that burden of proof and reversed, thus granting the plaintiffs' motion for summary judgment. *Id.* at 959, 961-65. After noting that the plaintiffs' motion had been based solely on the claim that the test violated the fifth amendment, *Davis*, 426 U.S. at 234, 236, the Supreme Court reversed the circuit court and strongly condemned the application of Title VII standards to a constitutional claim, *id.* at 238-39.

95. 426 U.S. at 238.

96. The Supreme Court's usual practice is to follow the prescription of Justice Brandeis and avoid issuing opinions that are any broader than is necessary for the disposition of the exact questions before it. *See* Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). It is ironic that the Court disregarded this practice with respect to a different issue in the *Davis* decision. After disposing of the constitutional issue, the Court went on to note that the defendant had satisfied his burden of proving job relatedness under the standards of Title VII.

In conclusion, it can be said that the post-*Davis* decisions addressing the issue of disproportionate impact under section 1981 have reached a plausible conclusion by an improper path. Had these courts examined the legislative history of section 1981 they would have found that Congress was prompted to act by a concern over reactionary white actions of the most intentional and malicious nature.[97] Upon this finding they could have based their decisions that unintentional disproportionate impact will not state a prima facie case under section 1981.

The understanding of the Congress that enacted a law, however, is not always deemed conclusive of how that law should be applied in future circumstances. Sutherland's treatise on statutory construction states:

> Legislation is often written in terms which are broad enough to cover many situations which could not occur to mind at the time when it is enacted. And so a statute, expressed in general terms and words of present or future tense, will be applied, not only to situations existing and known at the time of the enactment, but also prospectively to things and conditions that come into existence thereafter.[98]

This principle has most often been applied in response to technological change. Thus the Supreme Court has held that goods which properly fall in a class subject to a tariff cannot be exempted because they had not been invented or manufactured at the time of enactment.[99] Likewise, the Tenth Circuit has held that a wrongful death statute phrased in terms of carriages included motor trucks even though they had not yet existed when the statute was enacted.[100]

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426 U.S. at 248-52. Although this can be defended here on the ground that the courts were dealing with competing, mutually exclusive motions for summary judgment, *see id.* at 234, Justices Brennan and Marshall felt that the statutory issue should not have been reached, *id.* at 257 (Brennan, J., dissenting).

97. See note 71 *supra*.

98. 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 49.02, at 229 (4th ed. 1973).

> Use of legislative intent as the governing criterion for interpretation has a tendency, in general, to focus attention on circumstances and events of the time when a bill was enacted. But circumstances and situations developing after the enactment of a statute may be of great or even conclusive significance in determining what meaning was conveyed. Legislative standards are often couched in general terms which are capable of embracing and intended to embrace future applications which are not and cannot be foreseen at the time of enactment. Therefore a statute may be interpreted to include circumstances or situations which were unknown or did not exist at the time when it was enacted.

Id. § 49.01, at 228.

99. *See* Pickhardt v. Merritt, 132 U.S. 252, 257 (1889); Newman v. Arthur, 109 U.S. 132, 138 (1883).

100. *See* Cain v. Bowlby, 114 F.2d 519, 522 (10th Cir. 1940), *cert. denied*, 311 U.S. 710 (1942) ("it is a general rule in the construction of statutes that legislative enactments in general and comprehensive terms, and prospective in operation, apply to persons, subjects and businesses within their general purview and scope, though coming into existence after their passage, where the language fairly includes them").

Justice Holmes described this principle in terms of a court's larger duty to discover and effectuate the policy underlying the legislation. It is not sufficient for a court to rely upon the bare language of a statute or the examples discussed in the legislative history. If the language of the statute fairly encompasses the situation being litigated, the court's decision must reflect the congressional policy underlying that statute.[101] The Supreme Court adopted this approach in dealing with changed social circumstances in *Browder v. United States*.[102] In holding that a statute regulating the use of passports applied to certain conduct even though at the time of enactment that type of conduct was rare and thus not a focus of congressional attention, the Court stated that "[o]ld crimes, however, may be committed under new conditions. Old laws apply to changed situations. The reach of the act is not sustained or opposed by the fact that it is sought to bring new situations under its terms."[103]

This method of interpreting statutes in the light of altered circumstances could be used to justify the application of the *Griggs* disproportionate impact approach to cases under sections 1981 and 1982. The congressional debates reveal that the purpose of the Reconstruction Era civil rights legislation was the eradication of the badges and incidents of slavery.[104] The badges and incidents of slavery, it may be argued, have not been eradicated in the 1970's, but only changed in form. Former concerns over beatings, murders and de facto peonage[105] have been displaced by confrontations with standardized tests and minimum educational requirements.[106]

Paralleling these altered social circumstances are the Supreme Court's changing interpretations of the thirteenth amendment.[107] Early decisions

101. A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.

Johnson v. United States, 163 F. 30, 32 (1st Cir. 1908) (Holmes, Cir. J.); *cf. Runyon*, 427 U.S. at 191 (Stevens, J., concurring) ("even if *Jones* did not accurately reflect the sentiments of the Reconstruction Congress, it surely accords with the prevailing sense of justice today").

102. 312 U.S. 335 (1941).

103. *Id.* at 339-40.

104. *See McDonald*, 427 U.S. at 296 ("the 39th Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves"); 36 CONG. GLOBE 474 (remarks of Sen. Trumbull), 1151 (remarks of Rep. Thayer) ("The bill which now engages the attention of the House has for its object to carry out and guaranty the reality of [the thirteenth amendment]. It is to give it practical effect and force.") (1866).

105. See note 71 *supra*.

106. *See, e.g., Griggs*.

107. This change in the interpretation of the thirteenth amendment is consistent with the way in which the Court has changed its interpretations of other constitutional provisions in response

emasculated the amendment, restricting its scope to those deprivations of rights that amounted to slavery or personal servitude.[108] But in response to the changing times the Court abandoned this interpretation, holding in *Jones* that racial discrimination in the sale of real estate is a badge and incident of slavery. *Griggs* further developed this theme, holding that poor performance by blacks on standardized intelligence tests and the lower percentile of blacks with high school diplomas[109] can be linked to slavery and its pernicious after-effects on the educational opportunities available to blacks.[110]

The *Griggs* response to this situation is not derived from Title VII. Title VII contains no language referring to disproportionate impact, shifting the burden of proof, or the defense of job relatedness.[111] These concepts were judicially engrafted onto the act as an evidentiary method of achieving the purpose of Congress—which was found to be the elimination of "artificial, arbitrary, and unnecessary barriers to employment."[112] There is no reason why this same approach should not be used to effectuate the congressional purpose underlying sections 1981 and 1982.[113]

Moreover, use of the disproportionate impact theory under sections 1981 and 1982 is supported by three related considerations. First, civil rights legislation is now recognized by the courts as being remedial in nature[114] and thus deserving of liberal interpretation to realize the beneficient purposes underlying the statutes.[115] Second, Title VII and sections 1981 and 1982 should be interpreted in pari materia because they have similar remedial purposes.[116] The courts have generally given these statutes

to various societal changes. With respect to changing economic conditions and the commerce clause, see Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934). Regarding changing technology and the fourth amendment's protection against unreasonable searches, *compare* Goldman v. United States, 316 U.S. 129 (1942), *and* Olmstead v. United States, 277 U.S. 438 (1928), *with* Katz v. United States, 389 U.S. 347 (1967). Note the application of changing moral and political ideas to the prohibition of cruel and unusual punishment in Trop v. Dulles, 356 U.S. 86 (1958), and Weems v. United States, 217 U.S. 349 (1910). And consider the Court's greatly altered interpretation of the fourteenth amendment by comparing Plessy v. Ferguson, 163 U.S. 537 (1896), with Brown v. Board of Educ., 347 U.S. 483 (1954). *But see* R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977).

108. *See* Civil Rights Cases, 109 U.S. 3 (1833); Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1873). *See also* Hodges v. United States, 203 U.S. 1 (1906); United States v. Harris, 106 U.S. 629 (1822); Virginia v. Rives, 100 U.S. 313 (1879); United States v. Cruikshank, 92 U.S. 542 (1876).

109. *See* 401 U.S. at 425-26.

110. *See id.* at 430.

111. *See* 42 U.S.C. §§ 2000e to 2000e-17 (1970 & Supp. V 1975).

112. 401 U.S. at 431.

113. See note 104 *supra* and accompanying text.

114. *See* 3 J. SUTHERLAND, *supra* note 98, at § 72.05, at 392.

115. *See id.*

116. *See* 2A *id.* § 51.03. The courts have interpreted Title VII in pari materia with other related employment statutes. *See* Shultz v. Local 1291, 338 F. Supp. 1204, 1208 (E.D. Pa.), *aff'd*, 461 F.2d 1262 (3d Cir. 1972) ("We cannot consider as reasonable for purposes of the

parallel interpretations in matters of substance.[117] And finally, Congress has impliedly consented to the reading of section 1981 in pari materia with Title VII by refusing to amend Title VII in 1972 so as to make it the exclusive remedy for employment discrimination.[118]

The use of the disproportionate impact standard for sections 1981 and 1982 is permissible under the broad language of those statutes and is desirable as a method of effectuating the underlying congressional purpose. In those cases dealing with matters outside of the employment area the courts will have to alter the *Griggs* job relatedness defense to fit the particular situation. The defendant's burden in these instances should be to prove that the challenged practice is reasonably necessary for the achievement of a legitimate, non-discriminatory purpose.[119]

Labor-Management Reporting and Disclosure Act what would be considered an unlawful employment practice under the Civil Rights Act of 1964."); Hodgson v. Corning Glass Works, 330 F. Supp. 46, 49-50 (W.D.N.Y. 1971), *modified*, 474 F.2d 226 (2d Cir.), *aff'd sub nom.* Corning Glass Works v. Brennan, 417 U.S. 188 (1973) ("It is appropriate to apply the principles growing out of the cases arising under Title VII of the Civil Rights Act of 1964 to Equal Pay Act cases, since the purpose of both Acts is to eliminate employment discrimination.").

117. *See* Sabol v. Snyder, 524 F.2d 1009, 1012 (10th Cir. 1975); Long v. Ford Motor Co., 496 F.2d 500, 505 n.11 (6th Cir. 1974); Cooper v. Allen, 467 F.2d 836 (5th Cir. 1972); Buckner v. Goodyear Tire & Rubber Co., 339 F. Supp. 1108 (N.D. Ala. 1972); Douglas v. Hampton, 338 F. Supp. 18 (D.D.C. 1972), *modified*, 512 F.2d 976 (D.C. Cir. 1975); Richardson v. Hotel Corp. of America, 332 F. Supp. 519 (E.D. La. 1971), *aff'd*, 468 F.2d 951 (5th Cir. 1972).

118. Congress did at that time make Title VII the exclusive employment discrimination remedy for federal employees. *See* Brown v. General Services Administration, 425 U.S. 820 (1976). But both the House and the Senate rejected amendments aimed at eliminating other Title VII plaintiffs' right to sue under section 1981. *See* 118 CONG. REC. 3371-73 (1972) (Senate); H.R. REP. NO. 238, *supra* note 51, at 18-19, 66. Although no courts had yet applied the *Griggs* approach to section 1981, the Congress was undoubtedly aware that the two statutes had received similar treatment by the courts. And the Congress was well aware of the significance of the *Griggs* decision, which was often referred to in laudatory terms. *See* S. REP. NO. 415, *supra* note 29, at 14-15; H.R. REP. NO. 238, *supra* note 51, at 8, 20-22.

119. For example, if a bank's credit requirements were challenged as rendering a disproportionate percentage of blacks ineligible for loans, the bank could counter with evidence that under current economic conditions such requirements are necessary to avoid undue risk of default. A private school that requires prospective students to take a standardized test would have to prove that the results of that test are predictive of actual school performance and that the cutoff level selected is reasonably necessary for the achievement of the school's academic standards. See Note, *The Expanding Scope of Section 1981: Assault on Private Discrimination and a Cloud on Affirmative Action*, 90 HARV. L. REV. 412, 432 (1976), describing the proposed defendant's burden with essentially the same effect.

A situation that must be distinguished is one involving the use of quasi facially neutral practices—practices that are so riddled with subjective factors that their use must be viewed as an individual wrong rather than a societal wrong. An example of this is the purportedly neutral procedure for gaining admission to a private club. Usually this includes filling out an application giving personal and family data, obtaining the recommendation of one or more current members and being interviewed by members of the membership committee. If a rejected applicant were to file suit alleging discrimination, the normal response would be the claim that the applicant simply had not met the club's standards and that those standards were applied equally to all applicants. But such standards as congeniality and adequate social standing are inherently

IV. CONCLUSION

The purpose of the Congress that originally enacted sections 1981 and 1982 was to give practical meaning to the emancipation commanded by the thirteenth amendment. That purpose has not yet been achieved—racial discrimination remains with us today, often assuming subtle forms quite difficult to detect. The shifting burden of proof present in the disproportionate impact approach is a powerful weapon in the struggle to eradicate the vestiges of slavery. When the discrimination at issue is a facially neutral practice, the disproportionate impact approach is an appropriate and fair method of reconciling the interests of the plaintiff, the defendant and society as a whole.

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subjective, as are the other elements of the admission process. Merely lumping all of these subjective factors together and calling the aggregate a procedure does not create a facially neutral practice such as a standardized test. The latter operates disproportionately because of the historically inferior educational opportunities of blacks—a societal wrong. The former has a disproportionate impact due to the subjective desire of the current membership to exclude minority applicants—an individual wrong. Thus the membership rejection should be dealt with as a case of disparate treatment. Proof that this allegedly neutral admissions process had operated to exclude all minority applicants would simply be evidence—albeit strong evidence—of the defendant members' subjective discriminatory intent.

This analysis assumes that the club is truly private, rather than a mere camouflage for public discrimination, as in Tillmann v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973). In *Tillmann* the Court specifically refused to reach the question of whether the Title VII private club exemption applies under section 1981. Because of the Court's treatment of the two statutes in Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975), holding that Title VII had not restricted or repealed section 1981, the better view is that the private club exemption of Title VII should not be applied under section 1981. *See* Note, *supra* note 54, at 1452.

The more difficult question is whether truly private clubs have a constitutionally protected right to discriminate based upon the right of association. *See generally Runyon*, 427 U.S. at 175-79; Note, *supra* note 54, at 1452.