Burden of Proof in Racial Discrimination Actions Brought Under the Civil Rights Acts of 1886 and 1870: Disproportionate Impact or Discriminatory Purpose?
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I. INTRODUCTION

Competing notions about the meaning of equality have increasingly polarized the civil rights enforcement effort. In spite of the "difficulty of the issue[s]," the Supreme Court will continue the debate over equality this term. One of the issues confronting the Court in County of Los Angeles v. Davis involves allocation of the burden of proof in actions brought under the Civil Rights Acts of 1866 and 1870: Is the plaintiff's initial bur-

1. Professor Brest notes that the "policy of the 1960's provided common ground for persons having divergent aims. Disappointment with its results exposed latent differences and eroded the coalition that had been responsible for much of the earlier progress in civil rights." Brest, The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle, 90 Harv. L. Rev. 1, 2 (1976). For a discussion of the "latent [policy] differences" that contributed to the polarization of the civil rights movement, see id. at 2-3.


Professor Brest has noted that [of] the civil rights issues that have emerged during the past decade, two of the most controversial and important involve the propriety of granting racial preferences to traditionally disadvantaged minorities and the operational relevance of the fact that a color-blind practice has a disproportionate adverse impact on the members of a racial minority group.

Brest, supra note 1, at 4-5. Affirmative action and disproportionate impact analyses are related not only because of their importance to discrimination law, but because they seek to implement similar values. See Brest, supra note 1, passim; Comment, Proof of Racially Discriminatory Purpose Under the Equal Protection Clause: Washington v. Davis, Arlington Heights, Mt. Healthy, and Williamsburgh, 12 Harv. C.R.-C.L.L. Rev. 725, 727-30 (1977) [hereinafter cited as Proof of Purpose].


den of proof satisfied when it is established "that a color-blind practice has a disproportionate adverse impact on the members of a racial minority group"? The issue is particularly important in view of the expansive interpretations the early civil rights enactments have been given over the past decade. Unhampered by many of the restrictive substantive and procedural limitations of other civil rights measures, 42 U.S.C. §§ 1981 and 1982, which

7. Brest, supra note 1, at 4-5.


Justice Powell recognized the difficulty of limiting the scope of the 1866 Civil Rights Act in Runyon v. McCrary, 427 U.S. at 186-88 (Powell, J., concurring). See also id. at 212 (White, J., dissenting) (admission standards of "[s]ocial clubs, black and white, and associations designed to further the interests of blacks or whites" might be challenged under the 1866 Act).

9. For example, unlike the Reconstruction Acts, title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976), does not cover employers engaging fewer than 15 employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, bona fide private membership clubs, Indian tribes, and the United States Government. Id. § 2000e (b). Religious groups employing individuals in religion-oriented work are also exempted. Id. § 2000e-1. See also Johnson v. Alexander, 572 F.2d 1219 (8th Cir. 1978) (Armed Forces not an "employer" for purposes of title VII; case was heard under Civil Rights Act of 1866).

Unlike the 19th-century legislation, the Fair Housing Act, title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3619 (1976), does not cover in certain circumstances the sale or rental of single-family dwellings by a private, individual owner. Id. § 3603(b). Title VIII also exempts room rentals to religious or private groups. Id. § 3607.

Procedural prerequisites and substantive remedies under titles VII and VIII are less
are derived from the Reconstruction civil rights acts,\textsuperscript{12} potentially reach discriminatory conduct not covered by any other statutory or constitutional provision.\textsuperscript{13}

In \textit{Washington v. Davis},\textsuperscript{14} a decision that, according to one commentator, "began a new era in civil rights law,"\textsuperscript{15} the Supreme Court held that a more stringent standard of proof was required in neutral factor cases brought under the fourteenth amendment than in cases arising under title VII of the Civil Rights Act of 1964.\textsuperscript{16} Under the Constitution, plaintiffs must provide evidence of discriminatory intent.\textsuperscript{17} Under title VII, evidence of a disproportionate racial impact is sufficient to establish a prima facie case.\textsuperscript{18} The lower courts have divided on whether to align the 1866 and 1870 Acts with the constitutional standard or with the title VII standard.\textsuperscript{19}

This Comment will compare the origin and development of the two principal evidentiary theories, discriminatory purpose and disproportionate impact. The response of the lower courts to \textit{Washington v. Davis} in cases brought under the Civil Rights Acts of 1866 and 1870 will be discussed, and the legal arguments for and against aligning the Reconstruction Acts with the fourteenth amendment standard will be analyzed. Finally, the conflicting favorable than similar provisions under the 19th-century Acts. See Greenfield & Kates, \textit{Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866}, 63 CALIF. L. REV. 662, 665 & n.19 (1975).

\begin{itemize}
  \item \textit{42 U.S.C. § 1981} (1976), entitled "Equal rights under the law," states 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 executions of every kind, and to no other.

  \item \textit{42 U.S.C. § 1982} (1976), 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."

  \item For an analysis of the historical link between §§ 1981 and 1982 and the Civil Rights Acts of 1866 and 1870, see note 94 infra.


  \item \textit{Id.} at 246-47.

  \item See notes 58-72 and accompanying text infra.
\end{itemize}
notions of equality that underlie the two theories will be compared in order to determine the appropriate evidentiary standard for section 1981 and 1982 actions.

II. DEVELOPMENT OF THE PRINCIPAL EVIDENTIARY THEORIES IN RACIAL DISCRIMINATION LAW

Discriminatory motivation has long been a key element in establishing a cause of action in race discrimination law. Because the early cases brought under the Reconstruction amendments and Enforcement Acts involved blatantly discrimin-


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

U.S. CONST. amend. XIII.

Section 1 of the fourteenth amendment provides in part:
   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.

Id. amend. XIV, § 1.

Section 5 of the amendment empowers Congress to "enforce, by appropriate legislation, the provisions of this article." The fifteenth amendment states:
   Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
   Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Id. amend. XV.

22. Seven civil rights acts were passed by Congress during the Reconstruction period enforcing the rights created by the thirteenth, fourteenth, and fifteenth amendments. They include, in order of their passage: Civil Rights Act of 1866, ch. 31, 14 Stat. 27; Act of May 21, 1866, ch. 86, 14 Stat. 50 (making kidnapping for purpose of enslavement illegal); Act of March 2, 1867, ch. 187, 14 Stat. 546 (prohibiting peonage); Civil Rights Act of 1870, ch. 114, 16 Stat. 140 (guaranteeing the right to vote and the right to full and equal benefit of the laws); Act of Feb. 28, 1871, ch. 99, 16 Stat. 433 (regulating elections); Ku Klux Klan Act, ch. 22, 17 Stat. 13 (1871) (providing for enforcement of fourteenth amendment); Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (providing civil and criminal penalties for discrimination in accommodations, transportation, public amusements, and jury selection). The current versions of these Acts may be found in 42 U.S.C. §§ 1981-
tory practices, the existence of an illicit motive was rarely disputed. In traditional racial discrimination cases today, however, proof of discriminatory motivation is essential.

A. Proof of Discriminatory Purpose in the Traditional Racial Discrimination Case

The traditional racial discrimination case involves the disparate treatment of similarly situated individuals. The most recent formulation of the discriminatory purpose theory in cases involving disparate treatment appeared in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In the employment field, for example, traditional discrimination cases generally deal with practices involving discharge, discipline, promotion, transfer, lay off, failure to train, or retaliation. Such cases, regardless of the jurisdictional basis of the cause of action, have generally required proof of discriminatory intent. *Id.* at 1153-54 & nn.5-11. See generally *id.* at 15-17, 23-25. While traditional discriminatory purpose (disparate treatment) cases usually involve single plaintiffs, they may be brought as class actions. *Id.* at 1157-58.

Burden of Proof

Corp. v. Green, an action brought under title VII by a black mechanic and laboratory technician who charged that his dismissal was racially motivated. The McDonnell Court held that a plaintiff could establish a prima facie case of employment discrimination by proving four facts:

(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Although the Court noted that this test "is not necessarily applicable in every respect to differing factual situations," the essential inquiry in disparate treatment cases like McDonnell is always the same—whether the conduct of the defendant was "racially premised." The plaintiff must "demonstrate by competent evidence that the [stated] reasons for his rejection were in fact a coverup for a racially discriminatory decision." Although the Court noted that this test "is not necessarily applicable in every respect to differing factual situations," the essential inquiry in disparate treatment cases like McDonnell is always the same—whether the conduct of the defendant was "racially premised." The plaintiff must "demonstrate by competent evidence that the [stated] reasons for his rejection were in fact a coverup for a racially discriminatory decision.

The plaintiff need not provide direct proof of intent, however. Circumstantial evidence will suffice. For example, statistics may provide some evidence of intent (or lack of intent) to discriminate. In fact, noted authorities on employment discrimination law have asserted that plaintiffs may find the "burden of establishing a prima facie case" under this theory "relatively easy." Once the plaintiff has established a prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the [plaintiff's] rejection."
B. Disproportionate Impact: Neutral Factors and the Present Effects of Past Discrimination

The courts have created an exception to the traditional discriminatory purpose rule in "neutral factor" cases. Neutral factors include objective selection criteria such as standardized tests, credit ratings, work histories, academic and professional records, and minimum height and weight requirements, which are presumably employed without intent to discriminate on the basis of race. Such factors often disqualify minorities at higher rates than groups that have not been historically disadvantaged and as a result tend to perpetuate the effects of past discrimination. Because the discriminatory purpose theory focuses on illicit motive, it fails to compensate for inequalities created by the use of such race-neutral factors. The attention of the courts in neutral factor cases therefore has shifted from discriminatory motivation to discriminatory consequences.

1. Genesis of the disproportionate impact theory

By applying the statistical techniques used in early jury service cases, and by utilizing the concept of the prima facie case, the courts formulated a new evidentiary theory for neutral factor cases: disproportionate impact. The theory developed initially in equal protection race discrimination cases, then in title VII

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35. Professor Larson defines neutral factors as "those containing no specific reference to race." Additional examples from the employment field include aptitude tests, education requirements, professional and academic employment tests, arrest and conviction records, garnishment and bankruptcy records, drug history, and length of experience requirements. 3 A. LARSON EMPLOYMENT DISCRIMINATION § 73.00 (1977). Facially neutral selection practices have also been challenged in housing cases, see, e.g., Boyd v. LeFrak Organization, 509 F.2d 1110 (2d Cir.), cert. denied, 423 U.S. 896 (1975), and jury service cases, see, e.g., Casteneda v. Partida, 430 U.S. 482 (1977).


For a comparison of the disproportionate impact and discriminatory purpose theories, see Sweeney v. Board of Trustees of Keene State College, 569 F.2d 169, 174 & n.8, 175 (1st Cir.), vacated and remanded per curiam, 99 S. Ct. 295 (1978). See also Disproportionate Impact, supra note 8, at 1268 n.4.


employment discrimination cases. In 1971, the Supreme Court legitimized the use of the disproportionate impact theory in title VII cases in *Griggs v. Duke Power Co.* Blacks in that case challenged the power company’s policy requiring that applicants have a high school diploma or pass an intelligence test in order to be considered for employment or transfer to higher paying jobs. Writing for a unanimous Court, Chief Justice Burger emphasized Congress’ intention, expressed in the language of title VII, to “remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.”

In many cases, the *Griggs* disproportionate impact standard significantly reduces the plaintiff’s initial burden of production. Rather than inquire into the defendant’s motives, the plaintiff need only show that the challenged practice has a racially disproportionate impact. In the employment-testing field, the theory serves to implement Congress’ policy of assisting historically disadvantaged groups by outlawing selection criteria that disfavor minorities unless they are shown to be essential to the operation of the business.

2. **Limiting the scope of the impact theory**

The *Griggs* ruling prompted a wide application of the new evidentiary theory in neutral factor race discrimination cases brought under a variety of constitutional and statutory provisions. In June of 1976, this trend was dramatically interrupted.

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41. 401 U.S. 424 (1971). See Blumrosen, *supra* note 36, at 62 (Griggs’ redefinition of discrimination in terms of consequences termed new development in employment discrimination law). But cf. 3 A. Larson, *supra* note 35, § 75.31 (facially neutral tests were invalidated before Griggs); B. Schle & P. Grossman, *supra* note 24, at 5 & n.9 (generally tracing disproportionate impact theory to Griggs, but noting that standards similar to those articulated in *Griggs* were applied in Gregory v. Litton Sys., Inc., 316 F. Supp. 401 (C.D. Cal. 1970), aff’d as modified, 472 F.2d 631 (9th Cir. 1972)).

42. 401 U.S. at 429-30. The Court repeatedly emphasized that title VII’s disproportionate impact standard originated in the language and purpose of the statute. Id. at 429-31.

43. *Id.* at 430-31. See also Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975).


Washington v. Davis is the first of a line of cases in which the Court has attempted to reinforce the primacy of discriminatory intent in race discrimination law without saddling the plaintiff with an unreasonable burden of proof in neutral factor cases. Davis involved a written personnel test administered by the District of Columbia police department to prospective recruits in order to determine whether the applicants had acquired a certain level of verbal skill. Although the district court found that a higher percentage of blacks failed the test than whites, it nevertheless granted summary judgment for the defendants based on a finding that the percentage of black police recruits closely approximated the population ratio of eligible blacks in the recruiting area. The Court of Appeals for the District of Columbia Circuit reversed. Applying the Griggs rule, it noted that four times as many blacks as whites failed the test. The Supreme Court reversed the court of appeals and upheld the written test, declaring that "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."

Justice White examined initially the central purpose of the equal protection clause and the prior Court cases construing the fourteenth amendment. "[I]t is untenable," he reasoned, "that


Commenting on the broad application the lower courts had given to Griggs, Judge Lambros observed in Arnold v. Ballard, 448 F. Supp. 1025, 1027 (N.D. Ohio 1978):

In retrospect and in light of Washington v. Davis... it is now apparent that the Federal courts, in their eagerness to redress some of the effects of a long history of racial discrimination in this country, had not made the necessary fine distinctions among claims brought under Title VII, under 42 U.S.C. §§ 1981-1985, and/or under the equal protection clause.

45. Washington v. Davis was decided on June 7, 1976. In footnote 12 of that opinion, Justice White noted the Court's disagreement with some 18 cases dealing with employment discrimination, urban renewal, zoning, public housing, and municipal services that had improperly applied the disproportionate impact standard. 426 U.S. at 244 n.12. Several of these cases were brought under 19th-century civil rights statutes. E.g., Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Serv. Comm'n., 482 F.2d 1333 (2d Cir. 1973); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972); Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972); Arnold v. Ballard, 390 F. Supp. 723 (N.D. Ohio 1975).


49. Id. at 239.

50. Id. at 239-45.
the Constitution prevents the Government from seeking modestly to upgrade the communicative abilities of its employees...”

Justice White also examined the scope of the fourteenth amendment and the “consequences [that] would perhaps be likely to follow” if a disproportionate impact theory were to be applied. He observed that title VII analysis “involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed.”

The practical effect of the Supreme Court decisions following Davis has been to narrow the gap between the discriminatory intent and disproportionate impact theories by liberalizing the probative value of various kinds of circumstantial evidence relevant in an inquiry into motive. Nevertheless, there remains a crucial distinction between the impact and purpose theories in neutral factor cases: under the first a plaintiff establishes a prima facie case by simply showing a racially disproportionate impact; under the second the plaintiff must show something more than mere statistical disparity. The added burden under the purpose theory will vary according to the facts of the case. If the plaintiff establishes extreme disproportionate impact, additional evidence of discrimination may be unnecessary. In other cases, however, the plaintiff may be required to produce evidence relating to the circumstances of the decision, the statements or conduct of the decisionmaker, or the relative weight given various factors in making the decision in order to establish a prima facie case.

51. Id. at 245-46.
52. Id. at 248.
53. Id. at 247.
55. Justice White was careful not to exclude the possibility of using evidence of disproportionate impact to show discriminatory purpose. “Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact... 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...” Washington v. Davis, 426 U.S. at 242. See also id. at 253-54 (Stevens, J., concurring).
III. Washington v. Davis and Sections 1981 and 1982

Washington v. Davis' decisive limitation on the scope of the impact theory in constitutional cases has generated considerable confusion as to the standards that should be applied in section 1981 and 1982 causes of action. Some courts have adopted the Davis standard without discussing any of the underlying issues. Other courts have analyzed the statute in light of Davis and concluded that section 1981 causes of action require proof of discriminatory intent, noting the linguistic and historical similarities between the Reconstruction statute and the fourteenth amendment on the one hand and the dissimilarities between section 1981 and title VII on the other. Still other courts have concluded, however, that "the burden of proving intentional or purposeful discrimination required under a constitutional claim is not required" under section 1981, a "statutory claim." Certain commentators point to dicta in Davis that would appear to support this position. The most sensible view, in light of all of the


confusion, is that *Davis* did not unambiguously resolve the issue.\(^6^2\)

One of the most recent discussions of the intent issue occurs in *Davis v. County of Los Angeles*.\(^6^3\) The dispute in that case involved two written examinations administered in August 1969 and January 1972 by the Los Angeles County Fire Department pursuant to its procedures for screening applicants for entry-level fireman positions.\(^6^4\) Plaintiffs, on behalf of all present and future black and Mexican-American applicants, challenged the tests and the department’s five-foot seven-inch height requirement. The United States district court upheld the minimum height standard but found that both qualification tests had a discriminatory impact on minority applicants.\(^6^5\) Because the court found

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Justice Stevens noted the difficulty of applying title VII standards to other statutory schemes:

In a general way [title VII] standards shed light on the issues, but there is sufficient individuality and complexity to that statute, and to the regulations promulgated under it, to make it inappropriate simply to transplant those standards in their entirety into a different statutory scheme having a different history.

Washington v. Davis, 426 U.S. at 255 (Stevens, J., concurring).


63. 566 F.2d 1334 (9th Cir. 1977), cert. granted, 98 S. Ct. 3087 (1978) (No. 77-1553).

64. Judge Wallace explained the pre-1971 hiring procedure as follows:

The process began with the written test and a physical agility test and the top scorers were then selected for oral interviews. A total score was given each applicant, with the discriminatory written test having a 35 percent weighted value. The highest ranking candidates were certified for placement on the eligibility list from which vacancies were filled. When the list was exhausted, which usually happened in about two years, a new examination process would begin in order to produce a new eligibility list.

*Id.* at 1345 (Wallace, J., dissenting).

The procedure was changed in 1971. A new written test was developed in an attempt to eliminate cultural bias, and the examination was not used as a ranking device but was graded on a pass-fail basis. Ninety-seven percent of the applicants passed the written exam. The department proposed that 500 of the passing applicants be selected at random for interviews (giving every applicant who passed the exam an equal chance to be chosen for an oral interview), but was enjoined from so doing because of county and civil service regulations requiring that selections be made on merit. In response to this ruling, an abortive attempt was made to utilize an interview list consisting of the top 544 scorers on the written exam, of which 492 were white (representing 25.8% of the white applicants), 10 black (representing 5.1% of the black applicants), and 33 Mexican-American. Finally, one year after taking the examination and 18 months after applying, all passing applicants were interviewed and an eligibility list was certified. *Id.* at 1337 (majority opinion); *id.* at 1345-46 (Wallace, J., dissenting).

65. *Id.* at 1337 (majority opinion). For a summary of the relevant statistics, see *id.*; *id.* at 1346 (Wallace, J., dissenting).
that use of the two tests violated both section 1981 and title VII and because of the department’s "bad reputation as an employer in the minority community," the court ordered accelerated hiring in the ratio of one black and one Mexican-American for every three whites hired until the effects of past discrimination had been eliminated.

The United States Court of Appeals for the Ninth Circuit, after granting a rehearing to consider the impact of Washington v. Davis, upheld the district court’s determination that the 1972 written examination violated section 1981 because of its disproportionate effect upon minority applicants and reversed the judgment approving the five-foot seven-inch limitation. However, the circuit court held that the plaintiffs had no standing to challenge the 1969 examination. The majority expressed reluctance to apply the discriminatory purpose standard because of its belief that further limitations on the impact rule would "produce undesirable substantive law conflicts" and "would dilute what has been a potent remedy for the ills of countless minority employees."

Judge Wallace dissented. After an extensive analysis of the legal issues, he concluded that "the legislative history of section 1982 indicates that it should track the Fourteenth Amendment’s standards of proof." In Judge Wallace’s view, practical reasons necessitate a stricter standard in section 1981 cases. A requirement of discriminatory intent, like the administrative prerequisites under title VII, serves to screen out frivolous claims. Furthermore, divorcing section 1981 from the stricter constitutional standard motivates plaintiffs to proceed under the statute, thus undermining the efficacy of the fourteenth amendment. Finally, because of the broad scope of section 1981, any decrease in the burden of proof necessary to make the out a racial discrimination claim "should await legislative prescription."

66. Id. at 1336 (majority opinion). Of the department’s 1,762 firemen, about 53 (3%) were Mexican-American and 9 (0.5%) were black at the time of the district court judgment. See Petition for Writ of Certiorari at 6 n.1, County of Los Angeles v. Davis, 98 S. Ct. 3087 (1978) (No. 77-1553). The trial court found that 10.8% of the population of Los Angeles County was black and 18.3% was Mexican-American. 566 F.2d at 1345 & n.1 (Wallace, J., dissenting).


68. 566 F.2d at 1340.

69. Id. at 1348 (Wallace, J., dissenting) (emphasis in original).

70. Id. at 1350-51 (quoting Washington v. Davis, 426 U.S. at 246).
Although none have done so as exhaustively as the Ninth Circuit, most of the other circuits have addressed the issue. Three circuits seem to agree that proof of discriminatory purpose is not necessary in actions brought under section 1981, while five circuits have indicated that the burden of proof in section 1981 causes of action is equivalent to the burden in constitutional cases.

IV. THE CIVIL RIGHTS ACTS OF 1866 AND 1870—IMPACT OR PURPOSE?

Discussion of the evidentiary standard applicable to sections 1981 and 1982 can be divided into five areas: the implications of prior Supreme Court decisions, the in pari materia rule, legislative intent, the relevance of the broad scope of the Reconstruction Acts, and the impact the choice of standards will have on the role of the judiciary.

A. The Supreme Court Precedents

In a line of cases that has engendered considerable discuss-

71. See Davis v. County of Los Angeles, 566 F.2d 1334 (9th Cir. 1977), cert. granted, 98 S. Ct. 3087 (1978) (No. 77-1555); Kinsey v. First Regional Secs., 557 F.2d 830, 839 n.22 (D.C. Cir. 1977) (dicta in footnote indicating that title VII and § 1981 do not impose the same burden of proof as the Constitution).


72. See Williams v. DeKalb County, 582 F.2d 2 (5th Cir. 1978) (adopting constitutional evidentiary standards for § 1981 causes of action); Donnell v. General Motors Corp., 576 F.2d 1292, 1300 (8th Cir. 1978) (§ 1981 involves different standards of proof than title VII); Johnson v. Alexander, 572 F.2d 1219 (8th Cir. 1978) (§ 1981 claims follow constitutional rather than title VII evidentiary standards); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 140 (3d Cir. 1977) (implying that burdens of proof under § 1981 are the same as under the Constitution), cert. denied, 98 S. Ct. 1457 (1978); Chicano Police Officers Ass'n v. Stover, 552 F.2d 918 (10th Cir. 1977) (prior holding that the measure of a claim under § 1981 is essentially the same as that applied under title VII acknowledged as contrary to Washington v. Davis); Milwaukee v. Saxbe, 546 F.2d 693 (7th Cir. 1976) (because no constitutional claim was established, no § 1981 claim could be made out; constitutional claim was dismissed because plaintiff failed to allege intentional discrimination). Cf. Bolden v. Pennsylvania State Police, 578 F.2d 921, 912 (3d Cir. 1978) (enacting title VII, the 88th Congress did not intend "to circumscribe the remedial powers of the federal courts under §§ 1981, 1983, 1985, and 1988"); But cf. Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1191 n.37 (5th Cir. 1978) (title VII protection of bona fide seniority system should apply in cases brought under § 1981; court agrees with Johnson v. Ryder Truck Lines, Inc., 575 F.2d 471 (4th Cir.), petition for cert. filed, 47 U.S.L.W. 3153 (U.S. July 31, 1978) (No. 78-178); interestingly, Pettway was decided several months before Williams v. DeKalb County).
tion, the Supreme Court has repeatedly declared that the Civil Rights Acts of 1866 and 1870 prohibit "racial discrimination in the making and enforcement of private contracts." In Jones v. Alfred H. Mayer Co., the Court held that "$5 1982 bars all racial discrimination, private as well as public, in the sale or rental of property." In addition, the Court stated, the 1866 Act "was meant to prohibit all racially motivated deprivations of the rights enumerated in the statute," implying that section 1982 does not extend to nonracially motivated practices that nevertheless discriminate in fact. Language in other opinions also suggests that section 1981 prohibits only racially motivated refusals to make and enforce contracts. These pronouncements must be regarded as dicta, however, because in none of the cases was the question of motivation at issue; all involved blatant discriminatory practices. While Washington v. Davis involved a facially neutral practice that operated discriminatorily, the case did not resolve the intent issue under the Reconstruction statutes. The Supreme Court cases, then, do not explicitly decide the question of which evidentiary standard is applicable to sections 1981 and 1982.

75. 392 U.S. 409 (1968).
76. Id. at 413 (emphasis in original).
77. Id. at 426 (emphasis added; emphasis on "all" deleted). See also id. at 420 n.25 (issue in Jones involves "an actual refusal to sell to a Negro" (emphasis in original)); id. at 421-22 (§ 1982 "encompass[es] every racially motivated refusal to sell or rent"); id. at 449 (Harlan, J., dissenting) (disagreeing with Court's holding that "respondents' racially motivated refusal to sell [petitioners] a house entitles them to judicial relief").
78. In Runyon v. McCrary, the Court, while discussing the Act of 1866, stated:

Just 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.

427 U.S. 160, 170-71 (1976) (emphasis added) (footnote omitted). See also McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 288 (1976) § 1981 prohibits racial discrimination in the making and enforcement of contracts); Runyan v. McCrary, 427 U.S. at 192 (White, J., dissenting) ("We are urged here to extend the meaning and reach of 42 U.S.C. § 1981 so as to establish a general prohibition against a private individual's or institution's refusing to enter into a contract with another person because of that person's race."); id. at 192 passim (White, J., dissenting) (§ 1981 does not prohibit private racially motivated refusals to contract); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 235-37 (1969) ("[r]espondents' actions in refusing to approve the assignment of [Sullivan's] membership share [because Freeman was black] was clearly an interference with Freeman's right to 'lease'" under § 1982).
79. See notes 58-62 and accompanying text supra.
B. The In Pari Materia Rule

The argument has been made that since the Court has declared that title VII and section 1981 "embrace 'parallel or overlapping remedies against discrimination,'" the two statutes are in pari materia and should be construed together. According to Sutherland, "[s]tatutes are considered to be in pari materia—to pertain to the same subject matter when they relate to the same class of persons or things, or have the same purpose or object." If two statutes are found to be in pari materia, the later statute governs the construction of the earlier enactment. Therefore, the argument goes, since the Civil Rights Act of 1964 prohibits practices that result in disproportionate effects, the same standard should apply to the earlier Civil Rights Acts.

The in pari materia rule is not applicable in the case of the Reconstruction statutes, however, because title VII and section 1981 do not relate to the "same class of persons or things," nor do they have the "same purpose or object." Even were title VII to extend to all employment relationships, which it does not, it would not begin to reach the conduct potentially within the scope of section 1981. The Supreme Court in Johnson v. Railway Express Agency took great pains to point out that there are significant substantive and procedural differences between the two statutes; they provide "separate, distinct, and independent" remedies. Likewise, the fact that the two Acts generally seek to eliminate racial discrimination does not imply that they have the same "purpose or object." As

81. Disproportionate Impact, supra note 8, at 1286-87 & n.116-17.
82. 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 51.03, at 298 (4th ed. C. Sands ed. 1973) (footnote omitted). See also id. § 49.11.
83. Id. § 51.03, at 300.
85. See note 9 supra.
86. 421 U.S. 454 (1975).
87. Id. at 457-61. Compare Brown, Handling a Case from Inception to Trial, in EQUAL EMPLOYMENT OPPORTUNITY COMPLIANCE 1978, at 105, 105-41 (title VII procedures) with 3 A. LARSON, supra note 35, §§ 90.00-.50 (§ 1981 procedures).
88. Johnson v. Railway Express Agency, 421 U.S. at 461. The Supreme Court has similarly pointed to the vast differences between, on the one hand, a general statute [section 1982] applicable only to racial discrimination in the rental and sale of property and enforceable only by private acting on their own initiative, and, on the other hand, a detailed housing law [title VIII of the Civil Rights Act of 1968], applicable to a broad range of discriminatory practices and enforceable by a complete arsenal of federal authority.

Judge Wallace explained, "[t]hat both statutes can apply to the same facts and that both may afford similar remedies is beside the point. The same can be said of title VII and the Fourteenth Amendment, yet, after *Washington v. Davis*, their remains an essential 'operational distinction' between them."^{89}

Similarly, the fact that employment discrimination cases brought under title VII involves one evidentiary theory does not necessitate the application of the same theory in employment cases brought under section 1981. As Judge Wisdom observed in a similar context, "[d]ifferent treatment of similar legislative and constitutional provisions" has already become a reality in discrimination law.^{90} Reliance on the in pari materia rule, therefore, does not resolve the question of the appropriate evidentiary standard for causes of action under sections 1981 and 1982.

C. The Inquiry into Congressional Intent

It is well settled that the intent of the legislature is the primary test in statutory interpretation.^{91} According to Sutherland, "The reason for this doubtless lies in an assumption that an obligation to construe statutes in such a way as to carry out the will . . . of the lawmakers of the government is mandated by principles of separation of powers."^{92}

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89. *Davis v. County of Los Angeles*, 566 F.2d at 1348 (Wallace, J., dissenting).

> While *Washington v. Davis* found that an intent test applied to an employment discrimination claim brought under the equal protection component of the Fifth Amendment, it specifically reaffirmed that such an intent was not necessary under Title VII [citations omitted]. Similarly, although the Court struck down the equal protection challenge to the zoning laws of Arlington Heights, it remanded the case for consideration of the statutory issues. On remand, the Court of Appeals held that a violation of Title VIII could be made out without proof of a discriminatory intent. *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 7 Cir. 1977, 558 F.2d 1283. Accord, *United States v. City of Black Jack*, 8 Cir. 1974, 508 F.2d 1179, 1184-85.

91. 2A J. SUTHERLAND, supra note 82, § 45.05, at 15.
92. Id. Chief Justice Burger has recently emphasized the primacy of congressional intention in interpreting legislative policies:

Our system of government is, after all, a tripartite one, with each Branch having certain defined functions delegated to it by the Constitution. While "[i]t is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. 137, 177 . . . (1803), it is equally—and emphatically—the exclusive province of the Congress not only to formulate legislative policies, mandate programs and projects, but also to establish their relative priority for the Nation.

1. The original intention

Because of the controversy aroused by the extension of the Reconstruction statutes to cover private conduct, commentators have examined extensively the legislative history of sections 1981 and 1982 in an attempt to discern the intention of the Thirty-Ninth Congress.\(^93\) The Supreme Court concluded in *Runyon v. McCrary* that section 1981 derives both from the thirteenth and the fourteenth amendments.\(^94\) Judge Wallace, dissenting in *Davis v. County of Los Angeles*, indicated that because section 1981 enjoys a unique historical and conceptual relationship to the Fourteenth Amendment which is not shared by Title VII . . . it is quite proper to assume . . . that the standards for establishing a prima facie case of discrimination under section 1981 and the Equal Protection Clause of the Fourteenth Amendment should be the same: there must be proof of discriminatory intent.\(^95\)

A categorical denial by the Court of the historical relationship between section 1981 and fourteenth amendment would not necessarily require a different result. The fact that the Thirty-Ninth Congress intended the fourteenth amendment to proscribe only racially motivated conduct\(^96\) implies that the thirteenth

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93. One of the most authoritative treatments of the history of the Civil Rights Acts of 1866 and 1870 is found in 6 C. FAIRMAN, supra note 22, at 1163-206. See also J. TENBROEK, EQUAL UNDER LAW 174-97 (rev. ed. 1965); Greenfield & Kates, supra note 9, at 662-64; Gressman, The Unhappy History of Civil Rights Legislation, 50 MICH. L. REV. 1323 (1952); Note, Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments, 74 COLUM. L. REV. 449, 466-91 (1974); Disproportionate Impact, supra note 8, at 1275-80; Private Discriminations, supra note 8, at 617-21; Racial Discrimination in Employment, supra note 8, at 617-21.

94. 427 U.S. 160 (1976). The Court found § 1981 "to be drawn from both § 16 of the 1870 Act and § 1 of the 1866 Act." Id. at 160, 168 n.8. The 1870 Act was a fourteenth amendment statute, and the 1866 Act was a thirteenth amendment statute. Id. at 206 (White, J., dissenting). For a thorough analysis of the relationship between the 1866 Civil Rights Act and the fourteenth amendment, see R. BERGER, GOVERNMENT BY JUDICIARY 22-36, 38-40, 46, 48, 140-273 (1977). See generally Bickel, The Original Understanding and the Segregation Decision, 69 HARV. L. REV. 1 (1955).

95. According to Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), § 1982 was derived from the Civil Rights Act of 1866. Id. at 422.

96. It has been suggested that the discriminatory purpose standard for constitutional causes of action in *Washington v. Davis* was not required by the text of the fourteenth amendment, "but was simply a matter of the court's discretion." *Proof of Purpose*, supra note 2, at 739 & n.73. "In [Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977)], on the other hand, the Court seemed concerned that the adoption of a discriminatory effect standard would not show proper deference to the constitutional functions of the legislature and the executive, by involving the courts in reviewing the merits of political decisions." Id. at 744.
amendment carries a similar proscription. The historical context and the debates of the Thirty-Ninth Congress clearly indicate that the framers of the Reconstruction amendments and Enforcement Acts, in the massive undertaking of granting the newly emancipated blacks practical freedom, intended that the guarantee of fundamental rights outlaw only illicitly motivated forms of discrimination.

2. **Implied modification**

A stronger argument for a legislatively mandated impact standard could be made by showing that Congress modified the traditional purpose standard when it passed the Equal Employment Opportunity Act in 1972. With respect to the 1972 Act, the Supreme Court commented in *Runyon v. McCrory*: “Congress . . . specifically considered and rejected an amendment that would have repealed the Civil Rights Act of 1866, as interpreted

97. Davis v. County of Los Angeles, 566 F.2d at 1349 n.8 (Wallace, J., dissenting) (Wallace believes that “discriminatory intent is required in Thirteenth Amendment cases”).

98. Professor Berger notes:

While most men were united in a desire to protect the freedmen from outrage and oppression in the South by prohibiting discrimination with respect to “fundamental rights,” without which freedom was illusory, to go beyond this with a campaign for political and social equality was, as Senator James R. Doolittle of Wisconsin confessed, “frightening” to the Republicans who “represented States containing the despised and feared free negroes.”


In an extensive analysis of the §§ 1981 and 1982 intent issue, one commentator concludes:

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, 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. On the contrary, these sources give every indication that these laws were intended only to outlaw those actions undertaken with invidious, discriminatory motivation.

*Disproportionate Impact, supra* note 8, at 1280 (footnotes omitted).


by this Court in Jones . . . . There could hardly be a clearer indication of congressional agreement with the view that § 1981 does reach private acts of racial discrimination.”

Congressional endorsement of the view that sections 1981 and 1982 reach private acts of discrimination, however, does not necessarily imply that Congress also assented to the application of a disproportionate impact standard in cases brought under the early statutes. The history of the proposed 1972 amendment does not indicate that Congress intentionally or tacitly acquiesced to a modification of the traditional burden of proof in actions brought under the Reconstruction Acts. Since it seems doubtful that Congress intended to modify the evidentiary principles historically applicable to the nineteenth-century Civil Rights Acts, the original intention should govern.

100. 427 U.S. at 174-75 (emphasis in original). See also id. at 174 n.11.


In debating legislation that would have made title VII the exclusive employment discrimination remedy, Senators pointed to the differences between the 1866 and 1871 statutes and title VII. See, e.g., 118 Cong. Rec. 3370 (remarks of Sen. Javits) (statute of limitations for 19th-century statutes differs from limitation period under 1964 Act); id. at 3960 (remarks of Sen. Hruska); id. at 3961-62 (remarks of Sen. Javits) (1866 statute, unlike title VII, reaches third parties guilty of discrimination).

In his final argument against making title VII the exclusive employment discrimination remedy, Senator Williams described the distinctive nature of 19th-century civil rights law:

Two of the basic statutes that have guided this country for a century would be wiped out, in substantial part, by this amendment. . . . [citing § 1981]

For 100 years, there has been built a body of law dealing with the rights of individuals . . . .

The statute I have quoted was followed up, in 1871, by another provision. These are basic laws from which . . . developed a body of law that should be preserved and not wiped out.

Id. at 3963-64. The “body of law” referred to by Senator Williams consisted of the court opinions construing the Reconstruction civil rights legislation. These cases had almost exclusively applied a discriminatory intent standard. It seems clear, then, that although Congressmen and Senators were conscious of the Griggs standard, they did not intend to disturb the court precedents dealing with §§ 1981 and 1982.

102. It might also be argued that Congress impliedly repealed § 1981’s traditional purpose requirement when it enacted title VII in 1964. This argument is unpersuasive. Several commentators have expressed the view that title VII, as originally envisioned, was intended to proscribe only illicitly motivated conduct. B. SCHLEI & P. GROSSMAN, supra note 24, at 1, 15, Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 HARV. L. REV. 1109, 1113-18 (1971). The issue was not definitively settled until Griggs v. Duke Power Co., 401 U.S. 424 (1971).
3. **Purpose of the nineteenth-century Civil Rights Acts: Equal treatment or equal status?**

For many, the fact that the framers of the Reconstruction legislation intended to prohibit only conduct that can be shown to be illicitly motivated would not be determinative of the burden of proof issue.\textsuperscript{103} The view that present-day policy should control questions of constitutional or statutory construction is widely held.\textsuperscript{104} Unless the courts intend to completely abrogate the principle of separation of powers, however,\textsuperscript{105} they must defer to indi-

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The Supreme Court has on several occasions emphasized that title VII and § 1981 are independent. For example, in Johnson v. Railway Express Agency, 421 U.S. 454 (1975), the Court noted the congressional finding "that the two procedures augment each other and are not mutually exclusive." H.R. Rep. No. 92-238, p. 19 (1971). See also S. Rep. No. 92-415, p. 24 (1971)." \textit{Id.} at 459. The Court noted "the independence of the avenues of relief respectively available under Title VII and the older § 1981," \textit{id.} at 460, concluding "that the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent." \textit{Id.} at 461. In Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), the Court stated that "the 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." \textit{Id.} at 48 (footnote omitted). \textit{See generally id.} at 47, 48 n.9, 49-54.

Similarly, in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), the Court identified the significant differences between title VIII and § 1982, endorsing the view expressed by Representative Kelly of New York "that the scope [of § 1982] was somewhat different [than title VIII], the remedies and procedures were different, and still the new law was . . . quite necessary." \textit{Id.} at 416 (quoting 114 CONG. REC. 2807 (1968)) (footnote omitted).

"The Civil Rights Act of 1968 does not mention 42 U.S.C. § 1982, and we cannot assume that Congress intended to effect any change, either substantive or procedural, in the prior statute." \textit{Id.} at 416 n.20 (emphasis added).

One commentator has argued that "[t]he Supreme Court's deemphasis of legislative history as a guide to specific contemporary applications of Reconstruction era civil rights legislation is not without precedent." \textit{Expanding Scope}, supra note 8, at 420. Construing § 1981 "in accordance with contemporary mores seems necessary if the law is to remain responsive to evolving social values." \textit{Id.} \textit{See generally, Promise of Equality, supra note 13, at 324 ("the language of the impassioned Reconstruction Era congressional debates is of limited value today") (footnote omitted)).


Professor Blumrosen, commenting on the Supreme Court's "sensitive, liberal interpretation of Title VII" in Griggs, observed that "[a] judge may feel more comfortable in rendering a liberal interpretation of a statute than in interpreting the Constitution since a decision based on the Constitution is less easily revised." Blumrosen, supra note 36, at 63.

105. Professor Berger contends that when Chief Justice Warren declared that "we cannot turn back the clock to 1868," he in fact rejected the framers' intention as irrelevant." According to Berger, "such conduct impels one to conclude that the Justices are become a law unto themselves." R. BERGER, supra note 94, at 408 & n.5 (footnote omitted) (quoting Brown v. Board of Educ., 347 U.S. 483, 492 (1954)). \textit{See generally D. HOROWITZ, THE COURTS AND SOCIAL POLICY 12-21 (1977); Speech by Philip B. Kurland, Fifth Circuit Judicial Conference (April 26, 1978).}
cations of legislative purpose—if not expressly stated, then implicitly derived from the principles or policies embodied in legislative enactments. 104

Commentators have identified two basic values that undergird all civil rights legislation: equal treatment and equal status. 107 Equal treatment, in its most restrictive form, "would prohibit race-conscious decisionmaking in all circumstances," or, liberally defined, "would permit and in some circumstances require race-conscious decisionmaking as a remedy for the effects of past de jure discrimination by the same decisionmaker, but would prohibit it in all other situations." 108 Equal status, on the other hand, "is concerned with remedying inequalities of political, social, and economic status. This approach would require . . . decisionmakers always to consider race . . . ." 109

Each principal evidentiary theory embodies one of these values. The discriminatory purpose theory promotes the value of equal treatment by conditioning the plaintiff's right to prevail on proof that the defendant's act was prompted by an improper motive. The plaintiff is not favored by a presumption of a generalized injury originating at some distant place and time. The disproportionate impact theory, on the other hand, compensates victims of past societal discrimination by easing the burden of proof. It promotes the value of equal status by allowing the plaintiff to establish a prima facie case of discrimination without reference to the defendant's good or bad intentions. 110

Which value did the Thirty-Ninth Congress intend to implement under the Acts of 1866 and 1870? Section 1 of the Act of 1866 (from which both sections 1981 and 1982 were derived) 111 provided

[that all persons [considered citizens of the United States] of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same

106. See 2A J. SUTHERLAND, supra note 82, § 45.09, at 30.
107. This Comment uses "equal treatment" and "equal status" consistently with the discussion of Professor Fiss in Fiss, Groups and the Equal Protection Clause, 5 PHILOSOPHY & PUB. AFF. 107 (1976). See also Proof of Purpose, supra note 2, at 727-28 & n.21. Commentators have relied on the text and history of the Constitution and the Civil Rights Acts both to support and refute arguments for the adoption of one or the other principle as the dominant equal protection value. See, e.g., Brest, supra note 1, at 1, 5; Fiss, supra at 118-19 & n.16, 147 & n.63. See generally Tussman & tenBroek, The Equal Protection of the Laws, 37 CALIF. L. REV. 341 (1949).
108. Proof of Purpose, supra note 2, at 728 (footnotes omitted).
109. Id. at 728.
110. Proof of Purpose, supra note 2, at 728-29 & n.24. ("the Court has responded to the problem of equal status by using evidentiary presumptions to aid a plaintiff in his proof of racial discrimination").
111. See note 94 supra.
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 . . . ."112

The Supreme Court has made it clear that the Thirty-Ninth Congress intended that the 1866 Act apply equally to whites as well as nonwhites. In *McDonald v. Santa Fe Trail Transportation Co.*,113 Justice Marshall, writing for the majority, began his analysis of section 1981 by examining the language quoted above, noting that it "explicitly applies to 'all persons' . . . including white persons."114 Turning to the legislative history, Justice Marshall relied on comments made during the Senate debates such as the following: "'[The bill] simply gives to persons who are of different races or colors the same civil rights' . . . '[T]he white as well as the black is included in this first section' . . . '[The bill provides, in the first place, that the civil rights of all men, without regard to color, shall be equal . . . .']"115

In response to Senator Davis' objection that section 2 of the Act extended to blacks a protection never given to whites, Senator Trumball, one of the bill's sponsors, stated:

"‘Sir, this bill applies to white men as well as black men. It declares that all persons in the United States shall be entitled to the same civil rights, the right to the fruit of their own labor. . . . [T]he only object of [the bill] is to secure equal rights to all the citizens of the country, [it is] a bill that protects a white man just as much as a black man.'"116

Senator Trumball expressly disavowed the idea that the bill "‘discriminates in favor of colored persons.’"117 The Senators repeatedly affirmed that the races were to be treated equally; their rights before the law were to be the same.118

The House debates also clearly indicate that the value espoused by the proponents of the bill was equal treatment and not

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114. Id. at 287 (emphasis in original).
115. Id. at 289 n.20 (citations omitted) (brackets in original) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 504-05, 601 (1866) (remarks of Senators Howard, Johnson, and Henrick)).
116. Id. at 290 (emphasis in original) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 599 (1866)).
117. Id. at 295 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1758 (1866)).
118. Id. at 288; 289 n.20.
equal status. Referring to the bill, Representative Shallabarger declared:

"Its whole effect is to require that whatever rights as to each of those enumerated civil . . . matters the states may confer upon one race or color of the citizens shall be held by all races in equality. Your State may deprive women of the right to sue or contract or testify, and children from doing the same. But if you do so, or do not so as to one race, you shall treat the other likewise."119

The values expressed in the legislative history of title VII as interpreted by Griggs120 contrast markedly with the expressed intentions of the nineteenth-century legislators. Fully aware of the disparate impact resulting from standardized tests, the Eighty-Eighth Congress intended to include within the scope of title VII the consequences as well as the motivations of employment practices.121 While the Reconstruction Acts and the Civil Rights Act of 1964 were all broadly aimed at eradicating discrimination, they focused on different notions of equality. The historical origins of the 1866 and 1870 Acts indicate that sections 1981 and 1982, like the Constitution, are more circumscribed in their treatment of equality than title VII.

D. Scope of the Reconstruction Civil Rights Acts

The broad coverage of the fourteenth amendment figured prominently in the Supreme Court's decision to require the application of the discriminatory purpose theory in constitutional causes of action. The Court noted that application of a disproportionate impact theory to the equal protection clause "would render suspect each difference in treatment among the grant classes, however lacking the racial motivation and however otherwise rational the treatment might be."122 Consequently, notes one commentator, "[d]ecisionmakers would be forced to compensate for underlying social inequalities that they did not create."123

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119. Id. at 293 n.23 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1293 (1866)). Representative Wilson also declared that the bill provided for the equality of all races in their civil rights and immunities. Id. at 292 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866)). See also Proof of Purpose, supra note 2, at 740 n.74 (McDonald "held that Congress intended to enact the value of equal treatment").

120. 401 U.S. at 429-30, 434-36 & nn.10-11.


123. Proof of Purpose, supra note 2, at 738.
Similar results would likely follow if the disproportionate impact theory were applied to the Civil Rights Acts of 1866 and 1870. Section 1981 and 1982 prohibitions against racial discrimination extend significantly beyond the proscriptions of the Civil Rights Acts of the 1960’s, and in some respects even outdistance constitutional prohibitions. Courts have indicated that section 1981, for example, reaches discrimination involving privately owned recreational facilities, medical care, private education, labor union practices, libraries, franchising arrangements, restaurants, the professions, religious practices, transportation services, and voting. Blacks, whites, aliens, and Hispanics have standing under section 1981. In sum, the trend in recent Court decisions is to extend sections 1981 and 1982 to an increasingly broad range of private associational and contractual relationships. As the Court recognized in Washington

124. See Davis v. County of Los Angeles, 566 F.2d at 1347 (Wallace, J., dissenting) (“The potential scope of section 1981 is exceptionally broad, going far beyond the Title VII realm of employment, and conceivably reaching virtually all private contractual arrangements”); note 9 supra.

125. See Expanding Scope, supra note 8, at 422.


137. 3 A. LARSON, supra note 35, §§ 71.10-.50.

138. See note 8 supra. Justice White has discussed the problems associated with expanding the scope of § 1981:

As the associational or contractual relationships [to which § 1981 applies] become more private, the pressures to hold § 1981 inapplicable to them will increase. Imaginative judicial construction of the word “contract” is foreseeable; Thirteenth Amendment limitations on Congress’ power to ban “badges and incidents of slavery” may be discovered; the doctrine of the right to association may be bent to cover a given situation.

Runyon v. McCrory, 427 U.S. at 212 (White, J., dissenting).
v. Davis, use of an impact standard in these gray areas would involve the judiciary in far-reaching decisions about a whole range of practices "that may be more burdensome to the poor and to the average black than to the more affluent white."139

Some argue, however, that since the Civil Rights Acts are remedial in nature they should be liberally interpreted140 "in order that their beneficent objectives may be realized to the fullest extent possible."141 But unlike titles VI, VII, and VIII, which are subject to carefully circumscribed substantive and procedural limitations,142 sections 1981 and 1982 have no such restrictions. Because of the breadth of their application, sections 1981 and 1982, at least as much as the Constitution, need the restraining effect of a discriminatory purpose standard.143

E. Judicial or Legislative Resolution?

Incident to the concerns associated with the scope of sections 1981 and 1982 are the implications that application of the impact standard to the Reconstruction Acts would have on the role of the judiciary.144 In order to implement an impact standard in section 1981 and 1982 cases, the judiciary would be called upon in the first place to "undertake the political task of trying to decide

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139. 426 U.S. at 248 (footnote omitted) (the Court had specific reference to the effects of applying an impact standard in constitutional cases).

140. It has been argued that "because the 1866 Act is quasi-constitutional, its interpretation need not be limited by the intent of its framers." 52 WASH. L. REV. 955, 961 n.23 (1977).

141. 3 J. SUTHERLAND, supra note 82, § 72.05, at 392 (footnote omitted). See Disproportionate Impact, supra note 8, at 1284-86; Promise of Equality, supra note 13, at 326. In his opinion in Regents of the Univ. of Cal. v. Bakke, 98 S. Ct. 2733 (1978), Justice Brennan argued that decisions construing title VII and other civil rights statutes "are indicative of the Court's unwillingness to construe remedial statutes designed to eliminate discrimination against racial minorities in a manner which would impede efforts to obtain this objective." Id. at 2781 (Brennan, J., concurring in part and dissenting).


As Judge Wallace pointed out in his dissent to Davis v. County of Los Angeles, "[b]ecause these barriers [to title VII] tend to eliminate claims that are frivolous or suffering from obvious legal or factual defects, it is not unreasonable to provide that a prima facie case may be established without a showing of discriminatory intent." 566 F.2d at 1350 (Wallace, J., dissenting).

143. Davis v. County of Los Angeles, 566 F.2d at 1350 (Wallace, J., dissenting): "The section 1981 screening mechanism, as in actions proceeding directly under the Fourteenth Amendment, is the required demonstration of discriminatory intent."

144. See Perry, supra note 39, at 586-88 (implementation of disproportionate impact analysis depends on "conception of judicial function"); Burden of Proof, supra note 44, at 834 (discusses "the Court's traditional reluctance to interfere with the legislative and administrative process"); Proof of Purpose, supra note 2, at 738-39 (Davis "was also concerned with defining the proper role of the judiciary").
what . . . areas are appropriate ones" for the rule. According to Justice Powell, this would involve a finding "that past discrimination [in that area] had handicapped various minority groups to such an extent that disparate impact could be traced to identifiable instances of past discrimination."

The courts would then be required to define how the burden of proof will be allocated. Requiring the invalidation of any practice that has a racially discriminatory effect under a pure impact standard would be theoretically possible. This approach, however,

would deeply involve the judiciary in political decisionmaking, transforming the courts into an instrument for the redistribution of societal benefits and burdens between blacks and whites. Furthermore, the invalidation of such decisions would often be a remedy disproportionate to the decisionmaker's wrongful act, since the decisionmaker presumably was acting in a race-neutral manner against a background of societal inequality he did not create.

Recognizing the difficulties involved in this approach, commentators have attempted to define schemes for limiting the scope of the impact rule in section 1981 cases. Because of the sensitive balancing required, however, the courts have generally deferred such policy determinations to the executive and legislative departments. As Justice Powell explained, disparate impact alone is not sufficient to establish a statutory violation. In the case of title VII, he pointed out, Congress determined that "disparate impact is a basis for relief . . . only if the practice in question is not founded on 'business necessity' . . . or lacks 'a manifest relationship to the employment in question.'" Judically reading the impact theory into sections 1981 and 1982 without the kinds of legislative or administrative guidelines that are present in the case of title VII would, in the words of Justice White, require courts "to balance sensitive policy considerations against each other—considerations which have never been addressed by any Congress—all under the guise of 'construing' a statute. This is a

145. Runyon v. McCrory, 427 U.S. at 212 (White, J., dissenting) (Justice White used this argument to oppose the extension of § 1981 to private acts of discrimination).
147. Proof of Purpose, supra note 2, at 738-39 (footnote omitted).
task appropriate for the Legislature, not for the Judiciary.”

Legislative resolution of these issues implies that the judiciary will not “be the leader in the nation’s drive for racial equality.” It should not mean, however, that the disproportionate impact standard could never be used in race discrimination actions brought under the Reconstruction Acts. It may be advisable for the Legislature to extend the standard to the earlier statutes. But although legislative resolution of the problem may meet the demands of “equality” less promptly than would a judicial solution, the long term gains that would accrue by insisting that Congress rather than the courts extend the scope of sections 1981 and 1982 may far outweigh the cost of the delay. For as Chief Justice Burger explained, society also has a keen interest in the separation of powers: “While [it] is emphatically the province and duty of the judicial department to say what the law is, . . . it is equally—and emphatically—the exclusive province of the Congress not only to formulate legislative policies . . . but also to establish their relative priority for the Nation.” Construing sections 1981 and 1982 consistently with the fourteenth amendment would not only preserve the integrity of our constitutional

150. Runyon v. McCrary, 427 U.S. at 212 (White, J., dissenting) (Justice White used this argument to oppose the extension of § 1981 to private acts of discrimination). Justice Powell has implied that application of the impact standard to other civil rights measures would require the kind of legislative mandate that existed in the case of title VII. Regents of the Univ. of Cal. v. Bakke, 98 S. Ct. 2733, 2758 n.44 (1978).

151. Proof of Purpose, supra note 2, at 739 (footnote omitted). See Perry, supra note 39, at 588 & n.202. See also Brest, supra note 1, at 53.


153. Tennessee Valley Auth. v. Hill, 98 S. Ct. 2279, 2301 (1978) (citation omitted) (alteration by the Court) (quoting Marbury v. Madison 5 U.S. 137, 177 (1803)). The Chief Justice also quoted the following passage from Robert Bolt’s A Man for All Seasons to illustrate his feelings about the serious consequences that attend judicial encroachment on legislative functions:

“The law, Roper, the law. I know what’s legal, not what’s right. And I’ll stick to what’s legal . . . . I’m not God. The currents and eddies of right and wrong, which you find such plain-sailing, I can’t navigate, I’m no voyager. But in the thickets of the law, oh there I’m a forester. . . . What would you do? Cut a great road through the law to get after the Devil? . . . And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? This country’s planted thick with laws from coast to coast—Man’s laws, not God’s—and if you cut them down . . . d’you really think you could stand upright in the winds that would blow then? Yes, I’d give the Devil benefit of law, for my own safety’s sake.”

Id. at 2302 (quoting R. BOLT, A MAN FOR ALL SEASONS 147 (Heinemann ed. 1967)).
system by deferring important policy decisions to the legislature, but would strengthen the legitimacy of the judicial process by extricating the courts from the "political task of trying to decide" how societal benefits and burdens should be distributed between blacks and whites.

IV. CONCLUSION

The division in the lower courts on the issue of the standard of proof required in section 1981 and 1982 race discrimination cases involving facially neutral practices reflects the uncertainty that exists in the federal judiciary as to the direction discrimination law should take after Washington v. Davis. While some express concern about the restrictive impact the Davis rationale would have on race discrimination law if applied to section 1981 and 1982 actions, others rely on indications by the Supreme Court that major policy changes would better be made by the Congress. The disproportionate impact theory can be a powerful tool in the continuing struggle to assure all disadvantaged peoples "equal rights under the law." The sensitive balancing of interests required in the areas affected by sections 1981 and 1982, however, requires the authoritative mandate offered by a Congressional imprimatur. In an era when concern about the limits of judicial power is increasing, emphasis on legislative history and deference to legislative intent is appropriate. As the Chief Justice has vigorously asserted:

Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.\(^{155}\)

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