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During the past decade, thousands of civil rights suits have been filed under 42 U.S.C. §§ 1981 and 1982. Although the United States Supreme Court has interpreted these statutes, it has not yet announced the standard of proof necessary to establish a prima facie case of race discrimination under them. Following an in-depth examination of the "impact" and "intent" standards, as well as the language, purpose, and legislative history of the various civil rights statutes, the author concludes that the Court is likely to require proof of intentional discrimination to sustain a prima facie case under sections 1981 and 1982.

I. INTRODUCTION

For over 100 years after its enactment, the Civil Rights Act of 1866 was all but ignored as a vehicle for challenging race discrimination. During this period, United States Supreme Court deci-
sions rendered the 1866 Act impotent by severely limiting its scope and application. However, since 1968 a number of Supreme Court decisions have breathed new life into section 1 of the 1866 Act, now codified as 42 U.S.C. §§ 1981 and 1982. These decisions have held not only that sections 1981 and 1982 prohibit government-authorized race discrimination, but that they also prohibit race discrimination resulting from purely private conduct. Moreover, the Court has liberally construed the reach of these statutes to extend to a variety of relationships and discriminatory acts.

As a result of these recent cases, there has been an explosion in the use of sections 1981 and 1982 by civil rights litigants. As courts have applied these sections to more subtle and varied forms of race discrimination, numerous new substantive and procedural issues have arisen regarding their scope and application. The Supreme Court has ultimately resolved many of these issues. But one such issue remains, and it is of primary importance to the continued viability of sections 1981 and 1982 as meaningful weapons against both private and governmental race discrimination. This issue concerns the standard of proof a plaintiff must satisfy to establish a prima facie case of race discrimination under these statutes.

As will be discussed and examined in more detail below, the

2. E.g., Hurd v. Hodge, 334 U.S. 24 (1948); Corrigan v. Buckley, 271 U.S. 323 (1926); Hodges v. United States, 203 U.S. 1 (1906); The Civil Rights Cases, 109 U.S. 3 (1883); Virginia v. Rives, 100 U.S. 313 (1879). For discussion of these cases, see text accompanying notes 16-17 infra.


5. See cases cited note 3 supra.

6. In sharp contrast to the first 100 years of its existence, the number of cases involving the 1866 Act during the past 10 years has been in the thousands.

7. As will be further discussed in pt. II infra, many of these issues have arisen because of the uncertain relationship between the 1866 Act and more recent civil rights statutes such as the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 243 (codified in scattered sections of 5, 42 U.S.C.).

8. For a discussion of some of these procedural and substantive issues, see pt. II infra.

9. Although such words as "standard of proof" and "prima facie case" refer to procedural and evidentiary issues, they also strike at the substantive heart of §§ 1981 & 1982. What is actually involved is the question of what facts a plaintiff must prove to sustain a finding, in the absence of an appropriate justification by the defendant, of unlawful race discrimination in violation of § 1981 or § 1982. Unless the plaintiff meets this threshold of proof, the plaintiff's case will fail and the burden of justification will never shift to the defendant.

10. See pt. II infra.
courts have basically two choices with respect to this issue. One choice is to require that a plaintiff alleging race discrimination must in all cases prove that the defendant has engaged in purposeful or intentional race discrimination. The other choice is to require that the plaintiff need prove only that the challenged policy or practice, regardless of the defendant's intent or motivation, has resulted in a disproportionately adverse racial impact or effect.

The choice between an "intent" standard and an "impact" (or "effects") standard is more than one of semantics. Because race discrimination in today's society is often subtle and covert, a requirement of proof of intentional or purposeful discrimination would severely limit the effectiveness of the 1866 Act. By contrast, an "impact" standard concerns only the consequences of a defendant's conduct, policy, or practice and will allow a plaintiff to establish a prima facie case by objective statistical evidence.11

This article will focus on the appropriate standard of proof under section 1981, although much of its analysis is also relevant to section 1982. What follows is a discussion of the historical background and present significance of section 1981, a more precise explanation of the differences between the "intent" and "impact" standards, the current status of the section 1981 standard in the lower federal courts, an analysis of the arguments for and against each standard, and some tentative conclusions on how the Supreme Court is likely to rule on this issue.12

11. The "impact" and "effects" designations refer to the same standard and are interchangeable.

12. Since the adoption of more recent civil rights legislation in the 1960's, race discrimination has become less obvious and open. Defendants are not likely to admit that race was a motivating factor in their decisions or actions. Consequently, race discrimination is more difficult to prove if motivation or intent is a required element of the claim.

Moreover, many employers and landlords, for example, apply policies and practices to blacks and whites alike without any racially discriminatory intent or purpose. Nonetheless, these facially race-neutral policies and practices often have the effect of arbitrarily screening out disproportionately higher percentages of racial minorities than of whites. It is particularly this category of discriminatory conduct that the "impact" standard will allow a plaintiff to reach and to force a defendant to justify.

13. The Supreme Court has granted certiorari in at least one case that raises this issue. See Davis v. County Los Angeles, 566 F.2d 1334 (9th Cir. 1977), cert. granted, 98 S. Ct. 3087 (1978).
II. HISTORICAL BACKGROUND AND PRESENT SIGNIFICANCE OF SECTION 1981

Congress originally enacted 42 U.S.C. § 1981 as part of section 1 of the Civil Rights Act of 1866,14 pursuant to section 2 of the thirteenth amendment.15 Early Supreme Court interpretations of section 1 of the 1866 Act greatly limited its scope and reach in two general ways. First, although the Court’s analysis often was confusing and dictum, the Court held the 1866 Act to apply only to government-authorized race discrimination.16 Second, the Court held that because Congress enacted the 1866 Act to enforce the thirteenth amendment, the 1866 Act prohibited only a narrow range of conduct that, in effect, actually constituted perpetuation of slavery.17

However, in the landmark decision of Jones v. Alfred H. Mayer Co.,18 the Supreme Court distinguished these earlier cases and specifically held that section 1982, also derived from section 1 of the 1866 Act, applies to race discrimination resulting from purely private conduct.19 The Court also held that the 1866 Act applies


Section 1981 provides:

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

Section 1982 provides:

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

15. U.S. Const. amend. XIII, § 2. The thirteenth amendment provides:

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.


19. The correctness of this ruling was, and still is, hotly debated by the members of the Court, see Runyon v. McCrory, 427 U.S. 160, 192 (1976); White, J., dissenting); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 449 (1968) (Harlan, J., dissenting), as well as by numerous legal scholars, see, e.g., 6 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864-88, at 1217-19; Ervin, Jones v. Alfred Mayer Co.: Judicial Activism Run Riot, 22 Vand. L. Rev. 485 (1969); Henkin, The Supreme Court, 1967 Term—Foreword: On Drawing Lines, 82 Harv. L. Rev. 63, 95 (1968); Kino, Jones v. Alfred H. Mayer Co.: An His-
not merely to a narrowly defined notion of the badges and incidents of slavery but prohibits a variety of acts and practices with a scope as broad as the language of the Act.\textsuperscript{20} Although Jones v. Alfred H. Mayer Co. involved only section 1982, it was clear that the Court's reasoning was equally applicable to section 1981. The Court expressly so held in Johnson v. Railway Express Agency\textsuperscript{21} and in Runyon v. McCrary.\textsuperscript{22}

The Jones decision is of great significance because it extends the 1866 Act to private discrimination and broadens its coverage. However, the impact of sections 1981 and 1982 in civil rights litigation was initially not as great as one might have expected. This was partially due to the existence of the Civil Rights Acts of 1964 and 1968, which contained more comprehensive legislation dealing with race and other types of discrimination.\textsuperscript{23} For example, because the provisions of section 1981 and of title VII of the 1964 Act overlap in prohibiting racial discrimination in employment, the interrelationship between these two statutes created much initial confusion.\textsuperscript{24} Uncertainty as to whether a plaintiff proceeded...
ing under section 1981 must exhaust the administrative remedies required under the 1964 Act and whether the same kinds of injunctive and monetary relief would be available, combined with lack of administrative discovery and explicit provisions for attorneys' fees, resulted in few cases proceeding solely under section 1981.

However, the federal courts have now better defined the relationship between section 1981 and the more recent Civil Rights Acts. In Johnson v. Railway Express Agency, the Supreme Court held that section 1981 and title VII of the 1964 Act are separate, distinct, and independent causes of action that augment each other and are not mutually exclusive. Since this ruling, section 1981 has had an important independent vitality even in general areas of overlapping statutory coverage, such as employment discrimination. In fact, there are significant advantages to proceeding under section 1981. For example, section 1981 does not require the exhaustion of administrative remedies, whereas under title VII a claimant must file an administrative charge within a specified time and then exhaust the delay-ridden procedures of the Equal Employment Opportunity Commission (EEOC) prior to commencing litigation.

The remedies available to a section 1981 plaintiff are at least as

27. A claimant proceeding under title VII must file an administrative charge of discrimination with the EEOC within 180 days of the alleged discriminatory act if no appropriate state or local fair employment agency exists. The claimant must file within 300 days if such an agency does exist. Civil Rights Act of 1964, § 706(e), 42 U.S.C. § 2000e-5(e) (1976). Upon receiving a timely charge, the EEOC must investigate to determine whether reasonable cause exists to believe the charge is true. Id. § 706(b), (e), 42 U.S.C. § 2000e-5(b), (e); see 29 C.F.R. § 1601.13 (1978). The statute requires that the investigation be completed within 120 days of receiving the charge, Civil Rights Act of 1964, § 706(b), 42 U.S.C. § 2000e-5(b) (1976), but in practice the investigation takes substantially longer to complete. If the EEOC finds reasonable cause, it must attempt to conciliate the charge informally. Id. If conciliation attempts fail, the claimant may commence litigation within 90 days after receiving a notice of right to sue from the EEOC. Id. § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1).

The claimant may shorten this administrative process by demanding notification of right to sue after the charge has been filed for 180 days regardless of whether the EEOC has taken any action. 29 C.F.R. § 1601.25b(c) (1978). In addition, the Supreme Court has held in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), that timely filing of charges with the EEOC by the plaintiff and timely commencement of litigation upon receipt of the EEOC's notice of right to sue satisfy the title VII jurisdictional prerequisites.

By contrast, a plaintiff proceeding under § 1981 need not exhaust EEOC or other administrative remedies prior to commencing an action in federal court even when pleading both § 1981 and title VII violations. Johnson v. Railway Express Agency, 421 U.S. 454 (1975).
broad as those available to a title VII plaintiff and are more extensive in some cases. Under section 1981, as under title VII, a plaintiff can obtain class-wide injunctive relief as well as back pay. But unlike title VII, section 1981 does not restrict an award of back pay to any specific period. In addition, a plaintiff can obtain compensatory and punitive damages under section 1981 but not under title VII. Moreover, because a section 1981 plaintiff need not exhaust EEOC administrative remedies, nothing prevents that plaintiff from seeking immediate temporary injunctive relief in federal court. Finally, with the enactment of the Civil Rights Attorney’s Fees Awards Act of 1976, a successful plaintiff under section 1981 may now obtain an award of attorneys’ fees to much the same extent as under title VII.

Moreover, the 1964 and 1968 Acts exempt certain categories of defendants from their coverage, but the language of section 1981 contains no such exemptions. More important, section 1981 may apply to certain substantive areas of employment discrimination that have been judicially determined to be excluded from attack under title VII. One such area involves seniority plans. In a number of recent decisions, the Supreme Court has held that

29. Id. at 460. An award of back pay under title VII cannot extend back more than two years prior to the filing of the administrative charge with the EEOC. Civil Rights Act of 1964, § 706(g), 42 U.S.C. § 2000e-5(g) (1976).
30. In Johnson v. Railway Express Agency, 421 U.S. 454, 460 (1975), the Court held that compensatory and punitive damages are available to a § 1981 plaintiff. The weight of authority seems to indicate that they are not available under title VII. See, e.g., EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975); Van Hoomissen v. Xerox Corp., 497 F.2d 180 (9th Cir. 1974).
31. Section 706(k) of the 1964 Act, 42 U.S.C. § 2000e-5(k) (1976), authorizes a district court, in its discretion, to award attorneys’ fees to the prevailing party. As a practical matter, the lack of such explicit fees authorization in the 1866 Act made proceeding under § 1981 much less attractive than under title VII. This lack of authorization for attorneys’ fees may help explain why private litigants continued to exhaust title VII administrative prerequisites in employment discrimination cases rather than immediately commence litigation based solely on § 1981. Now, with the enactment of the Civil Rights Attorney’s Fees Award Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified at 42 U.S.C. § 1988 (1976)), a district court is authorized to award attorneys’ fees in its discretion to the prevailing party in actions based on certain civil rights statutes, including §§ 1981, 1982, & 1983.
under section 703(h)\textsuperscript{33} of title VII, bona fide seniority systems are not unlawful even though they perpetuate the discriminatory effects of pre-title VII race discrimination.\textsuperscript{34} Although such seniority systems enjoy a high degree of immunization from title VII challenges because of section 703(h), they are not necessarily immune from attack by claims based on section 1981.\textsuperscript{35}

Thus even in those areas in which the more recent civil rights statutes overlap with section 1981, there are several significant reasons for the importance of section 1981 as an independent cause of action.\textsuperscript{36} However, the language of section 1981 does not limit its scope to race discrimination in employment or in housing. Section 1981 applies to all contractual relationships and thus is potentially much broader than the provisions prohibiting race discrimination in the 1964 and in subsequent Civil Rights Acts.\textsuperscript{37}

The Supreme Court in \textit{Runyon v. McCrary}\textsuperscript{38} has already applied section 1981 to prohibit race discrimination in the admission practices of private, non-sectarian schools. Lower federal courts have extended section 1981 to claims of race discrimination in a wide variety of contexts, including hospital admissions,\textsuperscript{39} insurance,\textsuperscript{40} access to recreational facilities,\textsuperscript{41} utility security deposits, and other discriminatory practices.

\textsuperscript{34} \textit{E.g.}, Trans World Airlines, Inc. \textit{v. Hardison}, 432 U.S. 63 (1977); United Air Lines, Inc. \textit{v. Evans}, 431 U.S. 553 (1977); International Bhd. of Teamsters \textit{v. United States}, 431 U.S. 324 (1977). In \textit{Trans World Airlines} the Court held that § 703(h) is a definitional provision and that absent a discriminatory purpose, the operation of a seniority plan cannot be an unlawful employment practice even if the plan has discriminatory consequences. In Hazelwood \textit{School Dist. v. United States}, 433 U.S. 299 (1977), the Court indicated that the pre-Act/post-Act distinction applies to other allegedly discriminatory practices.
\textsuperscript{35} \textit{See, e.g.}, De Graffenreid \textit{v. General Motors Assembly Div.}, 558 F.2d 480 (8th Cir. 1977). \textit{But see} Chance \textit{v. Board of Examiners}, 534 F.2d 993 (2d Cir. 1976), \textit{cert. denied}, 431 U.S. 965 (1977); Watkins \textit{v. United States Steel Workers Local 2369}, 516 F.2d 41 (5th Cir. 1975).
\textsuperscript{36} For a somewhat more pessimistic assessment of the present vitality of § 1981 as an independent remedy, in light of the more recent civil rights legislation, see Reiss, \textit{Requiem for an "Independent Remedy": The Civil Rights Acts of 1866 and 1871 as Remedies for Employment Discrimination}, 50 So. CAI. L. Rev. 961 (1977).

\textsuperscript{38} 427 U.S. 160 (1976).
its, the delivery of county services, the grant of automobile franchises, and police misconduct. In fact, few areas of private or government-authorized race discrimination cannot be considered contractual in nature or do not come under the other broad language of section 1981. Consequently, the question of what standard of proof is necessary to establish a prima facie case under section 1981 is one of far-reaching importance and effect.

III. INTENT V. IMPACT: THE TWO STANDARDS DEFINED

Until recently, the distinction between the “intent” and “impact” standards has never received much attention in civil rights litigation. To appreciate fully the significance of this choice of section 1981 standards, it is necessary to examine how the federal courts have defined and applied each standard.

Although occasional Supreme Court decisions involving race discrimination and the fourteenth amendment’s equal protection clause have indicated that disparate racial impact raises an inference of discrimination, the “impact” or “effects” standard first took on real meaning in the context of title VII of the Civil Rights Act of 1964. In the seminal civil rights decision of Griggs v. Duke Power Co., the Supreme Court held that a showing of racially discriminatory effect by itself is sufficient to prove a prima facie case under title VII.

In Griggs, the plaintiffs, black employees, challenged the defendant company’s policies of requiring either a high school diploma or a passing score on a standardized general intelligence test as a prerequisite of employment in or transfer to certain jobs in the company. There was no showing that the defendant adopted or applied its diploma and test requirements with a ra-
cially discriminatory purpose or intent. The plaintiffs' only evidence was that these requirements, although applied to blacks and whites alike, disqualified a disproportionately greater number of black than of white employees. The Court found this evidence sufficient to prove a prima facie case under title VII.

Referring to the language and the legislative history of title VII, the Court first ruled that the 1964 Act prohibits practices, procedures, and tests neutral on their face and in intent if they are discriminatory in operation. The Court stated that title VII was directed at the consequences and effects of employment practices, not simply at the defendant's motivation. The Court then noted that even good intent or the absence of discriminatory intent does not redeem an employment procedure or test that has a racially discriminatory effect unless the defendant proves the procedure or test is job-related and justified by business necessity.

A three-step process for assigning burdens of proof in title VII cases has evolved from *Griggs* and subsequent Supreme Court decisions. First, the plaintiff bears the burden of establishing a prima facie case. To do so, the plaintiff must show that the employment practice in question has a racially discriminatory effect. The plaintiff may prove disproportionate impact solely by use of statistics, including analysis of the actual results of the defendant's policies and practices, or by reliance on general population demographic data.

50. *Id.* at 428-29.
51. The only evidence the Supreme Court considered was statistical. With respect to the diploma requirement, the Court looked at census figures for North Carolina (the location of the defendant's plant), which indicated that only 12% of the state's black males, as compared to 34% of the state's white males, had completed high school. *Id.* at 430 n.6. With respect to the standardized tests, the Court noted that whereas 58% of the whites passed such tests, only 6% of the blacks passed. *Id.*
52. *Id.* at 430-31.
53. *Id.* at 432.
54. *Id.* at 431-32, 436.
56. Of course, the plaintiff can establish a violation of title VII by proving intentional or purposeful discrimination. The elements of a prima facie case of intentional race discrimination under title VII are discussed in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).
Once the plaintiff has shown that a facially neutral employment practice has a disproportionate adverse racial impact, the burden shifts to the defendant to prove that the challenged practice has a manifest relation to the job in question and is thus justified by business necessity.\textsuperscript{58} If the employer then proves that the challenged practice is job-related, the burden shifts back to the plaintiff to show that other selection devices without a similar discriminatory effect are available and will serve the employer’s legitimate interests as well as the challenged practice.\textsuperscript{59}

The significance of this “effects” test in Title VII litigation cannot be understated. As a direct result of the Griggs standard, hundreds of federal court decisions have held that employment practices, neutral on their face and in application, violate Title VII because they have a disproportionate adverse racial impact and are not justified by business necessity. Relying solely on statistical evidence and without any inquiry into the defendant employer’s intent, courts have enjoined the use of various standardized intelligence tests,\textsuperscript{60} high school and college diploma requirements,\textsuperscript{61} minimum height and weight requirements,\textsuperscript{62} policies disqualifying applicants with arrest or conviction records,\textsuperscript{63} background investigations,\textsuperscript{64} policies disqualifying employees with more than one garnishment,\textsuperscript{65} and other facially neutral employment practices. Moreover, courts have adopted the “effects”

\textsuperscript{58} Id. at 329; Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). For tests covered by the EEOC guidelines on employee selection procedures, 29 C.F.R. § 1607 (1978), the defendant must show that the challenged tests have been empirically validated in accordance with the guidelines. See Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).


\textsuperscript{60} E.g., United States v. City of Chicago, 549 F.2d 415, 429 (7th Cir. 1977); United States v. Georgia Power Co., 474 F.2d 906, 912 n.5 (5th Cir. 1973).


\textsuperscript{62} E.g., Dothard v. Rawlinson, 433 U.S. 321 (1977); Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976); Davis v. County of Los Angeles, 566 F.2d 1334 (9th Cir. 1977).
test as the standard of proof necessary to make out a prima facie case under other titles of the recent Civil Rights Acts.66

In contrast to the "effects" (or "impact") standard, the "intent" standard in most instances requires that the plaintiff prove more than mere disproportionate adverse impact to make out a prima facie case. The requirement of proof of intentional or purposeful discrimination under the Constitution is not new, and several Supreme Court decisions have required such proof in school desegregation cases.67 However, not until two recent decisions, Washington v. Davis68 and Village of Arlington Heights v. Metropolitan Housing Development Corp.,69 has the Supreme Court extensively discussed the requirement of proof of intent.

In Washington v. Davis, the Supreme Court held that in order to establish a prima facie case of racial discrimination under the fifth amendment, a plaintiff must prove intentional or purposeful race discrimination.70 The plaintiffs challenged the validity of the District of Columbia police department's written personnel test, which excluded a disproportionately high number of black applicants. The plaintiffs asserted that because the test had a disparate racial impact, the defendants' use of the test violated the fifth amendment to the United States Constitution.71 The Court held that the title VII standards are not applicable to constitutional analysis and that therefore the defendant's facially neutral employment test was not invalid solely because it had a disproportionate adverse racial impact. The Court noted that disproportionate impact is not irrelevant to proof of intentional discrimination but generally will not, by itself, be sufficient to prove such intent.72

The Supreme Court further defined this "intent" standard in

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68. 426 U.S. 229 (1976). Washington v. Davis is also important because it is an employment discrimination case and thus has had an impact on other such cases involving § 1981. See pts. IV & V infra.


70. Washington v. Davis, 426 U.S. at 238-42.

71. Id. at 232-37. The plaintiffs also alleged violations of § 1981 and D.C. Code § 1-320. As will be discussed in detail infra, the Court did not determine the appropriate standard of proof for these statutory claims. See notes 99-123 and accompanying text infra.

Arlington Heights, in which the Court held that proof of racially discriminatory intent or purpose is necessary to establish a prima facie case of race discrimination under the equal protection clause of the fourteenth amendment. The Court ruled that to shift the burden of justification to the defendant, a plaintiff need not prove that the challenged action rested solely on a racially discriminatory purpose but must prove that such a purpose was a motivating factor for the action. The Court then explained that the determination of whether discriminatory purpose was a motivating factor requires an inquiry into such circumstances and direct evidence of intent as may be available, and identified a nonexhaustive list of evidentiary sources of intent: historical background of the allegedly discriminatory decision, specific sequence of events leading up to the decision and departure from normal procedural sequence, and legislative or administrative history and debates.

However, as in Washington v. Davis, the Court in Arlington Heights again stated that proof of disproportionate racial impact by itself generally will not support a claim of race discrimination in violation of the equal protection clause. It did indicate that disproportionate impact is not totally irrelevant and can be a starting point for further inquiry into evidence of intent. The Court noted that in some cases the discriminatory effect of facially neutral legislation or practices may present a clear pattern unexplainable on grounds other than race. However, the Court quickly qualified this statement by adding that only in rare cases of egregiously disproportionate impact—in which the only possible explanation is race discrimination—will impact alone be determinative of intent to discriminate.

Thus, although proof of disproportionate adverse impact is not totally irrelevant under the Supreme Court’s recent definition of the “intent” standard for constitutional claims, it will not nor-
mally be enough to support a plaintiff's prima facie case. Further refinement of this standard may uncover new evidentiary sources that will make it easier for plaintiffs to prove intent.\textsuperscript{81} But under present interpretations, many civil rights plaintiffs will be unable to establish the requisite intent when challenging facially race-neutral conduct, policies, or practices.

A hypothetical example may help illustrate the significance of the distinction between the "impact" and "intent" standards. Assume that a large company has a policy of not employing any persons with arrest records. This policy has been in effect for as long as the company has been in existence, and it is fairly applied to both black and white applicants. The arrest record policy is challenged by otherwise qualified black applicants who have been rejected as a result of its operation. These plaintiffs can offer no proof that the policy involves intentional race discrimination, but they can prove statistically that the policy operates to disqualify fifteen percent of the black applicants, compared with only four percent of the white applicants. In addition, based on appropriate census and crime statistics, they can demonstrate that a black person is three to four times as likely as a white person to have an arrest record.

Under the \textit{Griggs} "effects" standard, this statistical evidence would be sufficient to establish a prima facie case, shifting the burden to the defendant company to show that its arrest record

\textsuperscript{81} A number of lower courts have already construed the purposeful discrimination requirement of Washington v. Davis and \textit{Arlington Heights} and have set forth some additional guidelines as to what may constitute evidence of intent. \textit{See}, e.g., United States v. Board of School Comm'rs, 573 F.2d 400, 410-15 (7th Cir. 1978); Arthur v. Nyquist, 573 F.2d 134, 140-47 (2d Cir. 1978); Arnold v. Ballard, 448 F. Supp. 1025 (N.D. Ohio 1978); Dickerson v. United States Steel Corp., 439 F. Supp. 55 (E.D. Pa. 1977). These decisions indicate that evidence of disproportionate impact is not irrelevant but provides a starting point for further evidence of intent. They also indicate that a presumption of discriminatory purpose may arise where the material, probable, and foreseeable effects of a defendant's conduct is discrimination. Some decisions have noted that a plaintiff may establish a prima facie case of intentional discrimination by showing that in adopting a course of action the defendant ignored less discriminatory options that would have furthered the defendant's policies as effectively as the option chosen. \textit{See} United States v. Board of School Comm'rs, 573 F.2d 400 (7th Cir. 1978). Other decisions have indicated approval of the "rule of exclusion" means of proving a prima facie case, set forth in Castaneda v. Partida, 430 U.S. 482, 494 (1977). \textit{See} Arnold v. Ballard, 448 F. Supp. 1025 (N.D. Ohio 1978). These decisions provide methods of proving intentional race discrimination by objective evidence of intent and thus eliminate some of the proof problems inherent in proving subjective intent to discriminate. For a thoughtful discussion of examples of what may constitute evidence of intentional race discrimination in disproportionate impact cases, \textit{see} Simon, \textit{Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination}, 15 \textit{San Diego L. Rev.} 1041, 1107-27 (1978).
policy is justified. Under the “intent” standard, the plaintiffs' evidence would not be sufficient to establish a prima facie case: The disparate effect of the policy is not egregious, and there is no other evidence of racially discriminatory intent or purpose. Instead, the plaintiffs' claim of race discrimination would fail. Likewise, any other facially neutral policy with a similar adverse impact, such as a high school diploma requirement, would not be readily challengeable under the “intent” standard. No matter how arbitrary such policies and practices were in design, the defendant would not be required to justify them.

Thus, as the arrest record hypothetical illustrates, the difference between the “intent” standard and the “impact” standard is substantial for civil rights litigants. Because of the covert nature of modern race discrimination and of the widespread reliance on facially neutral policies and practices, proof of intentional discrimination is not easily established. Such proof is certainly much more difficult to show than evidence of impact or effect. Having defined the two standards, it is necessary to examine how they have been, and are being, applied with respect to section 1981.

IV. INTENT V. IMPACT: CURRENT STATUS OF THE DEBATE IN THE LOWER FEDERAL COURTS

Despite the importance of determining whether the standard of proof under section 1981 should be one that requires a showing of discriminatory intent or one that requires merely a showing of disproportionate impact, until recently the lower federal courts have made the choice with little discussion or analysis. Prior to the decision in Washington v. Davis, nearly every court that had considered the issue had held that the standard of proof under section 1981 was the same as that under title VII and thus that a plaintiff need only prove racially discriminatory effect to make out a prima facie case. To understand how this adoption of the “im-

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82. In fact, several courts have found that such arrest record policies do violate Title VII. See cases cited note 63 supra.
83. 426 U.S. 229 (1976).
84. Chicano Police Officer's Ass'n v. Stover, 526 F.2d 431 (10th Cir. 1975); Kirkland v. New York State Dept of Correctional Servs., 520 F.2d 420 (2d Cir. 1975); Long v. Ford Motor Co., 496 F.2d 500 (6th Cir. 1974); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972). See, e.g., Swint v. Pullman-Standard, 539 F.2d 77 (5th Cir. 1976); Wade v. Mississippi Cooper Extension Serv., 528 F.2d 508 (5th Cir. 1976); Tillman v. Wheaton-Haven Recreation Ass'n, 517 F.2d 1141 (4th Cir. 1975); Waters v. Wiscon-
pact" standard for section 1981 evolved, it is necessary to return again to the area of employment discrimination and title VII.

After the decision in Jones v. Alfred H. Mayer Co.,85 extended the Civil Rights Act of 1866 to reach private discrimination, section 1981 immediately was used by civil rights plaintiffs as an adjunct to claims based on the 1964 or the 1968 Civil Rights Acts. Because most of these claims were employment discrimination cases under title VII, section 1981 received its most extensive initial use in that area. However, because of the previously discussed uncertainties surrounding the relationship between section 1981 and title VII, few cases relied solely on section 1981.86 In fact, section 1981 was viewed primarily as an additional claim to be pressed only if something went wrong with the title VII claim.87 So although plaintiffs alleged section 1981 along with title VII violations in hundreds of employment discrimination cases, courts rarely gave section 1981 any independent consideration.

As a result of this tie-in between title VII and section 1981, courts often construed the two statutes alike. When the Supreme Court decided Griggs v. Duke Power Co.,88 and thereby adopted the "effects" test, the lower courts were faced with a tremendous upsurge of title VII complaints challenging practices solely on the basis of disparate impact. As it was prior to Griggs, plaintiffs continued to plead section 1981 as a secondary claim. Likewise, without independent analysis, courts continued to construe the standard of proof necessary for a prima facie case under section 1981 the same as that required for title VII. Because of the importance of the Griggs ruling for employment discrimination cases, the lower courts automatically applied the Griggs "effects" standard even when plaintiffs asserted only section 1981.89

86. See text accompanying notes 23-24 supra.
89. See cases cited note 84 supra. Title VII was not applicable to state or federal employers until amended by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103 (codified at 42 U.S.C. § 2000e (1976)). Prior to those amendments, plaintiffs often alleged § 1981 as the basis of employment discrimination claims against such public employers in addition to § 1983, the fifth amendment, and the fourteenth amendment. Courts treated claims based on § 1981, as well as claims based on § 1983 and on the Constitution, as though they were title VII claims.

Prior to Washington v. Davis, nearly every court that had considered the issue had ruled that under § 1983, as well as under the fifth or fourteenth amendments, a
This evolving relationship helps explain why, prior to the 1976 decision in *Washington v. Davis*, almost every circuit had held, often with little or no discussion, that under section 1981 a plaintiff need only prove racially discriminatory effect to make out a prima facie case and that lack of discriminatory intent was irrelevant.\textsuperscript{90} Likewise, the lower federal courts generally held that the title VII "effects" standard was applicable to claims brought pursuant to 42 U.S.C. § 1983, the fifth amendment, or the fourteenth amendment.\textsuperscript{91}

After the Supreme Court's holdings in *Washington v. Davis* and in *Arlington Heights*, the lower courts reconsidered the issue of the appropriate standard under the fifth and fourteenth amendments and, in addition, under 42 U.S.C. § 1983.\textsuperscript{92} Understandably, every lower court that has reconsidered the question of the appropriate standard for 42 U.S.C. § 1983 has held that a plaintiff must prove intentional discrimination and that a mere showing of disproportionate impact generally is not sufficient to establish a prima facie case of race discrimination.\textsuperscript{93} However, the lower courts have not read *Washington v. Davis* as requiring proof of in-

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\textsuperscript{90} See cases cited note 84 supra.

\textsuperscript{91} See note 89 supra. In addition, several cases have held that the "effects" standard applies to 42 U.S.C. § 1982. *E.g.,* Smith v. Anchor Bldg. Corp., 536 F.2d 231 (8th Cir. 1977); *Clark v. Mann*, 562 F.2d 1104 (6th Cir. 1977); *Williams v. Anderson*, 562 F.2d 1081 (8th Cir. 1977); *Butler v. Cooper*, 554 F.2d 643 (4th Cir. 1977); *Chicano Police Officer's Ass'n v. Stover*, 552 F.2d 918 (10th Cir. 1977); *United States v. City of Chicago*, 549 F.2d 415 (7th Cir. 1977); *Richardson v. McFadden*, 540 F.2d 744 (4th Cir. 1976); *Acha v. Beame*, 438 F. Supp. 79 (S.D.N.Y. 1977); *Santiago v. City of Philadelphia*, 435 F. Supp. 136 (E.D. Pa. 1977).
Although the actual rulings in *Washington v. Davis* and in *Arlington Heights* dealt with the standard of proof only under the fifth and fourteenth amendments, respectively, these rulings have also now caused the lower courts to reassess their positions on the appropriate standard for section 1981. In so doing, courts in different circuits have reached different conclusions. As of the date of this article, at least two courts of appeals and a few district courts had held that even after *Washington v. Davis* a plaintiff need prove only discriminatory effect or impact to establish a prima facie case under section 1981. On the other hand, at least

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94. Although Washington v. Davis was not a title VII case, see 426 U.S. at 238-39, 249-52, a number of lower courts have found it necessary to rule explicitly that the decision in no manner affected the *Griggs* "effects" standard in cases brought under title VII. E.g., *Richardson v. Pennsylvania Dep't of Pub. Health*, 561 F.2d 489 (3d Cir. 1977); *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310 (6th Cir. 1977); *Fire Fighters Inst. Inc. v. City of St. Louis*, 549 F.2d 506 (8th Cir. 1977); *United States v. City of Chicago*, 549 F.2d 415 (7th Cir. 1977).

However, the rulings in *Washington v. Davis* and *Arlington Heights* have resulted in a question of potentially broad significance regarding the 1972 amendments to title VII. These amendments extended title VII's coverage to state and local government employers. See note 89 supra. In enacting these amendments, it appears that Congress was exercising its powers under § 5 of the fourteenth amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). If this source is the sole constitutional basis for the 1972 amendments, claims against state and local governments under these amendments may require proof of intentional or purposeful discrimination. The Supreme Court is aware of this issue but has not fully considered or ruled on it. *Hazelwood School Dist. v. United States*, 433 U.S. 299, 306 n.12 (1977). At least three district courts have held that a showing of intentional discrimination is required in such claims. *Friend v. Leidinger*, 446 F. Supp. 361 (E.D. Va. 1977); *Blake v. City of Los Angeles*, 435 F. Supp. 55 (C.D. Cal. 1977); *Scott v. City of Anniston*, 430 F. Supp. 508, 515 (N.D. Ala. 1977). *Contra*, *United States v. City of Chicago*, 573 F.2d 416 (7th Cir. 1978).

One answer to this question is to recognize that Congress also enacted the 1972 title VII amendments pursuant to its commerce clause powers, as it did in enacting the 1964 Act. However, this position raises serious questions as to whether these amendments, which seek to regulate the employment decisions of state and local governments, are properly within the power of Congress to regulate interstate commerce. See *National League of Cities v. Usery*, 426 U.S. 833 (1976). The better argument would seem to be that although the equal protection clause requires proof of intent, Congress nonetheless has the power under § 5 of the fourteenth amendment to enact legislation that adopts an impact standard. See *United States v. City of Chicago*, 573 F.2d 416 (7th Cir. 1970). *See also Katzenbach v. Morgan*, 384 U.S. 641 (1966).

95. Ironically, just as *Griggs*, a title VII case, influenced the lower courts to adopt an impact standard in employment discrimination cases involving § 1981, *Washington v. Davis*, a constitutional ruling in another employment discrimination case, has influenced the lower courts to reconsider their § 1981 holdings. In both instances, the fact that the decisions were employment discrimination cases has had a greater effect on § 1981 than the actual holdings warranted. It should, however, be pointed out that § 1981 was plead in *Washington v. Davis*. As discussed in pt. V infra, some confusion exists as to whether the decision has, by implication, already ruled on the issue of the appropriate standard for § 1981.

96. Cases requiring only a showing of racially discriminatory effect include *Davis v. County of Los Angeles*, 566 F.2d 1334 (9th Cir. 1977), *cert. granted*, 98 S. Ct.
three other courts of appeals and a growing number of district courts have held that a showing of disproportionate impact, by itself, is not sufficient and that the plaintiff must prove intentional or purposeful discrimination to establish a prima facie case under section 1981.97

Only a few of these recent cases have engaged in any comprehensive analysis in determining which standard of proof is required for claims based on section 1981.98 Undoubtedly, this is because there are no clearly dispositive arguments for or against either standard. In the section that follows, the arguments for and against each standard will be identified and analyzed, beginning with the arguments concerning whether the Supreme Court’s decision in Washington v. Davis has already impliedly ruled on the standard-of-proof issue for section 1981.


98. The most extensive discussions of this issue are contained in opinions that have concluded that a plaintiff must prove intentional discrimination under § 1981. E.g., Davis v. County of Los Angeles, 566 F.2d 1334, 1347-51 (9th Cir. 1977) (Wallace, J., dissenting), cert. granted, 98 S. Ct. 3087 (1978); Lewis v. Bethlehem Steel Corp., 440 F. Supp. 949, 963-66 (D. Md. 1977).
V. INTENT v. IMPACT: THE ARGUMENTS FOR AND AGAINST EACH STANDARD FOR SECTION 1981

Although the matter is not entirely free from doubt, the Supreme Court in Washington v. Davis99 evidently neither considered nor decided the appropriate standard of proof for a prima facie case under section 1981. The most accurate reading of the Court's opinion is that the Court decided only the constitutional standard under the fifth amendment. To facilitate understanding of the Court's opinion, it is first necessary to examine the procedural history of the case.

In challenging the defendant police department's promotion and recruitment practices, the plaintiffs did allege that the practices violated section 1981, as well as the fifth amendment and section 1-320 of the District of Columbia Code.100 However, the plaintiffs never pursued these statutory grounds. Instead, they filed a motion for partial summary judgment with respect to the validity of the challenged personnel test (Test 21) based solely on their fifth amendment claim.101 In support of this motion, the plaintiffs presented evidence which showed that the challenged test excluded a disproportionately high number of black applicants.102 The defendants also filed motions for summary judgment, asserting that even if Test 21 had a disparate racial impact, the plaintiffs were entitled to relief on neither constitutional nor statutory grounds because the test was sufficiently related to police training performance.103 The district court found that the test had a racially discriminatory impact but that it was validated in terms of police training.104 Accordingly, the district court denied the plaintiffs' motion and granted those of the defendants.

The court of appeals reversed the district court's rulings, holding that the district court should have followed the title VII standards set forth in Griggs v. Duke Power Co.105 to decide the plaintiffs' fifth amendment claim.106 The court of appeals found the test unconstitutional because it had a disproportionately adverse racial impact and had not been proven to be an accurate measure of job performance in addition to being an indicator of

100. Id. at 233.
101. Id. at 234.
102. Id. at 233-36.
103. Id. at 234.
106. Davis v. Washington, 512 F.2d 956, 959 (D.C. Cir. 1975). This decision is summarized in the Supreme Court's opinion, 426 U.S. at 236-37.
probable success in the police training program.\textsuperscript{107} Apparently, the defendants did not contest application of the “impact” standard to the plaintiffs’ fifth amendment claim but questioned the adequacy of the plaintiffs’ statistical showing and contended that the test need be validated only by a demonstrated relationship to training program success.\textsuperscript{108}

Thus when the case reached the Supreme Court, the only issues presented to and ruled on by the lower courts concerned the appropriate standard of proof under the fifth amendment and the adequacy of the test’s validation with respect to the fifth amendment and the asserted statutes. The lower courts neither considered nor ruled on the appropriate standard of proof for a prima facie case under section 1981.

In reversing the court of appeals, the Supreme Court held that the plaintiffs had failed to prove intentional discrimination and that the defendants had adequately validated their test. In part I of its opinion, the Supreme Court set forth the procedural history of the case.\textsuperscript{109} In part II of its opinion, the Court discussed only the plaintiffs’ motion for summary judgment.\textsuperscript{110} With respect to this motion, the Court held that it was error for the court of appeals to apply the title VII standards in resolving a constitutional issue.\textsuperscript{111} Under an equal protection analysis, the Court ruled that a facially neutral practice is generally not unconstitutional solely because it has a racially discriminatory impact.\textsuperscript{112} After reviewing several equal protection cases, the Court concluded that to establish a constitutionally based prima facie claim of race discrimination, the plaintiffs must prove that the test involved purposeful or intentional discrimination.\textsuperscript{113}

An analysis of part II of the Supreme Court’s opinion shows that the Court discussed and decided the appropriate standard of proof only for claims based on the fifth amendment or on the equal protection clause of the fourteenth amendment. The Court went to great lengths to state explicitly that it dealt only with the fifth amendment claim raised in the plaintiffs’ motion for sum-

\begin{itemize}
  \item \textsuperscript{107} 512 F.2d at 961-65. See 426 U.S. at 237.
  \item \textsuperscript{108} 512 F.2d at 960-63.
  \item \textsuperscript{109} 426 U.S. at 232-38.
  \item \textsuperscript{110} Id. at 238-48.
  \item \textsuperscript{111} Id. at 238.
  \item \textsuperscript{112} Id. at 239.
  \item \textsuperscript{113} Id. at 245-48.
\end{itemize}
mary judgment. It repeatedly pointed out that the plaintiffs' motion presented no issues under any statutes or regulations. Moreover, throughout its discussion of the standard of proof necessary to establish a prima facie case of race discrimination, the Court repeatedly stated that it was dealing with "constitutional" issues and rules. Thus the Court did not rule on the section 1981 standard when, in part II of its opinion, it held that proof of intentional or purposeful discrimination is required for constitutionally based claims.

However, the discussion in part III of the Court's opinion is more troublesome. There, the Court considered the defendants' motions for summary judgment, which asserted that the plaintiffs were not entitled to relief on either constitutional or statutory grounds. The Supreme Court held that the court of appeals was in error in requiring that the defendants' Test 21 could be validated only by showing that it was related to job performance, because that was a title VII requirement. Instead, the Court held that the defendants had shown the test to be validated by their evidence of a positive relationship between the test and training-course performance. Thus the Court in effect ruled that the title VII requirement of job-relatedness validation does not apply to non-title VII employment discrimination cases whether based on constitutional or statutory grounds.

Just as it is clear that part II of the opinion, concerning the plaintiffs' standard of proof for a prima facie case, involves only constitutional claims, it is clear that part III, concerning what the defendants must show to justify use of their Test 21, involves both constitutional and statutory grounds. Although the Court in part III never identified the statutes it considered, the only statutory grounds pled by the plaintiffs were section 1981 and section 1-320

114. Id. at 234, 238 n.10. The Court also explicitly distinguished and contrasted its constitutional analysis from that necessary under title VII. Id. at 239, 246-47.
115. In pt. II of the opinion, the Court repeatedly used language to leave no doubt that it was dealing only with a "constitutional issue," a "constitutional standard," a "constitutional rule," and a "constitutionally-based" claim. On several occasions it specifically identified the constitutional amendments involved in the decision. E.g., id. at 238, 241, 242, 246, 248.
117. 426 U.S. at 248-52.
118. Id. at 250.
The discussion of the defendants' burden in part III of the opinion supports an argument regarding the standard of proof required for a prima facie case under section 1981. The Court had already ruled in part II that plaintiffs had failed to plead or prove a prima facie case under the fifth amendment. Accordingly, because the burden of justification never shifted to the defendants on this constitutional claim, there was no reason for the Court to consider whether the defendants had adequately validated Test 21 in accordance with fifth amendment requirements. That the Court did consider the adequacy of the defendants' evidence regarding the validity of the test in relation to the plaintiffs' statutory claims could indicate that the Court must have viewed the plaintiffs as having presented a prima facie case of race discrimination under section 1981 and/or D.C. Code § 1-320. For unless the plaintiffs had established a prima facie case with respect to these statutory claims, there would have been no reason for the burden to shift to the defendants to prove the test's validity and no reason for the Court to discuss the defendants' validation evidence in part III of the opinion. Because the only evidence before the Court was that the facially neutral Test 21 had a disproportionately adverse racial impact, it can be argued that the Court must have implicitly held that under section 1981 (and/or D.C. Code § 1-320), unlike the fifth amendment, the plaintiffs need prove only disproportionate impact to establish a prima facie case.

Despite the above argument, it does not appear that the Court did indeed implicitly determine the standard of proof for section 1981. Nowhere in part III of its opinion does the Court explain its reasons for discussing the defendants' proffered justifications for Test 21.\textsuperscript{121} However, from the procedural history of the case, it appears that the defendants in their summary judgment motions assumed that title VII standards governed the statutory issues. It further appears that the defendants assumed, at least for pur-

\textsuperscript{120} 426 U.S. at 233. Although § 1981 was never specifically identified in pt. III of the majority opinion, Justice Stevens in his concurring opinion interpreted pt. III as ruling on both § 1981 and D.C. Code § 1-320. \textit{Id.} at 255.

\textsuperscript{121} In his concurring opinion, Justice Stevens merely indicates that the statutory grounds cannot be ignored because the court of appeals set aside that portion of the district court's order granting the defendants' motions. \textit{Id.} In contrast, the dissent reasons that the majority should not have reached the statutory claims. \textit{Id.} at 257 (Brennan, J., dissenting).
poses of their motions, that the plaintiffs had established a prima facie case by proof of disparate impact. Likewise, the Court appropriately assumed, for purposes of deciding the defendants' summary judgment motions, that the burden had shifted to the defendants to prove the validity of Test 21 with respect to the plaintiffs' statutory claims. Thus it does not appear that the Court, by considering the question of whether the defendants had demonstrated sufficient justification for the use of Test 21, implicitly ruled that the plaintiffs had presented a prima facie case under section 1981 merely by proving disproportionate racial impact. Moreover, although the net effect of the Court's analysis in parts II and III with respect to the standard of proof for section 1981 is not totally free from doubt, it is unlikely that the Court would have left so important an issue to decision by implication.

But if Washington v. Davis did not directly rule on the issue of the appropriate standard of proof for section 1981 claims, the next question to be considered is whether there is any reason for not automatically extending its holding to section 1981. After Washington v. Davis and Arlington Heights there is no question that claims under 42 U.S.C. § 1983 require proof of intentional or purposeful discrimination. Is there any reason that these holdings should not likewise automatically extend to section 1981? The answer lies in the different constitutional bases for these two early civil rights statutes.

The sole constitutional basis for section 1983 is the fourteenth amendment. One of the primary purposes of section 1983 is to authorize a statutory cause of action for violations of that amendment. Accordingly, because the holdings in Washington v. Davis and Arlington Heights were directed at claims of race discrimin-

122. In fact, the defendants did not contest the applicability of the Griggs and the title VII standards to the case. They did not even raise them as an issue in their petition for certiorari. Id. at 238 & n.8. The Supreme Court raised the issue pursuant to its Rule 40(1)(d) (2) as “a plain error not presented.” Id. See text accompanying note 103 supra.

123. In light of the procedural history of the case, this assumption does not seem inappropriate. See note 122 supra. Undoubtedly, the Court saw no need to review the standard-of-proof issue for the statutory claims because it could dispose of the defendants’ summary judgment motions by finding sufficient evidence of the test’s validation.


125. See cases cited note 93 supra.

126. Section 1983 originated in § 1 of the Ku Klux Klan Act of 1871, ch. 22, § 1, 17 Stat. 13. The primary purpose of the 1871 Act was “to enforce the Provisions of the fourteenth amendment.” Id. Unlike the thirteenth amendment, the fourteenth amendment applies only to state action or to those acting under color of state law. See, e.g., The Civil Rights Cases, 109 U.S. 3 (1883). For a discussion of the purpose and history of § 1983, see District of Columbia v. Carter, 409 U.S. 418 (1973).
tion under the fourteenth amendment, that these holdings should automatically be applied to section 1983 is not surprising.

Unlike section 1983, section 1981 originally was enacted pursuant to section 2 of the thirteenth amendment to give force and effect to that amendment. Because section 1981 is based primarily on the thirteenth amendment, it applies to purely private conduct; section 1983, with its fourteenth amendment basis, applies only to state action. Just as this difference in constitutional origins is determinative of the state action issue, it may also be determinative of the standard-of-proof issue. Even if not determinative, the fact that section 1981 is based on the thirteenth amendment is at least a sufficient reason for not automatically extending the fourteenth amendment standards of Washington v. Davis and Arlington Heights to section 1981.

That the primary constitutional basis for section 1981 is the thirteenth amendment, not the fourteenth amendment, is significant but not necessarily dispositive of the standard-of-proof issue. Although the Supreme Court has ruled on the fourteenth amendment standard of proof, it has never determined the standard of proof required to make out a prima facie case of race discrimination under the thirteenth amendment. It is therefore necessary to

127. Runyon v. McCrary, 427 U.S. 160 (1976); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). See discussion in pt. II supra. There is, however, some confusion as to whether § 1981 is partially based on the fourteenth amendment. The confusion stems from the fact that § 1 of the 1866 Act was reenacted by the 1870 Act, a fourteenth amendment statute. See Note, Towards an Integrated Society—The New Section 1981, 1976 Am. St. L.J. 549. See also note 19 supra. However, despite its arguably dual constitutional basis, § 1981 is considered to be primarily a thirteenth amendment statute. Runyon v. McCrary, 427 U.S. at 169 n.8; Jones v. Alfred H. Mayer Co., 392 U.S. 409.

128. See note 126 supra.

129. This difference in the constitutional bases may also be significant in construing the language of the two statutes. See District of Columbia v. Carter, 409 U.S. 418 (1973).

130. It can be argued, however, that the holdings in Washington v. Davis and in Arlington Heights are not limited to the fifth and fourteenth amendments because the opinions talk generally in terms of requiring proof of intentional discrimination for "constitutionally-based claims," see note 115 supra, and thus that the Court was setting forth a constitutional as opposed to a statutory rule. See Clark, Legislative Motivation and Fundamental Rights in Constitutional Law, 15 San Diego L. Rev. 953 (1978). But this argument proves too much. It indicates merely that an impact standard may be permissible for statutory claims even though inappropriate for constitutional claims. In fact, the Court in Washington v. Davis explicitly reaffirmed the "effects" test for title VII cases. 426 U.S. at 246-47.
examine the thirteenth amendment before continuing with the analysis of section 1981.

Section 1 of the thirteenth amendment does not speak of race discrimination per se; it prohibits slavery and involuntary servitude. Section 2 of the thirteenth amendment, the enabling clause, broadly empowers Congress to enforce the amendment by appropriate legislation. Since its initial construction by the Supreme Court in the Civil Rights Cases, the Court has viewed the enabling clause as clothing "Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery." The Court also interpreted the enabling clause as authorizing Congress to adopt direct and specific legislation necessary "to meet all the various cases and circumstances to be affected by the [thirteenth amendment], and to prescribe proper modes of redress for its violation in letter or spirit." More recently, in Jones v. Alfred H. Mayer Co., the Court has again broadly stated that under section 2 of the thirteenth amendment Congress has the power "rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation."

As interpreted by the Supreme Court in Jones and in the Civil Rights Cases, the language and purposes of the thirteenth amendment are broad enough to authorize Congress to enact legislation that would prohibit conduct having the effect, though not the intent or purpose, of perpetuating the "badges and incidents" of slavery. Likewise, the language and purposes seem broad enough

131. Section 1 of the thirteenth amendment provides: "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."

132. Section 2 of the thirteenth amendment provides: "Congress shall have power to enforce this article by appropriate legislation."

133. 109 U.S. 3 (1883).


135. The Civil Rights Cases, 109 U.S. 3, 20 (1883). Ironically, although the Supreme Court in the Civil Rights Cases broadly defined the power of Congress under the enabling clause to abolish all "badges and incidents" of slavery, it narrowly defined these "badges and incidents" so as to exclude race discrimination in most contexts, such as in public accommodations, conveyances, and theaters. Id. at 20-25. This narrow definition of the "badges and incidents" of slavery was, of course, rejected in Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441 n.78 (1968). See pt. II supra.

136. 392 U.S. at 440. In ruling that the thirteenth amendment authorizes § 1982, the Court made several other broad statements about the power of Congress under the enabling clause. Stating that when racial discrimination herds men into ghettos it is a relic of slavery, the Court viewed congressional power as broad enough to eradicate conditions and barriers that prevent blacks from buying or renting property and to assure "that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man." Id. at 443.
to authorize legislation that would provide for a claim based solely on a showing of racially discriminatory impact or effect regardless of discriminatory intent or motivation. However, that the thirteenth amendment appears to empower Congress to enact legislation aimed at racially discriminatory effect or disproportionate impact regardless of intent does not necessarily mean that section 1981 is such a statute. To make this determination it is necessary to examine the language and the legislative history of section 1981.

Section 1981 is worded like an equal protection statute. It guarantees that all persons “shall have the same right” to make and to enforce contracts, to sue, to 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.” Because the language indicates that black persons shall have the same right to contract and to the equal benefit of all laws as whites, one can conclude that all section 1981 guarantees is, for example in the context of employment discrimination, that whatever employment policies are applied to blacks be likewise applied to whites. Thus in the arrest record hypothetical, as long as the employer

137. See, e.g., Lewis v. Bethlehem Steel Corp., 440 F. Supp. 949, 964 (D. Md. 1977). Even if the Court requires proof of intentional discrimination for claims proceeding directly under § 1 of the thirteenth amendment, it seems reasonably clear that Congress is empowered by the broad grant of authority in § 2 to adopt legislation that permits a prima facie case to be established by a showing of disproportionate racial impact. Courts have construed similar broad enabling language in § 5 of the fourteenth amendment as empowering Congress to adopt legislation prohibiting conduct even though such conduct had been previously determined not to violate the equal protection clause of the fourteenth amendment. Katzenback v. Morgan, 384 U.S. 641, 649-51 (1966); United States v. City of Chicago, 573 F.2d 416 (7th Cir. 1978).

138. See, e.g., Griffin v. Breckenridge, 403 U.S. 88 (1971), in which the Court upheld the constitutionality of 42 U.S.C. § 1985(3), relying on the thirteenth amendment. After reviewing the language and the legislative history of this anti-conspiracy statute, the Court concluded that to make out a claim, a plaintiff must prove that the conspirators acted with an invidiously discriminatory racial animus.

139. An argument can be made, however, that if the thirteenth amendment is broad enough to authorize legislation that permits a prima facie case based only on disproportionate racial impact, there is no reason to view § 1981 less broadly than the thirteenth amendment. This argument carries some weight if an impact standard is appropriate for claims based on § 1 of the thirteenth amendment. However, if an impact standard is appropriate only because Congress is empowered to authorize its use by legislation adopted pursuant to § 2, use of an impact standard is appropriate only if it is consistent with the legislative purpose and language of § 1981. See Griffin v. Breckenridge, 403 U.S. 88 (1971).

140. For the full text of §§ 1981 & 1982, see note 14 supra.
fairly applied the arrest record policy to both black and white applicants, the policy would not violate section 1981. This reading of the language of section 1981 would not permit a prima facie case to be based solely on disproportionate impact if the challenged practice were facially neutral and applied to blacks and whites alike.\footnote{141}

However, the language of section 1981, standing alone, is simply not that clear. It can certainly be argued that it also supports application of the “impact” standard. For if a practice has a significant adverse racial impact, then regardless of intent it has the effect of preventing blacks from enjoying the same and equal rights to contract as are enjoyed by whites.\footnote{142} Thus the language of section 1981, by itself, is susceptible to two plausible interpretations with respect to the question of whether the “intent” or the “impact” standard applies. But when compared to the language of other civil rights statutes, the language of section 1981 does lend some support to the argument that intentional discrimination must be shown.

In \textit{Griffin v. Breckenridge}, the Supreme Court held that 42 U.S.C. § 1985(c) is authorized by the enabling clause of the thirteenth amendment and thus extends to purely private conduct.\footnote{143} Section 1985(c)\footnote{144} provides civil remedies for conspiracies that are entered into “for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws.” In construing this language, the Court held that the word “equal” in this context requires that for conspirators’ conduct to be actionable, there must be some racially discriminatory animus or motivation behind it.\footnote{145} Thus use of the word “equal” in section 1985(c), even though appearing in a thirteenth amendment statute, indicates that a showing of discriminatory motive is nec-


\footnote{143. 403 U.S. 88 (1971). \textit{See} note 139 supra.}

\footnote{144. 42 U.S.C. § 1985(c) (1976), previously § 1985(3), was first enacted as § 2 of the Ku Klux Klan Act of 1971, ch. 22, 17 Stat. 13.}

\footnote{145. 403 U.S. at 102 & nn.9 & 10.}
necessary. And although the language of section 1985(c) is not completely analogous to that of section 1981, the Griffin Court's interpretation of the language of section 1985(c) lends some support to the argument that section 1981 requires a showing of intentional discrimination.146

Further support for requiring the "intent" standard for section 1981 comes from statements in the Supreme Court's analysis of section 1982 in Jones v. Alfred H. Mayer Co.147 Forty-two U.S.C. §§ 1981 and 1982 both originate from section 1 of the Civil Rights Act of 1866,148 and their operative language is almost identical. Like section 1981, section 1982 guarantees that all citizens shall have "the same right . . . as is enjoyed by white citizens" to inherit, lease, sell, hold, and convey real and personal property.149 In analyzing the language and legislative history of section 1982 to determine whether section 1982 reaches private conduct, the Jones Court twice stated that Congress intended section 1 of the 1866 Act to prohibit all "racially motivated" deprivations of rights enumerated in the Act.150 These statements are unquestionably dicta. The issue of the standard of proof required for a prima facie case under section 1982 was not before the Court in Jones; appellants presented only the issue of whether section 1982 applies to purely private conduct. However, these statements are at least some expression of the Court's view of the statute, a view that

146. The support that Griffin lends to requiring a showing of intent under § 1981 is, however, not substantial. Although the Court focused on the word "equal" in § 1985(c), its analysis was also influenced by other language and the legislative history of that statute. Section 1985(c) requires as an element of the claim that the conspiracy be "for the purpose of depriving" persons of equal protection. Some finding of intent or motivation is clearly required by use of the word "purpose." Indeed, it is difficult to conceive of a conspiracy as being actionable which only has the impact, but not the intent, of denying equal rights. Moreover, the Court in extending § 1985(c) to private conspiracies was concerned that it would be turning the statute into a general federal tort law. Id. at 100-02. Accordingly, the Court examined the legislative history of the 1871 Act not only to determine whether it applied to private conduct but also to determine whether the congressional purpose was to require racially discriminatory motive as an element of the claim. And unlike the legislative history of § 1981, the legislative history of § 1985(c) clearly and explicitly centers on the question of the need for proof of racially discriminatory animus. Id. Thus even though the Court in Griffin did focus on the equal protection language of § 1985(c), it is somewhat inaccurate to conclude that the mere presence of such language in § 1985(c) caused the Court to require proof of racially discriminatory intent or motive.

148. See discussion in pt. II supra.
150. 392 U.S. at 421, 426.
supports the argument for an “intent” standard under section 1981.151

A final argument with respect to the language of section 1981 involves a comparison of section 1981 to the operative language of title VII of the Civil Rights Act of 1964.152 Title VII prohibits and provides remedies for unlawful employment practices, defined in section 703 of the 1964 Act. Section 703(a)(2) defines an “unlawful employment practice” as one by which the employer limits, segregates, or classifies his employees or applicants for employment “in any way which would deprive or tend to deprive” individuals of employment opportunities or would “otherwise adversely affect” their status as employees because of their race or color.153 Although this quoted language does not explicitly adopt an impact standard, it does show that Congress was concerned with the effects of discriminatory employment practices.154 When compared to section 1981, the language of section 703(a)(2) more clearly indicates the appropriateness of an impact standard than does the equal protection language of the earlier statute.155

151. Some lower courts have relied on this dicta in Jones as part of their explanation for requiring proof of intentional discrimination in § 1981 claims. E.g., Davis v. County of Los Angeles, 566 F.2d 1334, 1349-50 (9th Cir. 1977); (Wallace, J., dissenting), cert. granted, 98 S. Ct. 3087 (1978); Lewis v. Bethlehem Steel Corp., 440 F. Supp. 949, 964-65 (D. Md. 1977).


153. 42 U.S.C. § 2000e-2(a) (1976) provides in full:
   It shall be an unlawful employment practice for an employer—
   (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
   (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.


155. The language of §§ 703(a)(2) & 1981 should also be contrasted with that of § 703(h), 42 U.S.C. § 2000e-2(h) (1976). Section 703(h) provides that notwithstanding any other provision of title VII, it shall not be an unlawful employment practice for an employer to apply different standards of compensation or different terms, conditions, or privileges of employment pursuant to a bona fide seniority system, “provided that such differences are not the result of an intention to discriminate because of race.” Based on this language, the Supreme Court has held that absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if it has some discriminatory consequences. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 82 (1977). That § 703(h) is an exception to the rest of title VII and explicitly requires intentional discrimination further supports the use of an “impact” standard under § 703(a)(2). The explicit language requiring proof of intent in § 703(h) also can be contrasted
Thus, although the language of section 1981 conclusively requires neither standard, when compared to the other civil rights statutes construed by the Supreme Court it does support the argument that a prima facie violation generally cannot be established by a mere showing of disproportionate impact. However, because the section's language is not decisive of this issue, it is necessary to examine the congressional purpose and the legislative history of section 1981.

Analysis of the legislative history of the 1866 Act sheds some light on the "intent v. impact" question, but again, as with the language analysis, ultimately it is inconclusive. The congressional debates show that Congress enacted the 1866 Act, particularly section 1, to give practical meaning to the thirteenth amendment. Even before the thirteenth amendment was officially ratified in December, 1865, most of the Reconstruction States had enacted legislation that explicitly denied the recently freed blacks ("freedmen") several fundamental civil rights. These state statutes, known as "Black Codes," typically prevented blacks from owning or renting certain types of property, engaging in certain types of employment, marrying whites, or testifying against whites. In some instances they even levied special taxes on freedmen. These Black Codes were not race-neutral but made facially invidious distinctions between the rights of blacks and of whites.

In the congressional debates surrounding S. 61, the bill that eventually would become section 1 of the 1866 Act, sponsors and supporters repeatedly expressed outrage over the adoption and operation of these Black Codes in the Southern States. The language of § 1981 as an indication that the language of § 1981 does not clearly require proof of intentional discrimination.


157. For the substance of these Black Codes, see S. EXEC. DOC. NO. 6, 39th Cong., 2d Sess. (1866); H.R. EXEC. DOC. NO. 188, 39th Cong., 1st Sess. (1866). See also 1 W. FLEMMING, DOCUMENTARY HISTORY OF RECONSTRUCTION 273-312 (1906); E. MCPherson, THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION 39-44 (1871).

158. For example, the Mississippi Black Code expressly prohibited blacks from owning farm land, 1865 Miss. Laws § 1. Other Codes made it illegal for blacks, but not for whites, to keep weapons. See E. McPherson, THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION (1871).

159. E.g., CONG. GLOBE, 39th Cong., 1st Sess. 39, 474, 516-17, 602-05, 1123-25, 1151-53, 1160, 1785 (1866).
most oppressive of these statutes, the Mississippi Black Code, was discussed several times and viewed as typical of all the other Codes. The debates show that the primary purpose of the 1866 Act was to give practical force and effect to the thirteenth amendment by providing a remedy for, and a means of eliminating, the racial discrimination of the Black Codes.

As might be expected, at no time during the debates regarding section 1 of the 1866 Act did Congress discuss the standard of proof required to support a prima facie claim. It is reasonable to assume that no member was concerned with or even aware of the "intent v. impact" issue. However, because Congress was primarily concerned with the purposeful race discrimination embodied in the Black Codes, an argument can be made that the objective of Congress in enacting the 1866 Act was to prohibit intentional discrimination. Moreover, at no time during the debates was any concern expressed for eliminating the disparate impact of facially neutral laws, practices, or conduct. This lack of concern is understandable because at the time Congress debated the bill, purposeful and intentional discrimination was so common-


161. The supporters of S. 61 viewed the Black Codes as circumventing the anti-slavery provisions of the thirteenth amendment. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 602-05, 1124, 1151, 1160, 1785 (1866).

162. Although Congress was mainly concerned with elimination of the racial discrimination of the Black Codes, the debates indicate that Congress was also concerned with private race discrimination, see Jones v. Alfred H. Mayer Co., 392 U.S. 409, 422-37 (1968). In addition, Congress was very concerned with whether the recently freed slaves had acquired the legal status of citizens under the thirteenth amendment. It therefore sought to declare them citizens under § 1 of the Act. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 425, 522-24, 569-75, 1115-25, 1775-81 (1866).

163. One possible exception involves references to the use of vagrancy laws in the Reconstruction States to perpetuate the effects of slavery. E.g., CONG. GLOBE, 39th Cong., 1st Sess. 1124-25, 1151, 1833 (1866). Various vagrancy laws enacted after the adoption of the thirteenth amendment authorized local sheriffs to arrest vagrants, defined as persons with no lawful employment or business, and to hire them out for little or no pay. Id.; E. McPherson, POLITICAL MANUAL FOR 1866 AND 1867, at 29-44 (1867). Congressmen were concerned about reports that because white employers were refusing to hire blacks, blacks were being considered vagrants and thus forced to work without pay by operation of law. Id.

It appears from the congressional debates that these vagrancy laws were facially race-neutral but had a racially discriminatory impact when enforced. But it is also clear that they were applied with a racially discriminatory intent and purpose. Moreover, the vagrancy laws specifically referred to in the debates, such as those of Mississippi, were in fact not facially race-neutral. CONG. GLOBE, 39th Cong., 1st Sess. 1855 (1866). The Mississippi vagrancy statute, adopted on November 24, 1865, contained a § that declared unemployed freedmen to be vagrants. 1865 Miss. Laws § 2. Another § established a poll tax on free blacks and provided that any failure or refusal to pay this tax would be prima facie evidence of vagrancy. The local sheriff had the duty to hire out such vagrants to anyone who would pay the tax. Id. §§ 6-7.
place throughout the Southern States that blacks were openly denied even the most fundamental civil rights.164 Congress was concerned with reports of the blatant and overt race discrimination that existed during the Reconstruction Era, not with the subtle and covert discrimination that exists today.

Because of congressional preoccupation with intentional discrimination, the congressional debates surrounding the 1866 Act tend to support the argument that proof of intentional discrimination is required to prove a prima facie case under section 1981. However, although the legislative history may lend some support to the argument for an “intent” standard, it neither precludes nor requires either standard.165 Standing alone, the legislative history of the 1866 Act ultimately is not determinative of the “intent v. impact” issue.

The legislative history of the 1866 Act by itself may be inconclusive, but comparing it with the legislative history of the 1964 Act, particularly title VII, is a little more enlightening.166 Similar to those of the 1866 Act, the congressional debates and reports regarding the Civil Rights Act of 1964 do not specifically discuss the standard of proof necessary to prove a prima facie violation.167

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164. Throughout the debates, proponents repeatedly characterized the 1866 Act as necessary to ensure equality of basic civil rights for all races. E.g., CONG. GLOBE, 39th Cong., 1st Sess. 475, 504, 1152, 1293, 1832-37 (1866).

165. The legislative history of the 1866 Act cannot play a more significant role in deciding the “intent v. impact” question because on a more abstract level of analysis, it does not preclude the argument that Congress was concerned with discriminatory effect as well as intent. In a general sense, the debates indicate a purpose behind the Act of giving “practical effect, life, vigor, and enforcement” to the thirteenth amendment. CONG. GLOBE, 39th Cong., 1st Sess. 1151 (1866) (remarks of Rep. Thayer). By adopting the Act, Congress sought to abolish slavery not just in the sense of changing the legal status of slaves but also in fact and in deed. Id. at 504, 1124, 1152. Congress did not want to pretend to give liberty and in reality have a modified condition of slavery; it wanted to make blacks free men “in fact.” Id. at 1152. Thus on a more general level of purposive analysis, it can be argued that such general statements and purposes support the use of an “impact” standard for § 1981. The general statements regarding the purposes of the 1866 Act appearing in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), also support such an argument. See note 136 supra and note 169 infra.

166. An examination of the legislative history of title VII is relevant to the issue because in Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Court viewed the legislative purpose of title VII as prohibiting employment practices that are fair in form but discriminatory in effect and therefore adopted the “effects” standard. Id. at 430-32.

167. Although they did not discuss the issue in terms of “intent v. impact,” some Congressmen expressed concern as to what would constitute discrimination under the 1964 Act and whether it could be proved solely by statistical comparisons between the population and the employer’s work force. See, e.g., H.R. Rep. No. 914, 88th Cong., 2d Sess., reprinted in [1964] U.S. CODE CONG. & AD. NEWS 2391, 2462.
However, the congressional debates and reports do emphasize congressional concern with the effects of race discrimination; from the extended debate regarding the use of discriminatory employment tests and the need to remove arbitrary barriers to employment, it is clear that the history of title VII supports an “effects” standard.\textsuperscript{168} Unlike the legislative preoccupation with overt and intentional race discrimination in the debates leading up to passage of the 1866 Act, the legislative history of the 1964 Act generally shows that Congress was concerned with the results of more subtle and indirect race discrimination.\textsuperscript{169}

On the whole, the language and legislative history of section 1981, especially when compared to that of title VII, seem to favor the argument that a plaintiff must prove intentional or purposeful race discrimination to establish a prima facie case. But although they support such a position, they do not clearly mandate it.\textsuperscript{170}

It should be pointed out that in the legislative reports accompanying the 1972 amendments to title VII, the House report explicitly approves of the \textit{Griggs} standard and the “effects” test. It states that the Act is designed to prohibit employment policies that cause a racially discriminatory effect and that are not job related. H.R. REP. No. 238, 92d Cong., 2d Sess. 20-25, \textit{reprinted in} [1972] \textit{U.S. Code Cong. \& Ad. News} 2137, 2155-60. Of course, no such explicit discussion or adoption of a standard of proof appears in the legislative history of either the 1866 or the 1964 Acts.

\textsuperscript{168} For example, much concern was expressed over statistics indicating higher unemployment and lower median income for blacks than for whites. \textit{See} H.R. REP. No. 914, 88th Cong., 2d Sess., \textit{reprinted in} [1964] \textit{U.S. Code Cong. \& Ad. News} 2391, 2513-16; 110 CONG. REC. 8348-49 (1964). Also, considerable debate took place in the Senate over § 703(h) of the Act, which prohibits use of discriminatory employment tests. Although the debate centered on whether the language of the proposed bill would prohibit all employment tests, a majority of the Senators sought to prohibit use of tests that were fair in form but discriminatory in effect. \textit{See}, e.g., \textit{Griggs} v. Duke Power Co., 401 U.S. 424, 434-36 \& nn.10-12 (1971); 110 CONG. REC. 5614-16, 5662, 5999-6000, 7012-13, 7247, 8447, 9024-26, 9599-9600, 13504, 13724 (1964).

\textsuperscript{169} This difference in the nature of the legislative concerns is not, however, dispositive of the standard-of-proof issue. It is not sufficient to determine what standard is appropriate based solely on the specific concerns of individual legislators. For in a general sense, both the 1866 Act and the 1964 Act were designed to ensure equality of fundamental rights between the races. \textit{See} note 165 \textit{supra}.

Accordingly, the Supreme Court recognized in \textit{Jones} v. Alfred H. Mayer Co., 392 U.S. 409 (1968), that the purpose of the 1866 Act was to ensure “that a dollar in the hands of a Negro [would] purchase the same thing as a dollar in the hands of a white man.” \textit{Id.} at 443. The Court equated the exclusion of blacks from white communities as nothing more than a substitute for the Black Codes and the herding of men into ghettos as a relic of slavery. Thus in this general sense, the 1866 Act as construed in \textit{Jones} can be said to be concerned with discriminatory effects as well as with motivation, just as is the 1964 Act. On this level of abstraction, the “impact" standard can be viewed as a modern version of a method of eradicating the more subtle “badges and incidents” of slavery now existing in society. Moreover, this general legislative purpose is not unlike that ascribed to title VII in \textit{Griggs} v. Duke Power Co., 401 U.S. 424 (1971).

\textsuperscript{170} But see \textit{Lewis} v. Bethlehem Steel Corp., 440 F. Supp. 949 (D. Md. 1977), in which the court briefly examined the language and legislative history of § 1981 and, after a comparison to title VII, concluded that they require a showing of discriminatory intent. \textit{Id.} at 959-60, 965-66.
The traditional modes of statutory construction—analysis of the specific language and of the legislative history—do not provide a conclusive answer to the "intent v. impact" question. Likewise, attempts to decide the question based on the purposes of the 1866 Act are equally inconclusive: Depending on the degree of generality used to characterize the purposes of the 1866 Act, purposive analysis can lend support to the adoption of either standard. It is therefore necessary to examine section 1981 in more general, practical terms, particularly with respect to the relationship between it and title VII of the 1964 Act.

There are a number of general practical policy arguments that can be made for and against each standard. One such argument is that because the greatest application of section 1981 is in the area of employment discrimination, no practical reason exists to require a stricter standard of proof under section 1981 than under title VII.\textsuperscript{171} This argument finds support in other contexts in which numerous appellate courts have explicitly held that in fashioning a substantive body of law under section 1981, the principles of law judicially created under title VII should control to avoid undesirable substantive law conflicts.\textsuperscript{172} This argument does, on the surface, seem to make good practical sense.

However, the Supreme Court has never construed section 1981 and title VII to avoid all undesirable conflicts, whether substantive or procedural.\textsuperscript{173} Moreover, the same argument could be

\textsuperscript{171} At least one court in a post-Washington v. Davis decision has found this practical argument persuasive and has adopted the impact standard for § 1981: Davis v. County of Los Angeles, 566 F.2d 1334, 1340 (9th Cir. 1977), cert. granted, 98 S. Ct. 3087 (1978). This argument is based on the Supreme Court's view that title VII and § 1981 are "parallel or overlapping remedies against discrimination." Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 & n.7 (1974).

\textsuperscript{172} The cases that have construed § 1981 to avoid substantive law conflicts with title VII have usually been cases in which the plaintiff has sought to assert claims or to obtain relief not available under title VII. E.g., Patterson v. American Tobacco Co., 555 F.2d 257 (4th Cir.), cert. denied, 429 U.S. 920 (1976); Chance v. Board of Examiners, 534 F.2d 993 (2d Cir. 1976), cert. denied, 431 U.S. 965 (1977); Waters v. Wisconsin Steel Works, 502 F.2d 1309, 1316 (7th Cir. 1974), cert. denied, 425 U.S. 997 (1976). Many of these cases involved challenges to seniority plans under § 1981 that were foreclosed under title VII by the Supreme Court's construction of the Civil Rights Act of 1964, § 703(h), 42 U.S.C. § 2000e-2(h) (1976). See note 34 supra. Thus for the most part courts have used this principle of construction to limit the substantive scope of § 1981 to that of title VII, not to make it broader. E.g., Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir.), cert. denied, 429 U.S. 920 (1976); Chance v. Board of Examiners, 534 F.2d 993 (2d Cir. 1976), cert. denied, 431 U.S. 965 (1977).

\textsuperscript{173} See, e.g., Johnson v. Railway Express Agency, 421 U.S. 454 (1975), in which the Court held that title VII's administrative requirements and back pay and dam-
made regarding section 1983 and title VII, yet after Washington v. Davis and Arlington Heights, the overlapping scope of those two statutes does not mean that they should require the same standard of proof for a prima facie case. As with section 1983, merely because section 1981 and title VII apply to employment discrimination does not mandate that they require the same standard of proof. In addition, section 1981 is applicable to a great many areas that are totally different from and much broader than employment discrimination. Because of the broad substantive reach of section 1981, it makes little sense to adopt a standard of proof solely to avoid conflict in one area of application when that standard will affect the statute's use in all other areas as well. Therefore, this bootstrap argument for an "impact" standard is not compelling.

Another practical policy argument in favor of the "impact" standard for section 1981 is that because of the covert and subtle nature of race discrimination in today's society, section 1981 would...
be rendered useless, or at best severely diluted, if a showing of intentional discrimination were required.\textsuperscript{178} It is undoubtedly true that intentional race discrimination is less obvious today and that requiring proof of intent would greatly undercut the vitality of section 1981 for civil rights litigants. It is also true that the Supreme Court has recognized the subtle nature of facially neutral practices that have a disparate racial impact and that this recognition was a significant factor in adopting the "effects" test for title VII.\textsuperscript{179} Again, however, the same argument can be made for section 1983, but that argument has not persuaded the Supreme Court to adopt an "impact" standard for that important civil rights statute.\textsuperscript{180} In light of the breadth of section 1981's application, this argument would seem to be no more persuasive for section 1981 than it was for section 1983. Thus, particularly in light of the recent Supreme Court decisions, these general practical policy arguments do not appear to be of such overriding importance to the Court that they mandate adoption of the "impact" standard for section 1981.\textsuperscript{181}

There are also two related practical policy arguments on behalf of requiring proof of intentional discrimination for section 1981 claims. One argument focuses on the differences between section 1981 and title VII in the screening of claims. The other argument involves the similarity between section 1981 and the fourteenth amendment in breadth of scope and of application.

Title VII of the 1964 Act, as well as other titles of that Act and the more recent civil rights legislation, contains a comprehensive scheme of administrative procedures and remedies that a plaintiff must exhaust prior to commencing an action in federal court.\textsuperscript{182} In addition, title VII and the EEOC regulations promulgated

\textsuperscript{178} A few post-Washington v. Davis lower court decisions have identified this argument as a significant reason for holding that a prima facie case can be shown under § 1981 based solely on proof of disproportionate impact. E.g., Davis v. County of Los Angeles, 566 F.2d 1334, 1340 (9th Cir. 1977), cert. granted, 98 S. Ct. 3087 (1978).


\textsuperscript{181} This is not to say that the need for an "impact" standard to challenge the effects of covert discrimination is an unimportant policy consideration. The need is important for § 1981 as well as for any other civil rights statute. This need is also the type of practical policy consideration that can provide justification for judicial approval of the "impact" standard for § 1981. However, like all such general policy arguments, it does not require that the "impact" standard be adopted.

thereunder specifically identify the employment policies and practices prescribed by the 1964 Act and delineate validation and comprehensive affirmative action requirements. The statutory provisions for judicial redress of unlawful employment practices are buffered by the extensive administrative exhaustion requirements, including administrative investigation and conciliation efforts for each alleged violation. Likewise, the provisions for judicial enforcement of title VII are tempered by the comprehensive EEOC regulations that specify what is necessary for employer compliance with title VII. Because these administrative mechanisms are designed to screen out frivolous and defective claims and to notify employers of expected conduct, it can be argued that it is reasonable to provide that a prima facie case may be established under title VII without proof of discriminatory intent.

However, unlike title VII, no administrative screening of section 1981 claims takes place, and no regulations exist delineating what conduct is deemed either to violate or to comply with section 1981. Nor is the language of section 1981 limited to a specific area or type of conduct; it is broad and sweeping in scope. Thus, the argument goes, as with claims under the fourteenth amendment, the screening device for claims under section 1981 is the requirement of proof of intent. This argument can be challenged in a number of ways. Because the EEOC rarely resolves a claim by conciliation and nearly always finds "reasonable cause," and because a finding of "reasonable cause" is not a prerequisite to litigation, the requirement of exhausting administrative remedies under title VII usually serves only as a delaying rather than as a screening device. Moreover, in light of the proliferation of title VII cases in the federal courts, the effectiveness of both the administrative screening and the comprehensive compliance regulations seems questionable. Thus there is little empirical support for the first part of this practical policy argument contrasting section 1981 with title VII. But at least these administrative procedures and

184. See authorities cited note 182 supra.
186. This argument found favor in the dissenting opinion in Davis v. County of Los Angeles, 566 F.2d 1334, 1350 (9th Cir. 1977) (Wallace, J., dissenting), cert. granted, 98 S. Ct. 3087 (1978).
189. See note 187 supra.
regulations exist, and title VII is limited to employment discrimination. For it is not just the differences between section 1981 and title VII that give this argument weight, but rather the similarities between the scope of section 1981 and that of the fourteenth amendment.

As discussed previously, section 1981 is not limited to employment discrimination or even to a limited notion of contract rights, but is applicable to a wide variety of substantive areas and relationships. Because it is worded like an equal protection statute and is applicable to private as well as to government-authorized discrimination, its scope and reach regarding race discrimination is in many respects much broader than that of the equal protection clause of the fourteenth amendment. Thus, assuming that section 1981 embodies an "impact" standard, a plaintiff could easily avoid the requirement of intentional discrimination in Washington v. Davis and in Arlington Heights by alleging section 1981 instead of section 1983 or the fourteenth amendment. Although nothing is inherently improper with this strategy, no more than in pleading title VII when applicable instead of section 1983, such use of section 1981 would frustrate one of the main justifications set forth in Washington v. Davis for requiring proof of intentional discrimination.

In Washington v. Davis the Supreme Court was concerned that if a showing of disproportionate racial impact alone would render a facially neutral statute invalid absent compelling justification, then it "would be far reaching and raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor or average black than to a more affluent white." Because section 1981 extends to both public and private contractual relationships and guarantees equality in a wide variety of non-contractual areas, these same concerns and con-

191. See text accompanying notes 38-45 supra. 192. Washington v. Davis, 426 U.S. 229, 248 (1976). The Court also quoted from studies that indicate that application of such an "impact" standard would perhaps invalidate tests and qualifications for voting, draft deferments, jury service, and government-conferred benefits as well as such things as sales taxes, bail schedules, utility rates, bridge tolls, license fees, minimum wage laws, and usury laws. Id. at 248 n.14. Given the breadth of § 1981, many of these governmental items, plus numerous additional private ones, would likewise be subject to challenge if the Court approved an "impact" standard for § 1981. 193. The language of § 1981 guarantees much more than that all persons shall have the same right to make and enforce contracts as is enjoyed by white persons. Among other things, it guarantees that all persons "shall have the . . . full and

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sequences would be present in even greater force were proof of discriminatory intent not required for claims based on section 1981. As with all such general policy and practical arguments, the Supreme Court can choose to accept or reject them based on totally subjective criteria. But this last argument seems extremely difficult to ignore or discard in the process of determining which standard is appropriate for claims of race discrimination based on section 1981.194

VI. CONCLUSION: HOW THE SUPREME COURT IS LIKELY TO DECIDE THE ISSUE

In the previous section, the arguments for and against each standard of proof have been set forth and analyzed. No single argument seems to carry the day for either standard. The analysis of the legislative history and language of section 1981, when compared to that of title VII, lends support to the requirement of proof of intent, as do many of the more abstract policy and general practical considerations. Moreover, the majority of lower courts have ruled in favor of requiring the "intent" standard, further illustrating support for that standard. Yet no single argument or combination of arguments is truly conclusive. Even though the language and legislative history of section 1981 may favor the "intent" standard, if the Supreme Court were disposed to adopt the "impact" standard, it could justify such a holding on any one of the more general purposive interpretations of the 1866 Act and its legislative history.195

Nonetheless, because of the far-reaching consequences of adopting the "impact" standard for section 1981, it seems more likely that the Court will require proof of intentional discrimination to sustain a prima facie case. Traditional modes of statutory construction may give way, at least implicitly, to the fear that section 1981 with an "impact" standard may replace the fifth and equal benefit of all laws... 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." See note 14 supra.


195. Indeed, it can be argued that that is precisely what the Court did in approving of the "effects" standard for title VII in Griggs v. Duke Power Co., 401 U.S. 424 (1971).
fourteenth amendments. The concerns expressed in *Washington v. Davis* would be multiplied because section 1981 applies to purely private as well as to governmental conduct. Thus the very importance of section 1981 to civil rights litigants—its broad reach and application—may be a double-edged sword and cause the Court to back away from the “impact” standard.

Adoption of the “intent” standard may not necessarily be the death knell of section 1981. Even under the non-exhaustive list of evidentiary factors set forth in *Washington v. Davis* and in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, disproportionate racial impact is not irrelevant and, when combined with some other indicia of intent, may be sufficient to prove a prima facie case. Yet unquestionably many tests, policies, and practices, such as the hypothetical arrest record policy, will be immune from challenge under section 1981 because the only provable evidence will be statistics showing disproportionate impact. This immunity will result in a substantial and significant decrease in the effectiveness of section 1981 as a civil rights weapon.

Although the Supreme Court is perhaps most likely to require a showing of intentional discrimination under section 1981, other possibilities are available that would permit a plaintiff to prove a prima facie case solely by disproportionate impact but that would not invalidate every classification or practice that has such an impact. One such possibility is to adopt a standard of proof for the defendant that would not be as onerous as the “business necessity” test under title VII or the “compelling state interest” test of the equal protection clause. If the plaintiff were to show that

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196. See note 81 supra.

197. This position is not inconsistent with the Court’s reasoning in *Washington v. Davis*, 426 U.S. 229 (1976). There the Court was concerned that adoption of an “impact” standard for equal protection cases would subject facially neutral statutes to the strict scrutiny of the “compelling state interest” test and public employment practices to the “business necessity” test. *Id.* at 248. The Court in *Washington v. Davis* was faced with a choice between subjecting the defendants’ Test 21 to the traditional “rational basis” test, which almost never invalidates anything, and the “compelling state interest” test, which almost always invalidates everything. Given the choice of these two equal protection standards, the Court realized the far-reaching consequences of applying the stricter test whenever a plaintiff establishes disproportionate racial impact. However, if a defendant’s burden of justification were something less than the “compelling state interest” test (or the “business necessity” test in employment discrimination cases), then the Court’s concerns about the use of the “impact” standard would be obviated. Although the Washington v. Davis Court was locked in to a choice between the traditional and the strict scrutiny tests for equal protection cases, no such doctrinal restriction is present in construing the burdens of proof for § 1981.
the defendant's policy had an adverse disproportionate racial impact, then the plaintiff would have established a prima facie case, and the burden would shift to the defendant. However, rather than prove that the challenged policy is job-related and justified by "business necessity" (or some other similarly strict standard in a non-employment case), the defendant would need to prove only that there was some credible, non-discriminatory reason for adopting the challenged policy or practice.¹⁹⁸ This use of the "impact" standard for section 1981 is sensible and is one the Supreme Court should adopt. It does not require the plaintiff to prove the impossible, and it places the risk of non-persuasion regarding intent on the defendant. Yet it does not subject every conceivable policy and practice to the strict scrutiny of the title VII standards or of the "compelling state interest" test.

In reality, this use of the "impact" standard might not require much more of a searching inquiry than the traditional rational basis test requires when no race discrimination is shown,¹⁹⁹ but at least the defendant would not escape some burden of justification simply because the plaintiff was unable to uncover acceptable proof of intent to discriminate.²⁰⁰ Although such use of the impact standard would lessen the vitality of section 1981 as a weapon against race discrimination, it at least would not return section 1981 to the relative obscurity of its first 100 years.

¹⁹⁸. The defendant's burden in impact cases could be expressed in several ways. At a minimum, the defendant should be required to prove that racial exclusion was not the reason for adopting the challenged policy or practice and that the policy or practice serves some other legitimate purpose. For a discussion of this and of other burdens of proof for the defendant in impact cases, see Simon, Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination, 15 S AN Diego L. Rev. 1041 (1978); Note, The Expanding Scope of Section 1981: Assault on Private Discrimination and a Cloud on Affirmative Action, 90 HARV. L. REV. 412, 431-32 (1978).

¹⁹⁹. Under Washington v. Davis, even if those denied employment because of a test with a disproportionate racial impact cannot prove race discrimination under the Constitution, the classification-creating test must still be rationally related to some legitimate governmental purpose. See 426 U.S. at 245-47.

²⁰⁰. This suggested standard of proof for the defendant, once the burden shifted upon a showing of disproportionate racial impact, would not be as difficult to satisfy as the defendant's burden when the plaintiff has proven intentional race discrimination. Under the test set forth for the fourteenth amendment in Arlington Heights, proof that a defendant's decision was motivated in part by a racially discriminatory purpose would not necessarily require invalidation of the challenged conduct. Instead, such proof would shift the burden to the defendant to prove that the same decision would have resulted even had the discriminatory motive not been considered. 429 U.S. at 270-71 n.21. The precise nature of the defendant's burden might vary depending on the nature of the claim, but the burden in § 1981 cases when the plaintiff has proved intentional discrimination should be at least as strict as that set forth in Arlington Heights.