**Cornell Law Review**

Volume 65
Issue 1 *November 1979*

Article 1

# Burger Court and the Prima Facie Case in Employment Discrimination Litigation: A Critique

Joel William Friedman

CORNELL
LAW REVIEW

Volume 65 November 1979 Number 1

# THE BURGER COURT AND THE PRIMA FACIE CASE IN EMPLOYMENT DISCRIMINATION LITIGATION: A CRITIQUE

*Joel William Friedman*†

Significant scholarly inquiry has focused on the Burger Court's civil liberties decisions. Commentators have dissected the Court's opinions to discover a pattern underlying the Court's approach to these cases. Most efforts have scrutinized the Court's decisionmaking process in the areas of criminal law and procedure,[1] the first amendment[2] and the right of privacy.[3] These observers have generally suggested that the Burger Court is retreating from the activist, libertarian philosophy of the Warren Court.[4]

---

† Associate Professor of Law, Tulane Law School. B.S. 1972, Cornell University; J.D. 1975, Yale Law School.

[1] *See, e.g.*, Dershowitz & Ely, Harris v. New York: *Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971); Israel, *Criminal Procedure, The Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1320 (1977); Stephens, *The Burger Court: New Dimensions in Criminal Justice*, 60 GEO. L.J. 249 (1971); Swindler, *The Court, the Constitution, and Chief Justice Burger*, 27 VAND. L. REV. 443, 457-64 (1974).

[2] *See, e.g.*, Meiklejohn, *Religion in the Burger Court: The Heritage of Mr. Justice Black*, 10 IND. L. REV. 645 (1977); Swindler, *supra* note 1, at 464-68.

[3] *See, e.g.*, Lee, *The Supreme Court on Privacy and the Press*, 12 GA. L. REV. 215 (1978).

Of course, the Court's diversified docket affords Court-watchers the opportunity to examine its performance in areas besides civil liberties. *See, e.g.*, Freeman, *A Study in Contrasts: The Warren and Burger Courts' Approach to the Securities Laws*, 83 DICK. L. REV. 183 (1979).

[4] *See, e.g.*, Dershowitz & Ely, *supra* note 1; Nikiforov, *The Supreme Court of the United States: A Shift to the Right?*, 53 TUL. L. REV. 720, 723-24, 730 (1979); Stephens, *supra* note 1, at 277-78; Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 169;

In its last three terms, the Supreme Court has contributed substantially to the body of employment discrimination law.[5] The Court issued ten opinions dealing with the right to equal employment opportunity during the 1976-77 term,[6] eleven such decisions during the 1977-78 term,[7] and nine more during the 1978-79 session.[8] Although these cases presented the Court with the opportunity to address a wide range of statutory and constitutional issues, this Article will focus on only one of these questions—the evolving nature of plaintiff's prima facie case in actions alleging a denial of equal employment opportunity. It will also consider whether the Burger Court's general retreat in the civil rights area has influenced the Court's disposition of employment discrimination cases and caused it to increase the plaintiff's initial burden in these cases. A thorough examination of this question will lead to conclusions regarding a proper allocation of burdens of proof in employment discrimination litigation arising under either the Constitution or federal statutes.

---

Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court* (pt. 1), 62 KY. L.J. 421 (1974). *But see* Israel, *supra* note 1, at 1416-25.

[5] *See generally* Edwards, *The Coming of Age of the Burger Court: Labor Law Decisions of the Supreme Court During the 1976 Term*, 19 B.C. L. REV. 1, 4-36 (1977); Friedman, *Constitutional and Statutory Challenges to Discrimination in Employment Based on Sexual Orientation*, 64 IOWA L. REV. 527, 527, 561-71 (1979); *1976-1977 Annual Survey of Labor Relations and Employment Discrimination Law*, 18 B.C. INDUS. & COM. L. REV. 1045, 1118-89 (1977).

[6] Dothard v. Rawlinson, 433 U.S. 321 (1977); Hazelwood School Dist. v. United States, 433 U.S. 299 (1977); Occidental Life Ins. Co. v. EEOC, 432 U.S. 355 (1977); TWA, Inc. v. Hardison, 432 U.S. 63 (1977); United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977); East Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); Electrical Workers Local 790 v. Robbins & Myers, 429 U.S. 229 (1976); General Elec. Co. v. Gilbert, 429 U.S. 125 (1976); Parker Seal Co. v. Cummins, 429 U.S. 65 (1976).

[7] Board of Trustees v. Sweeney, 439 U.S. 24 (1978); Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); Monell v. Department of Social Serv., 436 U.S. 658 (1978); City of Los Angeles v. Manhart, 435 U.S. 702 (1978); Foley v. Connelie, 435 U.S. 291 (1978); Lorillard v. Pons, 434 U.S. 575 (1978); Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978); United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977); Richmond Unified School Dist. v. Berg, 434 U.S. 158 (1977); Nashville Gas Co. v. Satty, 434 U.S. 136 (1977); Shell Oil Co. v. Dartt, 434 U.S. 99 (1977).

[8] United Steelworkers v. Weber, 99 S. Ct. 2721 (1979); Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 99 S. Ct. 2345 (1979); Personnel Adm'r v. Fenney, 99 S. Ct. 2282 (1979); Davis v. Passman, 99 S. Ct. 2264 (1979); Oscar Mayer & Co. v. Evans, 99 S. Ct. 2066 (1979); Ambach v. Norwick, 99 S. Ct. 1589 (1979); County of Los Angeles v. Davis, 440 U.S. 625 (1979); New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979); Vance v. Bradley, 440 U.S. 93 (1979).

## I
## TRADITIONAL ALLOCATION OF PROOF REQUIREMENTS IN EMPLOYMENT DISCRIMINATION LITIGATION

Title VII of the Civil Rights Act of 1964[9] prohibits employment discrimination by private[10] and public[11] employers on the basis of race, color, sex, religion, and national origin.[12] The Supreme Court has recognized two alternative theories of discrimination, each accompanied by its own method of proof.[13]

### A. *Disparate Treatment*

The most common and obvious type of discrimination involves an employer's overtly different treatment of individuals based solely on those persons' race, color, sex, religion, or national origin. In *McDonnell Douglas Corp. v. Green*,[14] the Court outlined the general requirements of a prima facie case for actions alleging such "disparate treatment." While noting that the specific elements of plaintiff's initial burden will vary with the factual posture of each case,[15] the Court declared that in most instances, plaintiff would sustain the initial burden by proving

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[16]

The plaintiff, therefore, has only a small burden to satisfy before compelling the defendant to come forward with some evidence in its defense. The plaintiff need only show that he or she

---

[9] 42 U.S.C. §§ 2000e to 2000e-17 (1976).

[10] *Id.* §§ 2000e(b), 2000e-2(a).

[11] *Id.* §§ 2000e-16, 2000e-2.

[12] *Id.* § 2000e-2(a).

[13] International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). *See* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1-12, 14-17, 73-75 (1976). For a case discussing the alternative nature of these theories, see Pennsylvania v. Local 542, International Union of Operating Eng'rs, 469 F. Supp. 329, 398-99 (E.D. Pa. 1978). *See also* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 572-73 (1978).

[14] 411 U.S. 792 (1973).

[15] *Id.* at 802 n.13.

[16] *Id.* at 802 (footnote omitted).

is a qualified minority individual who was not chosen for an available employment opportunity. Few non-frivolous plaintiffs will be unable to survive this initial screening device.[17] The *McDonnell Douglas* Court inferred, upon proof of these four factors and the absence of any explanation by the defendant, that a rejection of the plaintiff-applicant was based on a consideration proscribed by Title VII.[18] Consequently, a plaintiff can make a prima facie case of disparate treatment without offering any evidence of the defendant's discriminatory intent.[19]

Of course, a plaintiff's success in making out a prima facie case does not end the analysis in disparate treatment cases. It simply shifts the burden to the defendant to explain its actions. The nature and extent of this burden of production has been the subject of debate since the *McDonnell Douglas* decision. Unfortunately, the Court's two recent attempts at resolving this controversy only further confused matters.[20]

In *McDonnell Douglas*, the Court declared that once the plaintiff establishes a prima facie case, "[t]he burden then must shift to the employer to *articulate* some legitimate, nondiscriminatory reason for the employee's rejection."[21] This apparently straightforward statement, however, has raised two additional, troublesome issues. First, the Court's use of "articulate" as opposed to "prove" perhaps implied that the defendant bears only a light burden after the plaintiff establishes a prima facie case. Second, the Court failed to indicate clearly whether the defendant's evidence must show the existence of a single, nondiscriminatory justification or must help negate the presence of *any* discriminatory motive.

The *McDonnell Douglas* Court's failure to define the nature of defendant's burden has divided the lower courts. Some tribunals have emphasized the Court's choice of the word "articulate" instead of "prove" in *McDonnell Douglas*. This choice, these courts

---

[17] *See* Sweeney v. Board of Trustees, 569 F.2d 169, 177 (1st Cir.) (requirements not very arduous burden on plaintiff), *vacated and remanded for reconsideration per curiam*, 439 U.S. 24 (1978); B. SCHLEI & P. GROSSMAN, *supra* note 13, at 1155 (plaintiffs frequently find burden of establishing prima facie case relatively easy).

[18] The Court recently reaffirmed its adherence to this scheme. *See* Board of Trustees v. Sweeney, 439 U.S. 24 (1978); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

[19] *See* 2 A. LARSEN, EMPLOYMENT DISCRIMINATION § 50.10 (1975).

[20] *See* notes 24-56 and accompanying text *infra*.

[21] 411 U.S. at 802 (emphasis added).

reason, indicates that defendants need only come forward with some credible evidence of a legitimate, nondiscriminatory justification.[22] Other courts, however, opine that casting such a minimal burden upon defendants is meaningless. They conclude that the plaintiff's establishment of a prima facie case should shift the burden of persuasion to defendant. To prevail, the defendant then must prove by a preponderance of the evidence that a nondiscriminatory explanation supports its actions.[23]

The Supreme Court addressed this issue in two opinions rendered during the latter portion of its 1977-78 term. In *Furnco Construction Corp. v. Waters*,[24] three black bricklayers claimed that an employer's policy of refusing to accept applications at the jobsite constituted racial discrimination in violation of Title VII. After affirming the Seventh Circuit's ruling that plaintiffs had established a prima facie case under the *McDonnell Douglas* standard,[25] the Court examined the burden which then fell upon the defendant. Unfortunately, the imprecise language used by the *Furnco* majority failed to clarify the Court's thinking. Instead of facing the conflict in the lower courts and explaining the defendant's burden of proof under *McDonnell Douglas*, the Court begged the question by using both words in the operative paragraph.

> When the prima facie case is understood in the light of the opinion in *McDonnell Douglas*, it is apparent that the burden which shifts to the employer is merely that of *proving* that he based his employment decision on a legitimate consideration .... To dispel the adverse inference from a prima facie showing under *McDonnell Douglas*, the employer need only "*articulate* some legitimate, nondiscriminatory reason for the employee's rejection."[26]

---

[22] *See, e.g.*, Powell v. Syracuse Univ., 580 F.2d 1150, 1155-56 (2d Cir.), *cert. denied*, 99 S. Ct. 576 (1978); Barnes v. St. Catherine's Hosp., 563 F.2d 324, 329 (7th Cir. 1977); Flowers v. Crouch-Walker Corp., 552 F.2d 1277, 1281-82 (7th Cir. 1977); Harper v. Trans World Airlines, Inc., 525 F.2d 409, 411 (8th Cir. 1975); Sabol v. Snyder, 524 F.2d 1009, 1012 (10th Cir. 1975); Rich v. Martin Marietta Corp., 522 F.2d 333, 347-48 (10th Cir. 1975); Gates v. Georgia-Pacific Corp., 492 F.2d 292, 295-96 (9th Cir. 1974). *Cf.* Loeb v. Textron, Inc., 600 F.2d 1003, 1011-12 (1st Cir. 1979) (later Supreme Court decision in *Board of Trustees v. Sweeney* established this as the correct position).

[23] *See, e.g.*, Williams v. Bell, 587 F.2d 1240, 1245 n.45 (D.C. Cir. 1978); Turner v. Texas Instruments, Inc., 555 F.2d 1251, 1255 (5th Cir. 1977); Ostapowicz v. Johnson, 541 F.2d 394, 399 (3d Cir. 1976); Osborne v. Cleland, 468 F. Supp. 1302, 1303 (E.D. Ark. 1979); Randolph v. United States Elevator Corp., 452 F. Supp. 1120, 1124 (S.D. Fla. 1978).

[24] 438 U.S. 567 (1978).

[25] *Id.* at 575.

[26] *Id.* at 577-78 (emphasis added).

Arguably, the Court meant that the two words are synonymous and interchangeable. The use of both "prove" and "articulate" may suggest that "articulate" takes on the meaning of "prove" and the Court intends the defendant to shoulder the burden of persuasion once the plaintiff has made out a prima facie case. This conclusion, however, does not flow automatically from the premise of synonymity, nor is it clearly supported by the rest of the Court's opinion. Although the opinion indicates that the employer must proffer some evidence of its motivation,[27] it contains no discussion as to the extent of the defendant's burden or the conflicting lower court opinions on this issue.

The Court again faced this question in *Board of Trustees v. Sweeney*.[28] In that case, a female faculty member brought an action against a state college alleging that two prior denials of promotion resulted from sex discrimination.[29] The First Circuit held that the defendants' evidence failed to sustain their burden of proving the absence of discriminatory motive.[30] The court also stated, however, that

> [t]he ultimate burden of persuasion on the issue of discrimination remains with the *plaintiff, who must convince the court by a preponderance of the evidence* that he or she has been the victim of discrimination.[31]

The Supreme Court vacated the circuit court's decision, declaring that the lower tribunal had made two contradictory statements on the burden of proof issue.[32] The Court tacitly recognized that its own earlier choice of terminology had created confusion about the appropriate allocation of burdens of proof. But it declared that the citation to *McDonnell Douglas* in *Furnco* emphasized that the employer need only " 'articulate some legitimate, nondiscriminatory reason for [its action]' "[33] rather than " 'prove absence of discriminatory motive.' "[34]

---

[27] *Id.* at 580.

[28] 439 U.S. 24 (1978) (per curiam).

[29] Although her complaint asserted claims under the Constitution and several federal statutes, only her Title VII claim was appealed. Sweeney v. Board of Trustees, 569 F.2d 169, 171 (1st Cir.), *vacated and remanded for reconsideration per curiam,* 439 U.S. 24 (1978).

[30] 569 F.2d at 177.

[31] *Id.* (emphasis added).

[32] 439 U.S. at 24 n.1.

[33] *Id.* at 24 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).

[34] *Id.* (emphasis omitted) (quoting Sweeney v. Board of Trustees, 569 F.2d 169, 177 (1st Cir.), *vacated and remanded for reconsideration per curiam,* 439 U.S. 24 (1978)).

This discussion, however, fails to separate the burden of proof issue from the second of the two issues left unanswered by *McDonnell Douglas*—the factual issue to which defendant's evidence must be directed. Furthermore, it does not analyze the extent of the defendant's burden of proof. By reasserting its adherence to the language of *McDonnell Douglas*, the Court only perpetuated the dual ambiguities generated by that decision. Nonetheless, at the end of its opinion, the Court suggested the defendant bears only the burden of coming forward with some credible evidence.[35]

The four dissenting justices directly confronted these perplexing problems by clearly separating and stating the issues.[36] They found no operative distinction between the word "prove" and "articulate" because both terms involve the presentation of evidence or proof rather than mere allegation of nondiscriminatory purpose.[37] Nevertheless, the dissenters failed to provide any more insight into this matter than that offered by the majority. Their deficiency, like the majority's, lies in their failure to define clearly the extent of the defendant's burden of proof; they did not specify whether the defendant must prove his case by a preponderance of the evidence or some lesser standard.

Ultimately, the two opinions differ only slightly on this issue. The majority held that the defendant's burden consists simply of producing evidence of nondiscriminatory reasons; it need not disprove plaintiff's prima facie case nor prove the absence of discriminatory motive.[38] Similarly, the dissenters concluded that the employer must satisfy only the burden of producing evidence of legitimate reasons, while "the burden of persuasion . . . remains with the plaintiff" to prove the existence of discrimination.[39] Thus, defendants bear only the moderate[40] burden of coming forward with *some* evidence to challenge the inference of discrimination generated by plaintiff's prima facie case.[41]

---

[35] 439 U.S. at 25 n.2. On remand, the First Circuit interpreted the Supreme Court's decision as placing on defendant only the burden of producing some evidence of a nondiscriminatory explanation. Sweeney v. Board of Trustees, 604 F.2d 106, 109 (1st Cir. 1979).

[36] 439 U.S. at 28 (dissenting opinion, Stevens, J.).

[37] *Id.*

[38] *Id.* at 26 n.2.

[39] *Id.* at 29 (dissenting opinion, Stevens, J.).

[40] *Cf.* B. SCHLEI & P. GROSSMAN, *supra* note 13, at 1155-56 (defendant can normally "articulate some legitimate, nondiscriminatory reason" for action even where reason is arguably subjective).

[41] Sweeney v. Board of Trustees, 604 F.2d 106, 108 (1st Cir. 1979).

This interpretation of the defendant's burden of proof is consistent with the third stage of the proof formula enunciated in *McDonnell Douglas*. If the defendant satisfies its burden, the plaintiff receives an opportunity to show that the defendant's purportedly nondiscriminatory explanation is really a pretext shielding its true discriminatory purpose.[42] This final element brings defendant's subjective motivation into issue, for it is here that plaintiff must persuade the factfinder that defendant's conduct resulted from a discriminatory purpose. The First Circuit and the Supreme Court dissenters in *Sweeney* referred to this issue as the ultimate question of identifying the basis for defendant's action. Both recognized that on this point plaintiff must always bear the burden of persuasion.[43] Moreover, although they couched their discussion in slightly different terms, the majority in *Sweeney* ultimately concurred in this analysis.[44]

Thus the Supreme Court's struggle to explicate the proof requirements in disparate treatment cases resulted in a fairly straightforward formula that lies within the interstices of its several enigmatic opinions. The plaintiff creates an inference that the employer unlawfully discriminated by showing that he belongs to a protected class and that the employer denied him an available employment opportunity for which he was qualified. Absent any explanation by the defendant, the court presumes that the defendant purposefully based his action upon an impermissible consideration on the theory that employers do not base their decisions on whim or caprice.[45] To avoid judgment for the plaintiff after a prima facie case is made out, the defendant must initially claim a nondiscriminatory justification for its action. Although the defendant must buttress this claim with some evidence, and not simply by a bare allegation in the pleadings, the plaintiff, after the defendant's claim, shoulders the burden of persuading the factfinder that the defendant intentionally discriminated against him. To satisfy the burden, the plaintiff must prove by a preponderance of the evidence that the defendant's justification is either nonexistent or a sham.

---

[42] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973). *See also* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978).

[43] 439 U.S. at 29; 569 F.2d at 174-75.

[44] 439 U.S. at 24 n.1.

[45] Furnco Constr. Corp. v. Waters, 438 U.S. 567, 575-77 (1978).

This formulation of the proof requirements tracks the Court's ambiguously articulated design that requires the defendant to raise the issue of motivation initially, but places the burden of persuasion on plaintiff once that question is put in issue. It also places the burden of proving the essential element of the claim—discrimination—on the party asserting it. Finally, by requiring defendant to produce some evidence supporting its claim of a legitimate basis for its action, plaintiff receives adequate notice of the direction his proof of pretext or nonexistence should take.[46]

The Court's terminology in *McDonnell Douglas* also generated a dispute about the factual issue to be addressed by the defendant's offer of proof. The *McDonnell Douglas* Court announced that the defendant must articulate "*some* legitimate, nondiscriminatory reason"[47] for its actions to dispel the inference generated by plaintiff's prima facie case.[48] Once again, however, the Court obfuscated the issue in *Furnco*. The *Furnco* Court began by explaining that defendant must prove "that he based his employment decision on a legitimate consideration, *and not an illegitimate one*."[49] This phrasing strongly suggests that defendant's evidence must not only show the existence of a legitimate basis for its decision but also reveal the total absence of any discriminatory motivation. The paragraph in which this passage is contained, however, concludes with a recitation of the " 'some legitimate, nondiscriminatory reason' " language of *McDonnell Douglas*.[50] The

---

[46] Flowers v. Crouch-Walker Corp., 552 F.2d 1277, 1282 (7th Cir. 1977). *Cf.* Turner v. Texas Instruments, Inc., 555 F.2d 1251, 1255 (5th Cir. 1977) (stating that such benefit flows from shifting burden of persuasion to defendant).

[47] 411 U.S. at 802 (emphasis added).

[48] No factual determination on the employer's motivation was made by either the Supreme Court or the Eighth Circuit in *McDonnell Douglas*. Although the district court found that the defendant's refusal to rehire plaintiff was based *exclusively* on a nondiscriminatory reason, the Eighth Circuit reversed the lower court because "[t]he district court did not use appropriate standards in determining whether McDonnell's refusal to hire Green was racially motivated." Green v. McDonnell Douglas Corp., 463 F.2d 337, 353 (8th Cir. 1972). The circuit court never addressed the substantive issue concerning the nature of defendant's proof of motivation. The Supreme Court vacated the Eighth Circuit's ruling and articulated the proof guidelines for the district court to use in its retrial of the action. The Supreme Court never made a factual finding that implemented the general proof standards put forth in the opinion. On retrial, however, the district court again found that the employer's decision was not motivated by racial discrimination. Green v. McDonnell Douglas Corp., 390 F. Supp. 501, 502 (E.D. Mo. 1975), *aff'd*, 528 F.2d 1102, 1106 (8th Cir. 1976).

[49] 438 U.S. 567, 577 (1978) (emphasis added).

[50] *Id.* at 578.

Court resolved the ambiguity of this contradictory language only when it applied these proof standards to the evidence presented at trial. Rather than requiring the defendant to prove the absence of discrimination, the Court held that the defendant's showing of *a* nondiscriminatory justification sufficed.[51]

The Court reaffirmed this position when it vacated the judgment rendered by the First Circuit in *Sweeney*. The circuit court had interpreted *McDonnell Douglas* to require the defendant to demonstrate the absence of any discriminatory motive.[52] Just as in *Furnco,* the Court rejected this analysis because the lower court had imposed an undue burden of proof on the employer.[53] The Court reemphasized its adherence to the *McDonnell Douglas* standard requiring defendant to articulate only some legitimate reason for its decision.[54]

The analysis in *Furnco* and *Sweeney* comports with the tripartite proof standard applied in disparate treatment cases. Following the plaintiff's prima facie case, the defendant bears the burden simply of claiming a non-discriminatory justification. The plaintiff must then prove that the alleged explanation is a pretext for discrimination. Requiring the employer to refute the presence of any discriminatory motive would deviate from the general proof for-

---

[51] Furnco had alleged that its policy of hiring principally from a list of experienced bricklayers constituted a legitimate and nondiscriminatory basis for refusing to consider plaintiff. The appellate court held that the defendant failed to sustain its burden of proof, because a less discriminatory hiring practice was available and should have been employed. Waters v. Furnco Constr. Corp., 551 F.2d 1085, 1088-89 (7th Cir. 1977). This decision implied that Furnco's showing of a legitimate motive failed because its failure to adopt a less discriminatory practice indicated that discrimination was a factor behind its conduct. Reversing the Seventh Circuit, the Supreme Court ruled that the appellate court had imposed too heavy a burden on Furnco. The employer's burden, the Court reasoned, consisted only of showing some nondiscriminatory justification. Contrary to what the first portion of its discussion implied, the defendant was not required to prove the absence of a less discriminatory alternative employment policy. 438 U.S. at 578.

[52] Sweeney v. Board of Trustees, 569 F.2d 169, 177 (1st Cir.), *vacated and remanded for reconsideration per curiam*, 439 U.S. 24 (1978).

[53] 439 U.S. at 25 & n.2.

[54] The dissenters could not distinguish between the teachings of *McDonnell Douglas* and the rule employed by the First Circuit. They contended that by showing the existence of a legitimate nondiscriminatory explanation for its action, the defendant simultaneously and inherently demonstrated that bias was not a motivating factor. 439 U.S. at 29 (dissenting opinion, Stevens, J.). This analysis, however, fails to acknowledge that any particular employment decision may be caused by both legitimate and illegitimate considerations. The dissent's reliance on language in the majority opinion in *Furnco* only underscores the ambiguous and misleading nature of that opinion. *See* text accompanying notes 44-47 *supra*.

mula by transferring the burden of proof from plaintiff to defendant by effectively requiring the defendant to prove that its nondiscriminatory justification is not a pretext. By proving that defendant's nondiscriminatory explanation is a pretext, the plaintiff ipso facto identifies discrimination as the true motivating force behind the employer's conduct. Because the existence of intentional bias embodies the plaintiff's allegation in a disparate treatment case,[55] and because proof of pretext translates into proof of discriminatory intent,[56] courts should place the burden of proving that issue on the plaintiff.

B. *Disproportionate Impact*

In addition to a claim of disparate treatment, an aggrieved individual can rely on another theory in filing an action under Title VII. Since its decision in *Griggs v. Duke Power Co.*,[57] the Supreme Court has recognized that employment policies neutral on their face can deprive persons of their right to equal employment opportunity and violate Title VII.[58] Objective criteria often dis-

---

[55] *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

[56] *See* Mosby v. Webster College, 563 F.2d 901, 903 (8th Cir. 1977).

[57] 401 U.S. 424 (1971). The employer required all applicants for employment or transfer to have a high school education or pass a standardized general intelligence test. This policy, the Supreme Court held, violated Title VII's ban on racial discrimination. The Court based its ruling on a finding that both requirements disqualified black persons at a significantly higher rate than white applicants and that the employer had failed to prove that either standard was sufficiently related to successful job performance. *Id.* at 431-32.

[58] This theory's most obvious application relates to aptitude and intelligence examinations. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). In addition, courts have utilized it to invalidate employment practices that disqualify individuals for many reasons: minimum height and weight requirements (Dothard v. Rawlinson, 433 U.S. 321, 331 (1977)); arrest record history (Gregory v. Litton Sys. Inc., 316 F. Supp. 401, 403 (C.D. Cal. 1970), *aff'd as modified*, 472 F.2d 631, 632 (9th Cir. 1972)); all criminal convictions other than minor traffic offenses (Green v. Missouri Pac. R.R., 549 F.2d 1158 (8th Cir. 1977)); and garnishment experience (Johnson v. Pike Corp. of America, 332 F. Supp. 490, 494-95 (C.D. Cal. 1971)).

The Equal Employment Opportunity Commission has relied on this theory in voiding a requirement that all job applicants possess an honorable discharge from the armed forces after finding that this standard resulted in disproportionate exclusion of blacks and was not supported by a business necessity. EEOC Decision No. 74-25, 2 EMPL. PRAC. GUIDE (CCH) ¶ 6400 (Sept. 10, 1973). The Commission similarly struck down an employment bar asserted against unwed parents because illegitimacy is more discernible with respect to a female parent and thus it disproportionally excluded women. EEOC Decision No. 71-332, [1973] EEOC DEC. (CCH) (Sept. 28, 1970). *See also* EEOC Decision No. 75-030, 12 Fair Empl. Prac. Cas. 1355, 1357 (Sept. 24, 1974) (no evidence that discrimination against transsexuals imposes disproportionate burden on male applicants). *See generally* Siniscalco, *Homosexual Discrimination in Employment*, 16 SANTA CLARA LAW. 495, 507-08 (1976).

qualify minority persons at a disproportionate rate because a history of discrimination prevents many of these individuals from achieving a competitive position.[59] This "disproportionate impact" model focuses on the discriminatory impact of facially neutral policies rather than, as in disparate treatment cases, the intent underlying the employer's action.[60] Consequently, the nature of the proof required to make a prima facie case of such discrimination differs from that associated with claims of disparate treatment.[61]

To establish a prima facie case of discrimination under the disproportionate impact model, the plaintiff must prove that the employer's policy has a substantially disproportionate exclusionary impact[62] on his class, even though the practice applies equally to all persons.[63] Once the plaintiff has made such a showing, the employer must persuade the factfinder that the challenged policy relates to job performance.[64] If the employer sustains this burden, however, the plaintiff can still prevail by showing that a less discriminatory selection device would "serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' "[65]

---

[59] *See* Comment, *Applying the Title VII Prima Facie Case To Title VIII Litigation*, 11 HARV. C.R.-C.L. L. REV. 128, 154 (1976).

[60] *But see* text accompanying note 72 *infra*.

[61] *See generally* Friedman, *supra* note 5, at 565 n.212.

[62] The federal courts have not adopted a uniform quantitative standard for what constitutes a substantially disproportionate exclusionary impact. *See* Moore v. Southwestern Bell Tel. Co., 593 F.2d 607, 608 (5th Cir. 1979); B. SCHLEI & P. GROSSMAN, *supra* note 13, at 73-74; Shoben, *Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII*, 91 HARV. L. REV. 793, 794 (1978).

On August 25, 1978, however, the EEOC, the Labor Department's Office of Federal Contract Compliance Programs, the Department of Justice, and the Civil Service Commission adopted a set of uniform testing guidelines providing standards for determining the legality of selection procedures used by private and public employers. Among the important provisions of the guidelines is § 4D, the "four-fifths rule." This rule provides that a selection rate for members of a protected group of less than 80% of the rate for the highest scoring group generally suffices to create a prima facie case of disproportionate impact. This constitutes only a rule-of-thumb; the agencies will retain discretion in individual cases. *See* 2 EMPL. PRAC. GUIDE (CCH) ¶ 4010.04. *See generally* Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1978) (EEOC); 41 C.F.R. § 60-3 (1978) (OFCCP); 28 C.F.R. § 50.14 (1978) (Dep't of Justice); 5 C.F.R. 300.103(c) (1978) (Civil Service Comm'n).

[63] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

[64] Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.14 (1973).

[65] Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (quoting McDonnell Doug-

The disproportionate impact theory stems from the belief that not all discrimination is intentional. Discrimination can result from a combination of neutral policies and a tradition of societally imposed inequity. No one can identify a specific private culprit, but relief seems appropriate and desirable. Absence of discrete, individual responsibility should not, under this model, preclude the review and invalidation of employment practices that build on and perpetuate externally created, group-based inequalities.[66] Reliance upon this policy, however, has caused most commentators and courts to misstate, in part, the nature of proof associated with a claim of disproportionate impact and ignore a fundamental similarity between the disproportionate impact and disparate treatment concepts of discrimination.

### C. *Comparing the Two Models*

In discussing disproportionate impact and comparing it to disparate treatment, most academic and judicial observers emphasize that disproportionate impact analysis defines discrimination in terms of consequences, rather than motive. Under this view, a successful plaintiff proves only discriminatory effects in a disproportionate impact case, while proof of discriminatory intent is critical for claims of disparate treatment.[67] This characterization of the two theories, however, is not entirely accurate.

The plaintiff can make a prima facie case in a disproportionate impact action by relying exclusively on evidence demonstrating the discriminatory impact of an employer's policies.[68] But a plaintiff asserting a claim of disparate treatment need not make a showing of defendant's discriminating intent in his prima facie case.[69] Thus, under either theory, the plaintiff can require the defendant to come forward with some defense without offering any evidence of the employer's motivation.

---

las Corp. v. Green, 411 U.S. 792, 802 (1973)).

[66] *See* Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 62-72 (1972); Comment, *supra* note 59, at 154-56.

[67] *See, e.g.*, International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); Blumrosen, *supra* note 66, at 62; Shoben, *Probing the Discriminatory Effects of Employee Selection Procedures with Disparate Impact Analysis Under Title VII*, 56 TEXAS L. REV. 1, 2 n.3, 5 (1977).

[68] *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

[69] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); text accompanying notes 16-19 *supra*.

The two types of actions are distinct because, in a disproportionate impact case, a different burden shifts to the defendant after the plaintiff has established a prima facie case. The employer in a disparate treatment case must only come forward with some credible evidence of a nondiscriminatory justification for its action.[70] In a disproportionate impact case, however, the defendant bears the more onerous burden of persuasion on its defense of job-relatedness.[71]

This difference has one immediate ramification: the more exacting standard imposed upon defendants in disproportionate impact suits more frequently disposes of actions at this stage than does the relatively lax requirement imposed upon defendants in disparate treatment claims. These cases, as well as those resolved at the prima facie case stage, end without regard to defendant's motivation or intent. On the other hand, the relatively light initial burden placed upon plaintiff and defendant in disparate treatment cases causes most of those actions to turn on the intent-laden pretext issue.[72] Thus, the issue of intent is not frequently litigated in disproportionate impact cases but is the critical element of an allegation of disparate treatment.

The issue of intent, however, is not necessarily irrelevant to disproportionate impact actions. If the defendant carries its burden in proving the job-relatedness of its challenged employment criterion, the plaintiff may rebut this defense by showing that an alternative selection practice would generate a lesser discriminatory impact while still fulfilling the employer's legitimate objectives. If an alternative procedure is both efficient and less discriminatory, the defendant's failure to adopt it probably was motivated by a desire to retain the discriminatory impact of the original requirement. As the Supreme Court recognized in *Albemarle Paper Co. v. Moody,*[73] the plaintiff, by demonstrating the existence of an alternative policy, shows that the defendant's reliance on the incumbent screening device for its predictive value simply camouflages discrimination.[74] This third stage of proof, then, resembles

---

[70] *See* text accompanying notes 45-46 *supra.*

[71] Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). *But see* note 130 *infra.*

[72] *See* Smith v. University of N. Carolina, 18 Fair Empl. Prac. Cas. 913, 916 (M.D.N.C. Nov. 9, 1978); B. SCHLEI & P. GROSSMAN, *supra* note 13, at 1155-56.

[73] 422 U.S. 405 (1975).

[74] *Id.* at 425.

the intent-oriented third element (pretext) of proof in disparate treatment cases.

Thus, a disproportionate impact suit offers plaintiff some advantages over a disparate treatment action. In many disproportionate impact suits, the plaintiff will not need to litigate the difficult issue of the defendant's intent because of the heavier burden placed on the defendant once the plaintiff has made out a prima facie case. Plaintiffs, then, should prefer to proceed under a claim of disproportionate treatment. This advantage may be in jeopardy, however, because of a potentially broad decision by the Supreme Court—*Washington v. Davis.*[75]

## II

## WASHINGTON V. DAVIS

### A. *The Decision*

In *Washington,* two black men, who had applied unsuccessfully for positions as police officers in the District of Columbia, brought a class action suit against the District's police department challenging its recruiting procedures.[76] They claimed that the department's entrance requirements, including a written test,[77] discriminated against black applicants on the basis of race, thus violating their rights under the due process clause of the fifth amendment, the Civil Rights Act of 1866,[78] and a local ordinance.[79] Plaintiffs

---

[75] 426 U.S. 229 (1976).

[76] Two black police officers originally filed suit in federal district court against the Chief of the District Police Department, the Commissioner of the District of Columbia, and the Commissioner of the United States Civil Service Commission. Their complaint claimed that the Department's promotion policies were racially discriminatory. Two other plaintiffs intervened and filed an amended complaint. Only this latter portion of the case came before the Supreme Court when the intervenors moved for partial summary judgment.

[77] Acceptance into the Police Department's training program required that an applicant satisfy physical and character standards, possess a high school diploma or its equivalent and score at least 40 out of 80 on Test 21, the examination on which the case focused. Designed by the Civil Service Commission to test verbal ability, vocabulary, and reading comprehension, Test 21 is commonly used throughout the federal Civil Service. 426 U.S. at 234-35.

[78] 42 U.S.C. § 1981 (1976). This statute 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 . . . .

Plaintiffs could not file a claim under Title VII because it was not applicable to federal employers when their complaint was filed. *See generally* Brown v. General Servs. Adm'n, 425 U.S. 820, 825 (1976).

[79] D.C. CODE § 1-320 (1973). This provision states:

> In any program of recruitment or hiring of individuals to fill positions in the

moved for partial summary judgment on only their federal constitutional challenge to the department's recruiting policies; they did not place their statutory causes of action in issue. The defendants, officials of the District of Columbia and the United States Civil Service, filed a cross-motion for summary judgment, asserting that the plaintiffs were not entitled to relief on either their constitutional or statutory claims.[80] Both the plaintiffs' and defendants' motions concerned only the validity of the written personnel examination, "Test 21."[81]

The trial court denied the plaintiffs' motion and granted the defendants' cross-motions, entering judgment against the plaintiffs on both their constitutional and statutory claims. In ruling for the defendants, the court noted that the plaintiffs had never claimed intentional discrimination. Rather, the plaintiffs had alleged only that Test 21 had a discriminatory impact on black applicants and bore no relationship to job performance.[82]

On appeal, the plaintiffs contended that their summary judgment motion, which raised only the constitutional due process issue, should have been granted. The court of appeals reversed the trial court judgment and ordered the lower court to grant the plaintiffs' summary judgment motion.[83] The appellate court reached this decision by applying the *Griggs* disproportionate impact standard for Title VII claims to the constitutional due process issue in the case at bar.[84] Under this standard, the defendants' lack of discriminatory intent in designing and administering Test 21, the court held, was irrelevant.[85]

The Supreme Court reversed the court of appeals, holding that it had erroneously applied the statutory standard of racial discrimination to a constitutional claim.[86] Title VII disproportionate impact proof, the Court declared, does not suffice to prove unconstitutional racial discrimination. For a constitutional

---

government of the District of Columbia, no officer or employee of the government of the District of Columbia shall exclude or give preference to the residents of the District of Columbia or any State of the United States on the basis of residence, religion, race, color, or national origin.

[80] 426 U.S. at 233-34.

[81] *Id.* at 235.

[82] Davis v. Washington, 348 F. Supp. 15, 16 (D.D.C. 1972), *rev'd*, 512 F.2d 956 (D.C. Cir. 1975), *rev'd*, 426 U.S. 229 (1976).

[83] Davis v. Washington, 512 F.2d 956 (D.C. Cir. 1975), *rev'd*, 426 U.S. 229 (1976).

[84] *See* 512 F.2d. at 957 n.2 ("decisions applying Title VII furnish additional instruction as to the legal standard governing the issues raised in tbis case").

[85] *Id.* at 960-61.

[86] 426 U.S. at 238.

claim of racial discrimination, the Court concluded, a plaintiff must prove discriminatory intent, not just statistical disproportionate impact, to establish a prima facie case and subject the employer's action to strict scrutiny.[87] Absent proof of discriminatory purpose, the Court will review the alleged racial classification under the toothless[88] rational basis test.[89]

The *Washington* decision, requiring proof of discriminatory intent for the plaintiff's prima facie case in all constitutional claims of employment discrimination, could dramatically restrict future employment discrimination claims. This opinion thus deserves careful scrutiny. Although many scholars have discussed its relation to constitutional jurisprudence,[90] few have considered *Washington*'s potential impact on statutory claims of employment discrimination.

B. *Constitutional Analysis*

By requiring the plaintiff in employment discrimination actions under the Constitution to prove the difficult issue of discriminatory intent in his prima facie case, the *Washington* Court impeded the enforcement of constitutionally guaranteed civil rights. Imposing this stringent standard is not the only significant aspect of the Court's decision; the Court's reasoning is equally troubling, particularly because of the Court's disingenuous treatment of its own precedent.

The *Washington* Court gave two reasons for its rejection of the disproportionate impact theory. First, the Court declared that its

---

[87] *Id.* at 238-39, 242, 245. The Court recently extended the intent requirement to a constitutional claim of sex discrimination. *See* Personnel Adm'r v. Feeney, 99 S. Ct. 2282, 2293 (1979).

The *Washington* Court conceded that such extreme disproportionate impact cases as, for example, systematic exclusion of blacks from jury service may be enough to demonstrate discriminatory intent. 426 U.S. at 241-42 (dictum).

[88] *See generally* Friedman, *supra* note 5, at 533-534, 550, 560 & n.174.

[89] 426 U.S. at 247-48. *Accord*, Personnel Adm'r v. Feeney, 99 S. Ct. 2282, 2292-93 (1979) (dictum).

[90] *See, e.g.*, Brest, *Forward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976); Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36 (1977); Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540 (1977); Samford, *Toward A Constitutional Definition of Racial Discrimination*, 25 EMORY L.J. 509 (1976); Note, *Burden of Proof in Equal Protection Discriminatory Impact Cases: An Emerging Standard*, 26 CATH. U.L. REV. 815 (1977); Note, *Discriminatory Purpose: What It Means Under the Equal Protection Clause—Washington v. Davis*, 26 DEPAUL L. REV. 650 (1979); Comment, *Proof of Racially Discriminatory Purpose Under the Equal Protection Clause:* Washington v. Davis, Arlington Heights, Mt. Healthy, and Williamsburgh, 12 HARV. C.R.-C.L. L. REV. 725 (1977).

prior opinions did not support applying the *Griggs* theory to a constitutionally-based cause of action.[91] Second, the Court feared that adoption of the statutory standard would lead to the invalidation of "a whole range" of statutes and regulations "designed to serve neutral ends."[92] Neither of these explanations can withstand serious scrutiny.

The Court reached its conclusion that prior cases did not support the application of disproportionate impact theory to constitutional claims only by misinterpreting its own contrary precedent as reflecting a uniform position on the roles of impact and intent in constitutional litigation.[93]

> We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII . . . .
>
> . . . [O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.[94]

Yet in at least three prior cases, the Court had invalidated a statute or other official action exclusively because of its discriminatory effects. For example, in *Gomillion v. Lightfoot*,[95] the Court struck down an Alabama statute gerrymandering the boundaries of Tuskegee because it deprived the city's black residents of their fifteenth amendment right to vote. Justice Frankfurter declared that this redistricting could not pass constitutional muster because its "inevitable *effect*"[96] was to disenfranchise only black voters. The Court did not directly examine the city's purpose in drafting this legislation.[97]

Several years later, in *United States v. O'Brien*,[98] the Court reemphasized the importance of impact analysis to the *Gomillion*

---

[91] 426 U.S. at 239.

[92] *Id.* at 248.

[93] *See* Eisenberg, *supra* note 90, at 39; Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L. J. 1205, 1254 (1970); Perry, *supra* note 90, at 544; Comment, *supra* note 90, at 730 n.28.

[94] 426 U.S. at 239.

[95] 364 U.S. 339 (1960).

[96] *Id.* at 341 (emphasis added).

[97] Although Justice Frankfurter may have implicitly considered the city's motives (*see* Perry, *supra* note 90, at 545 n.32), the statute's discriminatory impact sufficed to render it unconstitutional.

[98] 391 U.S. 367 (1968).

decision. The *O'Brien* Court characterized *Gomillion* as standing "not for the proposition that legislative motive is a proper basis for declaring a statute unconstitutional, but that the inevitable effect of a statute on its face may render it unconstitutional."[99] Neither *Gomillion* nor *O'Brien*, however, received mention by the *Washington* Court.

Another case conflicting with *Washington* is *Palmer v. Thompson*.[100] In that case, the city of Jackson, Mississippi had decided to close its segregated public swimming pools after being ordered to open its public facilities to all races. Black residents filed suit under the equal protection clause of the fourteenth amendment to force the city to reopen the pools. The Court rejected this plea, holding that the closing did not affect blacks and whites differently. Although the record contained evidence supporting a claim of discriminatory intent,[101] the Court upheld the city's action because of the absence of any discriminatory impact upon blacks.[102] Referring to *Gomillion, inter alia,* the Court reiterated that "the focus in those cases was on the actual effect of the enactments, not upon the motivation which led the States to behave as they did."[103]

Rather than openly rejecting this essential portion of *Palmer,* the *Washington* Court feebly attempted to circumvent *Palmer*'s unambiguous language. Although the Court conceded that *Palmer* indicated that legislative intent was not a sine qua non for a constitutional right of action,[104] it maintained that the decision really turned on unrebutted evidence of a legitimate purpose behind the pool closings.[105]

This description, unfortunately, misrepresents *Palmer*. In that case, the Court clearly stated that the record contained evidence supporting both the plaintiff's allegation of a discriminatory purpose and defendant's assertion of a legitimate desire to preserve peace and order.[106] More to the point, the Court held that the likelihood of such multiple motivation demonstrated the futility of reviewing legislation for the intent of its proponents.[107] The

---

[99] *Id.* at 384.
[100] 403 U.S. 217 (1971).
[101] *Id.* at 224-25.
[102] *But see* Brest, *supra* note 90, at 27.
[103] 403 U.S. at 225.
[104] 426 U.S. at 242, 244 n.11.
[105] *Id.* at 243.
[106] 403 U.S. at 224-25.
[107] *Id.*

*Palmer* Court thus had refused to base its decision on intent, relying instead on the lack of any discriminatory impact.[108]

In addition, the *Washington* Court misrepresented the holding in *Wright v. Council of the City of Emporia*.[109] When the city of Emporia, which had affiliated with the school system of its county, sought to set up its own separate system, the plaintiffs challenged the city's action under the equal protection clause of the fourteenth amendment.[110] The Fourth Circuit reversed the trial court's judgment for the plaintiffs, holding that the validity of the city's conduct depended on the "dominant purpose"[111] behind the challenged action. This dominant purpose test was repudiated by the Supreme Court. Citing *Palmer* for support, the Court found no precedent for this standard.[112] Moreover, the Court added that:

> [A]n inquiry into the "dominant" motivation of school authorities is as irrelevant as it is fruitless .... Thus, we have focused upon the effect—not the purpose or motivation—of a school board's action in determining whether it is a permissible method of dismantling a dual system. The existence of a permissible purpose cannot sustain an action that has an impermissible effect.[113]

Thus, it concluded that the trial court had correctly focused on the effect of the city's action rather than upon the motivation behind it.[114]

The *Washington* Court's treatment of *City of Emporia* is the decision's most enigmatic aspect. After stating that discriminatory effect had never been the constitutional standard for adjudicating

---

[108] *Id.* at 225.

[109] 407 U.S. at 451 (1972).

[110] The *City of Emporia* lawsuit began in 1965 when an action was filed on behalf of black children against Greenville County officials. The plaintiffs sought to enjoin continuation of the county's racially segregated school system. On June 25, 1969, the district court ordered the county to implement a desegregation plan which the plaintiffs had submitted. Two weeks later, the Emporia City Council declared its intention to operate its own separate school system. On August 1, 1969, the plaintiffs filed a supplemental complaint against members of the Emporia City Council and School Board seeking to enjoin the creation of this independent school system. The Supreme Court's opinion deals only with the supplemental complaint. 407 U.S. at 455-58.

[111] Wright v. Council of City of Emporia, 442 F.2d 570, 572 (4th Cir. 1971), *rev'd*, 407 U.S. 451 (1972).

[112] 407 U.S. at 461-62.

[113] *Id.* at 462.

[114] *Id.*

claims of racial discrimination, the Court conceded that *City of Emporia* represents an instance where "the racial impact of a law, rather than its discriminatory purpose, is the critical factor."[115] It then distinguished *City of Emporia* by suggesting that the prior case rested not upon the adjudication of a constitutional question but rather on the effect that the city's action would have had on a prior federal judicial decree;[116] the Court focused[117] on language in *City of Emporia* that there was no need to find an "independent constitutional violation."[118] Yet, the *City of Emporia* Court had acknowledged that the district court's decision to enjoin the defendant's proposed withdrawal from the county school stemmed from a finding of a constitutional violation.[119]

Finally, the *Washington* Court misinterpreted the discussion in *City of Emporia* concerning the need for an " 'independent' constitutional violation." That statement does not mean that the case rests on nonconstitutional grounds. The lack of independence referred to the claim against both the city and the county rather than the separateness of the constitutional claim from another claim. As *City of Emporia* indicates, the Court treated the two municipalities as one unit.[120] Because a single constitutional charge could serve as the basis for review of the actions of both city and county, an independent claim under the fourteenth amendment against the city was unnecessary to raise a constitutional question about the city's withdrawal decision.

Not only did the *Washington* Court ignore or ineffectually distinguish its own precedent,[121] it also summarily dismissed decisions by several courts of appeals and district courts holding that proof of disproportionate impact alone sufficed to establish unconstitutional racial discrimination.[122] The Court rejected this

---

[115] 426 U.S. at 243.

[116] *Id.*

[117] *Id.*

[118] 407 U.S. at 459.

[119] 423 U.S. at 243. Moreover, the trial judge in *City of Emporia* had characterized the plaintiffs' complaint as seeking to protect their "constitutional right to unsegregated public education." 309 F. Supp. 671, 676 (E.D. Va. 1970), *rev'd*, 442 F.2d 570 (4th Cir. 1971), *rev'd*, 407 U.S. 451 (1972).

[120] 407 U.S. at 459-60.

[121] *See* Eisenberg, *supra* note 90, at 46.

[122] 426 U.S. at 244-45 & n.12. *See generally* Note, *supra* note 90, 26 CATH. U.L. REV. at 817-18; Note, *supra* note 90, 26 DE PAUL L. REV. at 658; Note, *Racial Discrimination Under the Constitution and Title VII—More Deference to the Reasonable Practices of Lawmakers and Employers*, 37 LA. L. REV. 973, 977 n.26 (1977).

overwhelming body of case law by noting simply that such cases "demonstrate that there is another side to the issue."[123]

The Court's cavalier treatment of both its own opinions, as well as those of a preponderance of the circuits, becomes more troubling when one considers that the Court undertook this constitutional inquiry on its own motion.[124] The defendants never challenged the applicability of the statutory disproportionate impact standard to plaintiff's constitutional right of action. They argued only that the appellate court had misapplied the *Griggs* test.[125]

In addition to its disingenuous use of precedent,[126] the *Washington* Court gave only one reason of substance for its decision: application of the statutory impact standard to constitutional claims, the Court maintained, could invalidate a wide range of well-intentioned legislation.[127] But this postulate incorrectly assumes that the discriminatory consequences of a facially neutral practice are less offensive than discrimination generated by a hostile motive. Equally undesirable societal costs result from both intentional and unintentional discrimination. Whatever the cause, differential treatment, and the diminished contact among races that it engenders, reinforces prejudices and stereotypes, creates feelings of inferiority and superiority, deprives individuals of important benefits, perpetuates fear and hostility, and impedes understanding and cooperation.[128]

Such deviation from the ideal of equality inherent in the constitutional guarantee of equal protection should not be tolerated.[129] The *Washington* Court erred: the effect that the disproportionate impact standard would have on statutes hardly constitutes a persuasive reason for scrutinizing disciminatory public action less rigorously when proof of discriminatory intent is lacking. The Court's insensitivity to unintentional discrimination will only

---

[123] 426 U.S. at 245.

[124] *Id.* at 238.

[125] *Id.* at 238 n.8.

[126] *See* text accompanying notes 95-120 *supra.*

[127] *Id.* at 248.

[128] *See* Brest, *supra* note 90, at 29; Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275, 299-300 (1972); Perry, *supra* note 90, at 558 n.99.

[129] *See* Eisenberg, *supra* note 90, at 81.

perpetuate the demoralizing and stigmatizing impact of official action that produces disproportionate exclusionary consequences.

*Washington*'s significance, however, extends beyond the flaws in the Court's reasoning. First, making intent a necessary element of the prima facie case in constitutional claims of employment discrimination sharply restricts the effectiveness of the Constitution as a means of advancing such claims. In addition, the Court's imposition of the stringent intent standard in constitutional cases may spawn a reconsideration and reformulation of the standard by which it judges statutory rights of action.

### C. *The Impact on Constitutional Litigation*

The *Washington* ruling immediately threatened the viability of the Constitution as a basis for employment discrimination suits. As with plaintiffs claiming a violation of Title VII, plaintiffs with constitutional claims greatly benefit from the disproportionate impact standard because they can establish a prima facie case without any direct evidence of defendant's discriminatory intent.[130] *Washington*, of course, extinguished that benefit by re-

---

[130] *See* notes 57-75 and accompanying text *supra*. In Albemarle Paper Co. v. Moody, 422 U.S. 405, 425-32 (1975), the Court elaborated on the defendant's heavy burden to rebut the plaintiff's showing of disproportionate impact and prove that its employment policy was job-related. The *Washington* Court significantly diminished this burden of proof. In addition to requiring proof of intent in the plaintiff's prima facie case, the Court held that defendants were entitled to summary judgment on the plaintiff's statutory claims. The opinion stated that the plaintiff could not prevail on his claims under 42 U.S.C. § 1981 and D.C. CODE § 1-320 because Test 21 satisfied the applicable statutory standard of job-relatedness. 426 U.S. at 248-52. Although the plaintiff did not file an action under Title VII, the Court further noted both that the defendants did not dispute the applicability of Title VII job-relatedness standards to the plaintiff's claims under § 1981 and the municipal statute, and that the trial court had assumed that Title VII criteria controlled the case. *Id.* at 249. The Court concluded that the defendants had satisfied the Title VII requirement of job-relatedness by showing a correlation between success on Test 21 and adequate performance in the police recruit training course. *Id.* at 248-52. The Court ruled that the court of appeals had held defendants to an unnecessarily strict standard in invalidating Test 21 because the defendants failed to prove a relationship between success on the examination and actual performance as a police officer. A positive relationship between test and training course performance, the Court held, validated the exam, and the defendants were not obliged to produce evidence of any relationship to actual performance on the job. *Id.* at 249-50.

Justice Brennan, dissenting, points out the clear inconsistency of this result with the requirement articulated in *Griggs* and *Albemarle* that defendant prove the *job*-relatedness of its practices. 426 U.S. at 266-67. This inconsistency stands out, in particular, because the record disclosed no persuasive evidence that training course performance related to on-the-job performance. The majority's refusal to recognize this incongruity and its suggestion that its definition of defendant's burden was not "foreclosed by either *Griggs* or *Albemarle*"

quiring that plaintiff prove intent as part of the prima facie case in constitutional cases.

Intent, like all states of mind, is a subjective condition that does not lend itself to clear and persuasive proof. The inherent difficulty in demonstrating any subjective motivation will often prove insurmountable. Thus, genuine victims of discrimination could be foreclosed from redressing their injuries, particularly in situations involving governmental action. In such instances, the decisionmaking authority frequently is dispersed among so many individuals that direct evidence of the actual motivation underlying a particular decision may defy discovery.[131] Moreover, the knowledge that intent is an essential element of any potential litigant's case may encourage official decisionmakers to take the simple steps necessary to camouflage their true intentions.[132]

Because of *Washington*, many deserving plaintiffs who could offer proof of the discriminatory consequences of the government's conduct, but cannot confirm the presence of intent, will be forced to abandon their reliance on the Constitution and look to alternative sources of relief. Unfortunately, the unspoken message of *Washington* may produce repercussions extending far beyond the constitutional boundaries of that particular case.

### D. *The Impact on Statutory Causes of Action*

The *Washington* Court addressed the role of intent in employment discrimination litigation only with respect to plaintiff's constitutional claim. Although the decision did not deal directly with this issue in its statutory context, the pro-defendant tenor of this case has caused many federal courts to reconsider the standards they traditionally applied to actions brought under the federal antidiscrimination statutes. Several of these courts have applied *Washington*'s intent requirement to employment discrimination actions brought under the Civil Rights Acts of 1866 and 1964. Both the legislative histories of the two statutes and the reasoning employed in these wayward opinions, however, indicate that such an extension of the *Washington* holding is un-

---

(*id.* at 251), indicate the Burger Court's increasingly generous treatment of defendants in employment discrimination actions. *See generally* Freeman, *Legitimizing Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1114 (1978).

[131] *See* Washington v. Davis, 426 U.S. 229, 253 (1976) (concurring opinion, Stevens, J.).

[132] *See* Shutran & Jones, *Civil Rights*, 1977 ANN. SURVEY AM. L. 691, 720.

warranted—a showing of disproportionate exclusionary impact should continue to suffice in establishing a prima facie case in such suits.

1. *Title VII Actions*

Because the plaintiffs in *Washington* did not assert a Title VII claim, and strong Supreme Court rulings oppose an intent requirement in Title VII actions against private employers,[133] the lower federal courts have not attempted to append such a requirement onto the prima facie case in those actions.[134] The courts have, however, disagreed whether the *Washington* decision should affect the nature of the plaintiff's prima facie case when the defendant is a public body.[135]

Title VII was amended by the Equal Employment Opportunity Act of 1972.[136] One of the most significant changes contained in the new enactment was the extension of Title VII's coverage to federal, state and local government employers.[137] After the ruling in *Washington*, litigants asked the courts to reexamine the issue of whether a single standard should control both statutory and constitutional claims of employment bias in the public sector.

Proponents of an intent requirement for Title VII actions against governments rely on the constitutional foundation of the 1972 amendments as their principal support. They contend that the Constitution does not permit imposition of the *Griggs* impact

---

[133] The Court has spoken against such a requirement, both before *Washington* (*see, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 422 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971)), as well as after *Washington* (*see, e.g.*, New York City Transit Auth. v. Beazer, 440 U.S. 568, 584 (1979); Nashville Gas Co. v. Satty, 434 U.S. 136, 141 (1977); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Hazelwood School Dist. v. United States, 433 U.S. 299, 307-08 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 & n.15 (1977); General Elec. Co. v. Gilbert, 429 U.S. 125, 137 (1976)).

[134] *See, e.g.*, Rule v. International Ass'n of Bridge Workers, 568 F.2d 558, 566 (8th Cir. 1977); Yuhas v. Libbey-Owens-Ford Co., 562 F.2d 496, 498 (7th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978); Kinsey v. First Regional Sec., Inc., 557 F.2d 830, 839 (D.C. Cir. 1977); Gibson v. Local 40, Supercargoes & Checkers, 543 F.2d 1259, 1265 (9th Cir. 1976); Heiser, *Intent v. Impact: The Standard of Proof Necessary to Establish a Prima Facie Case of Race Discrimination Under 42 U.S.C. § 1981*, 16 SAN DIEGO L. REV. 207, 224 n.94 (1979).

[135] One trial judge completely switched sides on this issue within just nine months. *Compare* United States v. Virginia, 454 F. Supp. 1077, 1082-84 (E.D. Va. 1978) (proof of impact alone sufficient to establish prima facie case against police department) *with* Friend v. Leidinger. 446 F. Supp. 361, 386 (E.D. Va. 1977) (proof of discriminatory purpose held necessary to establish prima facie case against fire department), *aff'd*, 588 F.2d 61 (4th Cir. 1978).

[136] Pub. L. No. 92-261, § 11, 86 Stat. 111 (1972).

[137] *See generally* 42 U.S.C. §§ 2000e(b), 2000e-16 (1976).

standard on governmental agencies. Congress, they reason, enacted this statute under section 5 of the fourteenth amendment, and because *Washington* requires proof of discriminatory purpose for a claim under the fourteenth amendment, an action brought under a statute enacted pursuant to that amendment also must be reviewed under the same intent standard.[138]

This proposition rests on the premise that a statute cannot exceed the scope of the constitutional provision from which it derives its authority. Under this theory, a statute cannot constitutionally proscribe state action its constitutional progenitor would permit. Although the Supreme Court has recognized that Congress passed the 1972 amendment to implement section 5 of the fourteenth amendment,[139] it also has rejected claims that other statutes enacted under this amendment cannot exceed its limitations.[140]

In *Katzenbach v. Morgan*,[141] for example, a federal statute prohibited certain uses of literacy tests to assess voter qualifications. The Court noted that this law was enacted pursuant to section 5 of the fourteenth amendment and that it had ruled previously that the use of such literacy tests did not violate that constitutional provision. Nevertheless, the constitutionality of a federal act barring the use of constitutionally permissible literacy tests was upheld as a legitimate exercise of Congress' authority under the enabling clause of the fourteenth amendment.[142] The Court explained that Congress, under section 5, may enact any "appropriate legislation" designed to enforce the equal protection guarantees of the fourteenth amendment.[143] The constitutional test for any exercise of that power is whether the statute is

---

[138] *See* Armour v. City of Anniston, 19 Fair Empl. Prac. Cas. 1755, 1759 (N.D. Ala. 1977), *aff'd*, 597 F.2d 46, 48 n.2 (5th Cir. 1979); Friend v. Leidinger, 446 F. Supp. 361, 386 (E.D. Va. 1977), *aff'd*, 588 F.2d 61 (4th Cir. 1978); Blake v. City of Los Angeles, 435 F. Supp. 55, 63 (C.D. Cal. 1977), *rev'd*, 595 F.2d 1367, 1377 (9th Cir. 1979); Scott v. City of Anniston, 430 F. Supp. 508, 515 (N.D. Ala. 1977), *rev'd in part*, 597 F.2d 897, 898-900 (5th Cir. 1979); Perry, *supra* note 90, at 573 n.148.

[139] *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 447, 453 n.9 (1976). *See also* H.R. REP. No. 233, 92d Cong., 1st Sess. 17 (1971); S. REP. No. 413, 92d Cong., 1st Sess. 10 (1971).

[140] *See* Katzenbach v. Morgan, 384 U.S. 641, 650-51 (1966); U.S. v. Guest, 383 U.S. 745, 781-84 (1966) (concurring and dissenting opinion, Brennan, J.). *Cf.* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968) (discussing thirteenth amendment).

[141] 384 U.S. 641 (1966).

[142] *Id.* at 648-49.

[143] *Id.* at 650-51.

"plainly adapted" to carrying out the objectives of the amendment and is consistent with the letter and spirit of the Constitution.[144] Furthermore, the Court emphasized that the scope of judicial review is limited by the discretion granted Congress to determine what legislation is necessary to secure the protections provided by the fourteenth amendment.[145]

Extension of the *Griggs* impact standard to actions brought under the 1972 amendments comports with this constitutional standard. The legislative history of that enactment demonstrates that Congress intended to provide public employees with all the protections against discrimination afforded private sector employees by the 1964 Act.[146] Granting these safeguards to government workers clearly supplements and implements the anti-discrimination guarantees of the equal protection clause and falls within the discretion accorded Congress to make such determinations.[147] Thus, since adoption of an impact standard in this context rationally relates to enforcement of the equal protection clause and agrees with the letter and spirit of the Constitution, the enactment of a statute amenable to such an interpretation does not exceed the limit of Congress' legislative power under section 5.[148]

---

[144] *Id.*

[145] *Id.*

[146] *See* Chandler v. Roudebush, 425 U.S. 840, 841 (1976); note 150 *infra.*

[147] *See* Scott v. City of Anniston, 597 F.2d 897, 900 (5th Cir. 1979); Blake v. City of Los Angeles, 595 F.2d 1367, 1373 (9th Cir. 1979); United States v. City of Chicago, 573 F.2d 416, 423-24 (7th Cir. 1978); Pennsylvania v. Rizzo, 466 F. Supp. 1219, 1227 (E.D. Pa. 1979).

[148] Some courts have suggested that imposition of the impact standard upon state and local government would impermissibly interfere with a state's ability to govern itself. Citing the Supreme Court's opinion in National League of Cities v. Usery, 426 U.S. 833 (1976), adherents of this view claim that such a result would violate the notions of federalism contained within the tenth amendment. *See* Friend v. Leidinger, 446 F. Supp. 361, 386 (E.D. Va. 1977), *aff'd*, 588 F.2d 61 (4th Cir. 1978). *Cf.* Scott v. City of Anniston, 430 F. Supp. 508, 515 (N.D. Ala. 1977) (if impact standard conflicts with *Usery* under tenth amendment analysis, standard also conflicts with *Washington* under fourteenth amendment), *rev'd in part*, 597 F.2d 897, 898-900 (5th Cir. 1979). *Usery* and tenth amendment analysis, however, are inapposite in this context. *Usery* clearly limited Congress' authority under the commerce clause to regulate conduct by the states. The 1972 amendments to Title VII, unlike the amendments to the Fair Labor Standards Act in *Usery*, were enacted under the fourteenth amendment and not the commerce clause. Thus, the tenth amendment does not preclude such an extension of *Griggs* to public employee actions. *See* Scott v. City of Anniston, 597 F.2d 897, 900 (5th Cir. 1979); Blake v. City of Los Angeles, 595 F.2d 1367, 1373 (9th Cir. 1979); United States v. City of Chicago, 573 F.2d 416, 424 (7th Cir. 1978); Firefighters Institute for Racial Equality v. City of St. Louis, 549 F.2d 506, 510 n.5 (8th Cir.), *cert. denied*, 434 U.S. 819 (1977); Pennsylvania v. Rizzo, 466 F. Supp. 1219, 1228 (E.D. Pa. 1979).

Moreover, the Supreme Court in *Dothard v. Rawlinson*,[149] a post-*Washington* Title VII sex discrimination action against a state board of corrections, rejected the defendant's request that its statutorily-imposed minimum height and weight requirements be judged by a standard different than that applied to private employers. Reviewing the legislative history of the 1972 amendment, the Court concluded that "Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike."[150] This language, when coupled with the Court's continued support of impact analysis in private sector actions,[151] indicates that *Washington* does not foreclose the applicability of *Griggs* to discrimination claims leveled against public employers.

A decision rendered by the Court between *Washington* and *Dothard*, however, has led some commentators to doubt that the *Griggs* standard applies in actions against public employers.[152] In *General Electric Co. v. Gilbert*,[153] a class of women employees sued their employer under Title VII. They alleged that the defendant engaged in unlawful sex discrimination by excluding pregnancy benefit payments from the coverage of its comprehensive nonoccupational sickness and accident insurance plan. While this action was pending before the Fourth Circuit, the Supreme Court decided *Geduldig v. Aiello*.[154] In that case, the plaintiffs unsuccessfully attacked a similarly limited disability benefits program. The disability insurance plan in *Geduldig* was created by California law, and the plaintiffs rested their claim of unlawful sex discrimination on an alleged violation of the equal protection clause of the fourteenth amendment. The Court in *Gilbert* faced the issue of

---

[149] 433 U.S. 321 (1977).

[150] *Id.* at 331-32 & n.14. The Court was speaking about the scrutiny appropriate for the defense of business necessity, not the nature of plaintiff's prima facie case. But the Court's divination of the legislative intent behind enactment of the 1972 amendments is equally applicable in the latter context. *See* Vanguard Justice Soc'y v. Hughes, 471 F. Supp. 670, 701 (D. Md. 1979). Congress clearly knew of the *Griggs* impact standard and could have excluded its application to public employee suits when it passed the 1972 amendments. The absence of any language in the amendments suggesting a separate standard for actions against governments further supports the view that Congress intended the disproportionate impact theory to prevail in all Title VII cases. *See* United States v. City of Chicago, 573 F.2d 416, 422 (7th Cir. 1978).

[151] *See* note 133 *supra*.

[152] *See* Edwards, *supra* note 5, at 13, 21-22; Hsia, *The Effects Test: New Directions*, 17 SANTA CLARA LAW. 777, 789 (1977).

[153] 429 U.S. 125 (1976).

[154] 417 U.S. 484 (1974).

whether the constitutional determination in *Geduldig* disposed of the statutory question in the case at bar.[155]

Justice Rehnquist, through a masterful display of semantic sleight-of-hand, ultimately concluded that the constitutional determination in *Geduldig* controlled and that the employer's exclusion of pregnancy from its list of covered disabilities did not violate Title VII. After acknowledging that there is "no necessary inference" that the statutory standard should be identical to the constitutional concept of discrimination,[156] Justice Rehnquist declared that constitutional decisions are a "useful starting point" in resolving statutory claims.[157] Immediately, and without explanation, the statutory and constitutional standards of discrimination were then described as "not wholly dissimilar"[158] and the decision in *Geduldig* turned from "quite relevant"[159] to "precisely in point."[160] Therefore, Justice Rehnquist concluded that because California's exclusion of pregnancy from its disability plan did not amount to unconstitutional sex discrimination, General Electric's similarly restricted insurance policy did not violate the statutory ban on sex discrimination.[161]

The *Gilbert* Court's equation of the constitutional and statutory definitions of sex discrimination, however, does not mean that intent must be a requisite element of the prima facie case in statutory as well as constitutional claims of discrimination. *Gilbert* never discussed the role of intent in plaintiff's initial burden of proof under either of these two rights of action. It stopped short of deciding whether the employer intended to discriminate because it held that the employer's plan in fact did not discriminate against women on the basis of sex.[162] The Court only decided the threshold issue of whether a sex-based classification was created by the employer's failure to include pregnancy as a compensable disability. Only for this issue—the existence of sex-based differential treatment—not the necessity of proving discriminatory purpose, did the Court adopt a coterminous standard for the two types of claims.[163] To the contrary, the Court admitted that

---

[155] 429 U.S. at 133.

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] *Id.* at 136.

[161] *Id.* at 145-46.

[162] *Id.* at 139-40.

[163] Moreover, the separate opinions of Justices Stewart, Blackmun, and Brennan emphasized their belief that *Gilbert* did not impair the continued viability of the *Griggs* impact

a Title VII action could be predicated upon a showing of discriminatory effect.[164] The plaintiffs could not secure a judgment because the Court found that the employer's plan did not generate any discriminatory impact on women.[165] This analysis of *Gilbert*, especially when considered in light of the *Dothard* Court's subsequent statement, reveals that the Court has not foreclosed application of the *Griggs* impact standard to public or private employee suits under Title VII.[166]

Although the Supreme Court has hampered constitutional plaintiffs by adding an intent requirement to their prima facie case in public employment discrimination, courts should continue to allow Title VII plaintiffs to make out a prima facie case with a showing of disproportionate impact. This result would fulfill Congress' intention to give plaintiffs suing public employers the same benefits under Title VII that plaintiffs suing private employers already enjoyed. The otherwise restrictive Supreme Court decisions have not foreclosed this interpretation of Title VII. In any event, an expansion of the *Washington* intent requirement beyond its constitutional context would unfairly expose more citizens to irremediable, invidious discrimination and undercut the spirit of a statute designed to promote equal employment opportunity.[167]

---

standard, *Id.* at 146 (concurring opinion, Stewart, J.); *id.* (concurring opinion, Blackmun, J.); *id.* at 154-56 (dissenting opinion, Brennan, J.).

[164] *Id.* at 136-37.

[165] *Id. See* Love v. Waukesha Joint School Dist. #1, 560 F.2d 285, 288 (7th Cir. 1977); Sirota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification,* 55 TEXAS L. REV. 1025, 1038 (1977).

[166] Courts have frequently held *Griggs* applicable to public employee Title VII actions. *See, e.g.*, Blake v. City of Los Angeles, 595 F.2d 1367, 1373-74 (9th Cir. 1979); Association Against Discrimination v. City of Bridgeport, 594 F.2d 306, 308-09 (2d Cir. 1979); United States v. City of Chicago, 573 F.2d 416, 421-24 (7th Cir. 1978); Image of Greater San Antonio v. Brown, 570 F.2d 517, 521 (5th Cir. 1978); Richardson v. Pennsylvania Department of Health, 561 F.2d 489, 491 (3d Cir. 1977); Firefighters Institute for Racial Equality v. City of St. Louis, 549 F.2d 506, 510 (8th Cir.), *cert. denied*, 434 U.S. 819 (1977); Vanguard Justice Soc'y v. Hughes, 471 F. Supp. 670, 699-700 (D. Md. 1979); Allen v. City of Mobile, 464 F. Supp. 433 (S.D. Ala. 1978); United States v. City of Buffalo, 457 F. Supp. 612, 618-19 (W.D.N.Y. 1978); United States v. Virginia, 454 F. Supp. 1077, 1082 (E.D. Va. 1978); United States v. South Carolina, 445 F. Supp. 1094, 1111 (D.S.C. 1977), *aff'd mem.*, 434 U.S. 1026 (1978).

[167] *See* United Steelworkers of America v. Weber, 99 S. Ct. 2721, 2727-28 (1979).

This position derives additional support from post-*Washington* development of the law in a related area. In Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), the village's denial of respondent's request to rezone some land from single-family to multiple-family classification was challenged as violative of the village's obligations under the equal protection clause of the fourteenth amendment and the Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3631 (1976). *See generally* Smedley, *A Com-*

### 2. *The Civil Rights Act of 1866*

Supplementing Title VII, section 1 of the Civil Rights Act of 1866[168]—currently codified at 42 U.S.C. § 1981—offers an additional federal avenue of redress for victims of employment discrimination. This statute currently plays a significant role in the achievement of the nation's goal of equal employment opportunity.[169] But the problems that the *Washington* decision might pose

---

*parative Analysis of Title VIII and Section 1982*, 22 VAND. L. REV. 459 (1969); Note, *The Federal Fair Housing Requirements: Title VIII of the 1968 Civil Rights Act,* 1969 DUKE L. J. 733; Note, *The Fair Housing Act of 1968: Its Success and Failure,* 9 SUFFOLK U. L. REV. 1312 (1975). Relying on its holding in *Washington*, the Court ruled that the plaintiff was required to offer proof of the village's racially discriminatory purpose to prevail on its constitutional cause of action. 429 U.S. at 264-65. As the appellate court had ruled in favor of the plaintiff on its constitutional claim but had not addressed the statutory count (*id.* at 271), the Supreme Court remanded the case to the Seventh Circuit for resolution of that issue. 429 U.S. at 271.

The Fair Housing Act, enacted as Title VIII of the Civil Rights Act of 1968, guarantees to all persons the right not to be denied a dwelling on the basis of race, religion, sex or national origin. This portion of the Act provides, in pertinent part, as follows:

> [I]t shall be unlawful [to] refuse to sell or rent . . . or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.

42 U.S.C. § 3604(a) (1976).

The village of Arlington Heights contended that the constitutional decision in *Washington* should govern the disposition of plaintiff's statutory cause of action. It also claimed that the use of the phrase "because of race" in the substantive provision of Title VIII mandated a showing of discriminatory intent to prove a violation of the 1968 statute.

The Seventh Circuit, on remand, rejected both of these claims. The legislative history of Title VIII, the court reasoned, indicated that Congress intended for this enactment to be interpreted expansively in order to achieve its broad remedial objectives. The imposition of an intent requirement, it continued, would be inconsistent with this policy. In addition, the appellate court noted that the presence of the phrase "because of race" had not prevented the courts from applying an impact standard in Title VII actions. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1288-90 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978). Accordingly, the court held that plaintiffs could establish a prima facie case under Title VIII by producing evidence of the discriminatory consequences of a defendant's actions without making a showing of discriminatory purpose. *Id.* at 1290. *Accord*, Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 146-47 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978).

The analysis adopted by the Seventh Circuit, and the legislative histories of the two respective statutes, demonstrate the close connection between these enactments and strongly suggest that the refusal to extend the holding in *Washington* to a statutory count in the housing context should apply with equal force to suits brought under Title VII. *See* Waters v. Heublein, Inc., 547 F.2d 466, 469 (9th Cir. 1976), *cert. denied,* 433 U.S. 915 (1977). *See generally* Comment, *supra* note 59; Note, *Work Environment Injury Under Title VII,* 82 YALE L.J. 1695, 1701 (1973).

[168] 42 U.S.C. §§ 1981, 1982 (originally enacted as Act of April 9, 1866, 14 Stat. 27 (1866)), *quoted in* note 78 *supra*.

[169] *See* Heiser, *Intent v. Impact: The Standard of Proof Necessary to Establish a Prima Facie Case of Race Discrimination Under 42 U.S.C. § 1981,* 16 SAN DIEGO L. REV. 207, 208 n.6 (1979).

for Title VII suits could easily beset actions brought under this old, yet similar enactment. If the deleterious effects of that decision are to be confined to constitutional litigation, section 1981 must remain free of the intent requirement.

In 1968, the Supreme Court revived the previously dormant section 1981.[170] This provision does not expressly forbid employment discrimination, but it consistently has been interpreted to prohibit employment discrimination in private[171] and nonfederal[172] public[173] employment contracts.

Although the plaintiffs in *Washington* originally asserted a claim under section 1981,[174] the *Washington* Court never needed to decide what elements are required to make out a prima facie case under section 1981.[175] The Court's subsequent opinions have not disposed of this issue,[176] but the Court's lack of sympathy for minority civil rights litigants in employment discrimination litigation[177] could influence lower courts deciding whether a

---

[170] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 422-37 (1968). Although *Jones* involved a claim under § 1982, another part of the same original Act, the Court discussed all of section 1 of the Act, before focusing on the § 1982 claim.

[171] *See, e.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 285-96 (1976); Johnson v. Railway Express Agency, 421 U.S. 454, 461 (1975); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 442 n.78 (1968); Macklin v. Spector Freight Sys., Inc., 478 F.2d 979, 993 (D.C. Cir. 1973); Brady v. Bristol-Myers, Inc., 459 F.2d 621, 623 (8th Cir. 1972); Sanders v. Dobbs Houses, Inc., 431 F.2d 1097, 1099-1100 (5th Cir. 1970).

[172] *See, e.g.*, Brown v. General Servs. Adm'n, 425 U.S. 820, 824-35 (1976) (§ 717 of Title VII, as amended by § 11 of Equal Employment Opportunity Act of 1972, is exclusive statutory remedy available to federal employees asserting a claim of employment discrimination). *See generally* Reiss, *Requiem for an "Independent Remedy": The Civil Rights Acts of 1866 and 1871 as Remedies for Employment Discrimination*, 50 S. CAL. L. REV. 961, 980-82 (1977).

[173] *See, e.g.*, Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1335 (2d Cir. 1973) (municipal police force), *cert. denied*, 421 U.S. 991 (1975); Carter v. Gallagher, 452 F.2d 315, 322 (8th Cir.) (municipal civil service commission), *cert. denied*, 406 U.S. 950 (1972); Bulls v. Holmes, 403 F. Supp. 475, 477 (E.D. Va. 1975) (county board of supervisors). *See generally* B. SCHLEI & P. GROSSMAN, *supra* note 13, at 609; Reiss, *supra* note 172, at 975-82.

[174] 426 U.S. at 233.

[175] *See* text accompanying notes 76-78 *supra*. In affirming the appellate court's judgment granting defendants' motions for summary judgment, and thereby ruling that plaintiffs were not entitled to relief under § 1981 and D.C. CODE § 1-320, the Court examined the job-relatedness of Test 21. 426 U.S. at 248-52. This issue was not a part of the plaintiffs' prima facie case, but rather, the defense asserted by the defendants. Without directly deciding whether traditional Title VII analysis should govern the disposition of this defense, the Court simply noted that neither party disputed the applicability of Title VII standards and that the trial court had acted under the same assumption. 426 U.S. at 249 & n.15.

[176] *See, e.g.*, New York City Transit Auth. v. Beazer, 440 U.S. 568, 583 n.24 (1979); Davis v. County of Los Angeles, 566 F.2d 1334 (9th Cir. 1978), *dismissed as moot*, 440 U.S. 625 (1979).

[177] *But see* United Steelworkers of America v. Weber, 99 S. Ct. 2721, 2726-30 (1979).

section 1981 action more nearly resembles a claim under Title VII or the Constitution.[178]

Prior to *Washington*, most federal courts perfunctorily applied traditional Title VII analysis to section 1981 causes of action on the unspoken assumption that the two statutes required identical standards of proof.[179] Plaintiffs could establish a prima facie case under either statute merely by showing disproportionate exclusionary impact. The ruling in *Washington*, however, has caused many lower courts to reconsider the appropriate standard of proof for section 1981 claims.

Three factors bear significantly on whether a section 1981 claim is controlled by the statutory standard of proof articulated by the Court in *Griggs* or the constitutional standard announced in *Washington*: (1) the constitutional underpinnings of section 1981; (2) its historical and functional relationship to Title VII; and (3) social policy considerations. None of these criteria point conclusively to either standard. The combination of all relevant factors, however, supports the extension of the *Griggs* impact theory to actions filed under section 1981 and argues against requiring plaintiffs to prove discriminatory purpose in making out their prima facie case.

The broad language of section 1981 could accommodate a construction favoring either the *Griggs* standard or the *Washington*

---

[178] In 1871, Congress enacted another of the Reconstruction Civil Rights Acts:

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

Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (codified at 42 U.S.C. § 1983 (1976)).

Plaintiffs using this statute seek relief from a violation of their constitutional rights; thus the intent requirement of *Washington* should apply to such constitutionally-based claims. Because no independent statutory claim supports such an action, unlike a charge pressed under § 1981, and the other federal civil rights statutes enacted during this period do not relate to the employment sphere, further discussion of *Washington*'s impact on claims brought under the nineteenth century antidiscrimination statutes will be limited to § 1981.

[179] *See, e.g.*, Chicano Police Officer's Ass'n v. Stover, 526 F.2d 431, 438-39 (10th Cir. 1975); Douglas v. Hampton, 512 F.2d 976, 984-85 (D.C. Cir. 1975); Long v. Ford Motor Co., 496 F.2d 500, 505-06 (6th Cir. 1974); Harper v. Kloster, 486 F.2d 1134, 1137 (4th Cir. 1973); Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1335-37 (2d Cir. 1973); Castro v. Beecher, 459 F.2d 725, 732-33 (1st Cir. 1972); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971). *See generally* B. SCHLEI & P. GROSSMAN, *supra* note 13, at 638. Note, *Davis v. Los Angeles: Plaintiff's Burden of Proof Under Section 1981*, 9 GOLDEN GATE U.L. REV. 1, 5 (1978-79).

standard.[180] Thus, other guidelines for statutory construction must provide the answer.

An examination of a statute's historical and constitutional background often reveals its appropriate interpretation. The background of section 1981, however, makes this an unusually difficult, complex, and confusing undertaking. Congress originally enacted section 1981 as section 1 of the Civil Rights Act of 1866[181] under its authority granted by section 2 of the thirteenth amendment[182] to enact legislation enforcing the constitutional prohibition against slavery.[183] Two years later, the fourteenth amendment was added to the Constitution. Shortly thereafter, to ensure the constitutionality of the old Civil Rights Act,[184] Congress reenacted section 1 of that statute in section 18 of the Civil Rights Act of 1870,[185] pursuant to the enabling clause of the fourteenth amendment.[186] The 1874 recodification of federal statutes eventually eliminated this duplication,[187] but section 1981's dual constitutional parentage has lent support to both sides in the standard-of-proof controversy.[188]

---

[180] *See* note 78 *supra.*

[181] *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 422 n.28 (1968); Brooks, *Use of the Civil Rights Acts of 1866 and 1871 to Redress Employment Discrimination,* 62 CORNELL L. REV. 258, 261-63 (1977).

[182] *See generally* U.S. CONST. amend. XIII, § 2. Sections 1 and 2 of that amendment provide:

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 the power to enforce this article by appropriate legislation.

[183] *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 431-35 (1968).

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

[185] Act of May 31, 1870, ch. 114, § 18, 16 Stat. 144. *See* Runyon v. McCrary, 427 U.S. 160, 168 n.8 (1976).

[186] Hurd v. Hodge, 334 U.S. 24, 33 (1948). *But see* Heiser, *supra* note 169, at 231 n.127.

[187] Act of June 20, 1874, ch. 333, 18 Stat., pt. 3, at 113. Both enactments then resided at 24 Rev. Stat. §§ 1977, 1978 (1874). Act of June 22, 1874, 18 Stat., pt. 1, at 348.

[188] For more extensive discussions of the legislative history surrounding § 1981, see R. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS 33-84 (1947); Brooks, *supra* note 181, at 261-68; Gressman, *The Unhappy History of Civil Rights Legislation,* 50 MICH. L. REV. 1323, 1323-26 (1952); Larson, *The Development of Section 1981 As A Remedy for Racial Discrimination in Private Employment,* 7 HARV. C.R.-C.L. L. REV. 56, 59-63 (1972); Maslow & Robison, *Civil Rights Legislation and the Fight for Equality 1862-1952,* 20 U. CHI. L. REV. 363, 367-70 (1953); Reiss, *supra* note 172, at 970-92; Note, *Section 1981 and Private Discrimination: An Historical Justification for a Judicial Trend,* 40 GEO. WASH. L. REV. 1024, 1025-35 (1972); Note, *Racial Discrimination in Employment Under the Civil Rights Act of 1866,* 36 U. CHI. L. REV. 615, 617-21 (1969).

Proponents of an intent requirement frequently contend that because section 1981 is a product of the fourteenth amendment, the standard of proof controlling constitutional claims should also apply to that section.[189] Thus, they maintain, as *Washington* requires plaintiffs to prove discriminatory intent in their prima facie case in fourteenth amendment actions, an identical requirement applies to claims filed under section 1981.[190]

There are two telling responses to this position. First, the Supreme Court has ruled repeatedly that section 1981 "prohibits racial discrimination in the making and enforcing of *private* contracts"[191] that are not subject to fourteenth amendment restrictions. In addition, the Court has stated that the primary origin of section 1981 is the thirteenth amendment.[192]

Moreover, as discussed previously regarding the 1972 amendments to Title VII, a federal statute is not necessarily bound by the same limitations imposed upon the constitutional provision from which it derives.[193] Thus, even ignoring the rel-

---

[189] For courts extending the *Washington* intent requirement to § 1981 actions without any explanation, see Scott v. City of Anniston, 597 F.2d 897, 899 (5th Cir. 1979) (dictum); Donnell v. General Motors Corp., 576 F.2d 1292, 1300 (8th Cir. 1978); Chicano Police Officer's Ass'n v. Stover, 552 F.2d 918, 920 (10th Cir. 1977); City of Milwaukee v. Saxbe, 546 F.2d 693, 705 (7th Cir. 1976); National Organization for Women v. Waterfront Commission, 460 F. Supp. 84, 87 (S.D.N.Y. 1978), *dismissed in part,* 19 Empl. Prac. Dec. ¶ 9253 (S.D.N.Y. 1979); United States v. City of Buffalo, 457 F. Supp. 612, 618 (W.D.N.Y. 1978).

The Fifth Circuit originally ruled that plaintiffs need not prove discriminatory purpose in § 1981 claims. Williams v. DeKalb County, 577 F.2d 248, 255-57 (5th Cir. 1978). On rehearing, however, one of the three members of the panel changed his mind and the court adopted the position originally advocated by Judge Clark (577 F.2d at 257 (concurring opinion, Clark, J.)) and held that the *Washington* intent rule applied to § 1981 actions. Williams v. DeKalb County, 582 F.2d 2, 2-3 (1978) (per curiam). On this issue, Judge Clark's concurring opinion relied exclusively on the Fifth Circuit's prior decision in Nevett v. Sides, 571 F.2d 209 (1978). 577 F.2d at 257. Although *Nevett* contained a § 1981 claim, as well as fourteenth amendment and § 1983 claims, the Fifth Circuit, in applying *Washington* to the standard of proof issue, treated the case solely as a constitutional claim. 571 F.2d at 213 n.3, 217-19. *See* Williams v. DeKalb County, 577 F.2d 248, 257 n.5 (5th Cir.), *rev'd,* 582 F.2d 2 (5th Cir. 1978). Neither the *Nevett* court nor Judge Clark in *DeKalb County* discussed the § 1981 issue in more than cursory fashion. *See also* Grigsby v. North Miss. Medical Center, Inc., 586 F.2d 457, 460-61 (5th Cir. 1978).

[190] Arnold v. Ballard, 448 F. Supp. 1025, 1028 (N.D. Ohio 1978); Johnson v. Hoffman, 424 F. Supp. 490, 494 (E.D. Mo. 1977), *aff'd sub nom.* Johnson v. Alexander, 572 F.2d 1219 (8th Cir.), *cert. denied,* 99 S. Ct. 579 (1978).

[191] Runyon v. McCrary, 427 U.S. 160, 168 (1976) (emphasis added). *Accord,* Johnson v. Railway Express Agency, 421 U.S. 454, 459-60 (1975). *Cf.* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 436-37 (1968) (§ 1982 construed to cover private contracts).

[192] Runyon v. McCrary, 427 U.S. 160, 170-71 (1976). *See also* Pennsylvania v. Local 542, International Union of Operating Engineers, 469 F. Supp. 329, 400-01 (E.D. Pa. 1978); Brooks, *supra* note 181, at 268; Heiser, *supra* note 169, at 231 n.127.

[193] *See* notes 139-48 and accompanying text *supra.*

evant Supreme Court precedent and designating the fourteenth amendment as section 1981's constitutional parent does not mandate that a section 1981 action must incorporate the standard of proof applicable to claims filed under the fourteenth amendment.

On the other hand, a determination that section 1981 derives from the thirteenth amendment is not conclusive as to the standard of proof issue. But an examination of the standard of proof applied to actions under section 1981's companion section, also enacted pursuant to the thirteenth amendment, reveals that the *Griggs* standard is most appropriate for both types of actions.

In addition to that portion which eventually became 42 U.S.C. § 1981, section 1 of the Civil Rights Act of 1866 contained a provision barring racial discrimination in the sale or rental of property. This language was similarly reenacted in the Civil Rights Act of 1870 and subsequently recodified at 42 U.S.C. § 1982.[194] In *Jones v. Alfred H. Mayer Co.*, the Supreme Court held that section 1982 was enacted pursuant to the thirteenth amendment.[195] As with section 1981, however, the language of section 1982 does not delineate the elements necessary to establish a prima facie case for violation of its provisions. One court has found an intent requirement in section 1982.[196] This conclusion stems from the *Jones* Court's indication that section 1982 prohibits racially *motivated* refusals to sell or rent property.[197] This trial court, however, incorrectly interpreted this language as requiring a showing of discriminatory purpose in section 1982 actions.

The *Jones* Court never dealt with the standard-of-proof issue for claims under section 1982. The sole issue under consideration was whether the statute prohibited private as well as public acts of discrimination.[198] Although the Court stated that section 1982 precluded "every racially motivated refusal to sell or rent,"[199] it made this statement in response to the defendants' claim that only racial discrimination by public officials was within the purview of section 1982. Only when taken out of this limited context does such a statement bear any relation to the standard of proof issue. The Court sought only to ensure that the subject statute was not improperly restricted to state action.

---

[194] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 422 n.28 (1968).

[195] *Id.* at 433, 437-38.

[196] Lewis v. Bethlehem Steel Corp., 440 F. Supp. 949, 964-65 (D. Md. 1977). *See also* Heiser, *supra* note 169, at 235; Note, *supra* note 179, at 19.

[197] 392 U.S. at 419-22, 426.

[198] *Id.* at 412-13.

[199] *Id.* at 421-22.

More important, the plaintiff in *Jones* asserted only an individual claim of disparate treatment. Discriminatory intent is the essence of such a claim.[200] *Jones* did not involve a charge that the defendant employed a facially neutral policy producing discriminatory consequences. Accordingly, the *Jones* Court never ruled on the separate question of whether a showing of discriminatory impact established a prima facie case under section 1982. Because the Court has not addressed this issue on any subsequent occasion, there is no definitive statement of the proof required of plaintiffs in section 1982 actions. In contrast, its modern day counterpart, Title VIII of the 1968 Civil Rights Act, has been interpreted as being amenable to the *Griggs* standard of proof.[201]

Some courts have also contended that the wording of section 1981 so closely tracks the equal protection clause that the statute requires a showing of intent. Specifically, a comparison of the guarantee in section 1981 that all persons shall have the same right "to the full and equal benefit of all laws"[202] with the parallel language in the fourteenth amendment has led these courts to conclude that section 1981 should be judged by the constitutional standard.[203]

Proponents of this proposition, however, have not explained why semantic similarity alone requires identical standards of proof for two independent laws. In addition, because a statute's coverage is not circumscribed by the scope of its constitutional predecessor, its independent interpretation should not be limited by the interpretation of a similarly worded ancestor.

Although this analysis of section 1981's constitutional origins does not conclusively resolve the burden of proof controversy, further insight may be gleaned from a comparison of the provisions of section 1981 and its modern counterpart, Title VII. Because both of these civil rights statutes address the problem of employment discrimination, the more extensive body of Title VII jurisprudence provides an additional source of guidance on the proof standard applicable to a section 1981 prima facie case. Specifically, since application of the *Griggs* princple to Title VII suits has survived *Washington*, the Title VII standard should govern

---

[200] *See* notes 52-56 and accompanying text *supra*.

[201] *See* Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1289-90 (7th Cir. 1977); note 167 *supra*.

[202] For the complete text of § 1981, see note 78 *supra*.

[203] *See* Lewis v. Bethlehem Steel Corp., 440 F. Supp. 949, 965 (D. Md. 1977); Croker v.

claims brought under the analogous statute, section 1981. This follows the in pari materia principle of statutory construction: if two statutes relate to the same subject matter, they are in pari materia and the more recently enacted statute controls the interpretation of the prior enactment.[204]

In *Johnson v. Railway Express Agency*,[205] the Court faced the question of whether the statute of limitations applicable to section 1981 claims was tolled by the start of a Title VII action based on the same incident. Although the in pari materia rule was not directly in issue, the Court did examine the relationship between the two statutes in resolving the question. Noting that the remedies available to Title VII plaintiffs are "co-extensive"[206] with and "related"[207] to those provided by section 1981, and that both statutes are "directed to most of the same ends,"[208] the Court nevertheless found substantial differences between these two enactments.[209]

The two acts, the *Johnson* Court mentioned, are not co-extensive in their coverage.[210] While Title VII prohibits discrimination on the basis of race, color, sex, national origin, and religion,[211] section 1981 has been held inapplicable to claims of sex,[212] religious,[213] and national origin[214] discrimination. On the

---

Boeing Co., 437 F. Supp. 1138, 1181 (E.D. Pa. 1977).

[204] F. DWARRIS, A GENERAL TREATISE ON STATUTES 189-90 (1871); 2A J. SUTHERLAND, STATUTORY CONSTRUCTION § 51.03 (4th ed. C. Sands 1973).

[205] 421 U.S. 454 (1975).

[206] *Id.* at 459 (citing H.R. REP. No. 238, 92d Cong., 2d Sess. 19 (1972), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2137, 2154).

[207] *Id.* at 461.

[208] *Id.*

[209] *Id.* For a detailed comparison of § 1981 and Title VII, see Brooks, *supra* note 181.

[210] 421 U.S. at 460.

[211] 42 U.S.C. § 2000e-2 (1976).

[212] *See, e.g.*, Raether v. Phillips, 401 F. Supp. 1393, 1396 (W.D. Va. 1975); Strunk v. Western Ky. Univ., 11 Fair Empl. Prac. Cas. 355, 357 (E.D. Ky. 1975); Rackin v. University of Pa., 386 F. Supp. 992, 1009 (E.D. Pa. 1974); League of Academic Women v. Regents of the Univ. of Cal., 343 F. Supp. 636, 638-39 (N.D. Cal. 1972); Fitzgerald v. United Methodist Community Center, 335 F. Supp. 965, 966 (D. Neb. 1972). *But see* Parmer v. National Cash Register Co., 346 F. Supp. 1043, 1047 (S.D. Ohio 1972) (plaintiff stated claim under §§ 1981 and 1982 for sex discrimination), *aff'd per curiam*, 503 F.2d 275 (6th Cir. 1974). *Cf.* Johnson v. City of Cincinnati, 450 F.2d 796, 798 (6th Cir. 1971) (claim of sex discrimination under §§ 1983 and 1985(3) not preempted by Title VII).

[213] Olson v. Rembrandt Printing Co., 375 F. Supp. 413, 417 (E.D. Mo. 1974) (dictum), *aff'd*, 511 F.2d 1228 (8th Cir. 1975). *See* B. SCHLEI & P. GROSSMAN, *supra* note 13, at 613-14.

[214] *See* Vera v. Bethlehem Steel Corp., 448 F. Supp. 610, 613 (M.D. Pa. 1978); Enriquez v. Honeywell, Inc., 431 F. Supp. 901, 905-06 (W.D. Okla. 1977); Mouriz v. Avondale Shipyards, Inc., 428 F. Supp. 1025, 1027 (E.D. La. 1977); Budinsky v. Corning Glass Works,

other hand, charges of discrimination on the basis of alienage fall within the scope of section 1981[215] but outside the purview of Title VII.[216] Furthermore, while Title VII forbids only employment discrimination, section 1981 prohibits discrimination in the making and enforcing of all contracts. The broad language of section 1981 also contains none of the exemptions for certain types of employers[217] or employment practices[218] found in Title VII.

---

425 F. Supp. 786, 787 (W.D. Pa. 1977); Cubas v. Rapid Am. Corp., 420 F. Supp. 663, 665 (E.D. Pa. 1976).

Several trial courts have held that Hispanic plaintiffs have standing to raise a claim of discrimination under § 1981. *See, e.g.,* Puerto Rican Council v. Metromedia, Inc., 10 Fair Empl. Prac. Cas. 1009, 1010 (S.D.N.Y. 1975) (inappropriate to dismiss claim at pleading stage based on defendant's contention that Puerto Ricans, being Caucasian, lack standing under § 1981); Miranda v. Clothing Workers Local 208, 10 Fair Empl. Prac. Cas. 557, 558 (D.N.J. 1974) (argument without merit that Puerto Ricans lack § 1981 standing because they are Caucasian); Sabala v. Western Gillette, Inc., 362 F. Supp. 1142, 1147 (S.D. Tex. 1973), *aff'd in part, rev'd in part,* 516 F.2d 1251 (5th Cir. 1975), *vacated and remanded,* 431 U.S. 951 (1977) (finding that Mexican Americans had § 1981 standing vacated in light of *International Bhd. of Teamsters v. United States*). These cases, however, may not mean that national origin discrimination is actionable under § 1981, because the courts might have viewed the claims of non-white plaintiffs as actually alleging racial discrimination.

> While the trend seems to be to extend § 1981 to cover discrimination based on national origin or ethnic heritage, at least when the plaintiffs are Spanish-surnamed, no satisfactory rationale for this extension has yet been provided. The one obvious rationale that could be used to explain these cases is that they have involved plaintiffs who could be considered "nonwhite," and thus within the literal meaning of § 1981, even though they are, strictly speaking, Caucasian.

B. SCHLEI & P. GROSSMAN, *supra* note 13, at 613. *See generally* Greenfield & Kates, *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866,* 63 CALIF. L. REV. 662 (1975). *See also* Gomez v. Pima County, 426 F. Supp. 816, 818-19 (D. Ariz. 1976) (brown-skinned individuals, regardless of race, have § 1981 standing); League of United Latin Am. Citizens v. City of Santa Ana, 410 F. Supp. 873, 877-78, 911-12 (C.D. Cal. 1976) (implicit treatment of Mexican Americans' claims as involving racial discrimination under § 1981).

[215] Guerra v. Manchester Terminal Corp., 498 F.2d 641, 653-54 (5th Cir. 1974).

[216] Espinoza v. Farah Mfg. Co., 414 U.S. 86, 95 (1973).

[217] Title VII does not apply to employers with less than fifteen employees (42 U.S.C. § 2000e(b) (1976)), or to uniformed members of the armed forces (Johnson v. Alexander, 572 F.2d 1219 (8th Cir.), *cert. denied,* 439 U.S. 986 (1978)). It also permits religious discrimination by religious educational institutions. 42 U.S.C. § 2000e-2(e) (1976). Section 1981 has been ruled inapplicable to claims of discrimination by federal government employees. Brown v. General Servs. Adm'n, 425 U.S. 820, 829 (1976).

[218] In International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), the Court held that § 703(h) protects the employer's use of a bona fide seniority plan that perpetuates the discriminatory effects of pre-Title VII discriminatory policies. Section 1981 does not contain any analogous exemption from the coverage. Two circuit courts have reasoned that such seniority plans nevertheless are subject to a similar exclusion from attack under § 1981. Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1191 n.37 (5th Cir. 1978), *cert. denied,* 439 U.S. 1115 (1979); Johnson v. Ryder Truck Lines, Inc., 575 F.2d 471, 475 (4th Cir. 1978), *cert. denied,* 440 U.S. 979 (1979). A similar interpretation was rejected, however, by the Third Circuit in Bolden v. Pennsylvania State Police, 578 F.2d 912, 921 (3d Cir. 1978).

The possible relief and filing procedures under the two actions also differ. In section 1981 actions, punitive damages are available under certain circumstances, and an award of backpay is free from the two-year limit specified in Title VII.[219] In addition, section 1981, unlike Title VII, allows a plaintiff to initiate judicial action before exhausting the available administrative remedies.[220] Finally, while Title VII contains its own set of limitations periods, actions brought under section 1981, which lacks any limitations language, fall under the control of the most analogous state limitations period.[221]

These differences have led at least one court and several commentators to conclude that section 1981 claims should not be subject to the standard of proof governing Title VII actions.[222] Some courts, however, continue to adhere to the position that despite such disparities these two statutes should be accorded identical treatment on this issue.[223] This mixed reaction reemphasizes that a comparison between Title VII and section 1981 does not by itself conclusively resolve this controversy.[224] A thorough analysis

---

[219] Johnson v. Railway Express Agency, 421 U.S. 454, 460 (1973).

[220] *Id.*

[221] *Id.* at 462.

[222] *See* Officers for Justice v. Civil Serv. Comm'n, 20 Fair Empl. Prac. Cas. 179, 181, 184 (N.D. Cal. 1978); Heiser, *supra* note 169, at 236-37; Note, *Burden of Proof in Racial Discrimination Actions Brought Under the Civil Rights Acts of 1866 and 1870: Disproportionate Impact or Discriminatory Purpose?* 1978 B.Y.U. L. REV. 1030, 1045-46; Note, *supra* note 179, at 22-23.

[223] Davis v. County of Los Angeles, 566 F.2d 1334, 1340 (9th Cir. 1977), *vacated as moot*, 440 U.S. 625 (1979); Domingo v. New England Fish Co., 445 F. Supp. 421, 428 (W.D. Wash. 1977) (citing Griggs v. Duke Power Co., 401 U.S. 424 (1971)).

For cases holding that § 1981 does not require a showing of discriminatory purpose, with no rationale other than perhaps reasoning that *Washington* referred only to constitutional claims, see Rule v. Bridge Workers Local 396, 568 F.2d 558, 564 (8th Cir. 1977); Kinsey v. First Regional Sec., Inc., 557 F.2d 830, 838 n.22 (D.C. Cir. 1977); Randolph v. United States Elevator Corp., 19 Fair Empl. Prac. Cas. 368, 371 (S.D. Fla. 1978); Rice v. City of St. Louis, 19 Fair Empl. Prac. Cas. 197, 198 (E.D. Mo. 1978); Dawson v. Pastrick, 441 F. Supp. 133, 140-41 (N.D. Ind. 1977), *aff'd in part, rev'd in part on other grounds*, 600 F.2d 70 (7th Cir. 1979); Winston v. Smithsonian Science Information Exch., Inc., 437 F. Supp. 456, 473 (D.D.C. 1977); Stallings v. Container Corp. of America, 75 F.R.D. 511, 516-19 (D. Del. 1977); Woods v. City of Saginaw, 13 Empl. Prac. Dec. ¶ 11,299 (E.D. Mich. 1976).

[224] Although the *Washington* Court never addressed the § 1981 prima facie case question directly, it hinted about its position on the issue. The Court held that the plaintiffs were not entitled to relief on either of their statutory causes of action because the test used by the defendants ("Test 21") was held sufficiently job-related (426 U.S. at 248-52). The Court, arguably, should not have reached the question of the defendants' job-relatedness defense if the plaintiffs had not established a prima facie case of discrimination through proof of discriminatory impact. Since plaintiff's constitutional claim was dismissed for failure to allege purposeful discrimination, a prima facie statutory violation could exist only through operation of a less stringent proof standard. Had the Court intended to apply the

of this issue must extend beyond a comparison of section 1981 and certain constitutional and statutory provisions, and include an evaluation of competing policy interests.

Some have argued that requiring a showing of intent in a section 1981 prima facie case filters out frivolous and unmeritorious claims. In Title VII litigation, the complex and extensive mass of administrative procedures confronting all potential litigants may protect the federal judiciary from an otherwise unconstrained torrent of cases. The absence of such an administrative screening process in section 1981 litigation, it is concluded, necessitates the use of an intent standard to perform this important screening function.[225]

This suggestion rests on the premise that the exhaustion of administrative remedies required in Title VII actions refines the quality of cases eventually reaching the federal courts. Such a view is unsound. Because a finding of no probable cause by the federal agency does not bar the filing of suit,[226] this requirement, rather than serving as a filter, only postpones the inevitable.[227]

Another argument supposedly supporting an intent requirement in section 1981 actions is that a contrary decision will undermine the holding in *Washington*. Since many fourteenth amendment claims of employment discrimination could also be brought under section 1981,[228] the application of a lower standard of proof in the statutory cause of action would supposedly encourage litigants to assert claims under section 1981 which

---

intent requirement to the § 1981 claim, it would not have needed to rule on the defendants' defense because it had already held that the plaintiffs failed to show purposeful discrimination. Thus, the Court either assumed or decided, sub silentio, that the constitutional standard did not control the § 1981 claim. *See* Williams v. DeKalb County, 577 F.2d 248, 257 n.5 (5th Cir.), *rev'd,* 582 F.2d 2, 2-3 (5th Cir. 1978); Heiser, *supra* note 169, at 229.

[225] *See* Davis v. County of Los Angeles, 566 F.2d 1334, 1350 (9th Cir. 1977) (dissenting opinion, Wallace, J.), *vacated as moot,* 440 U.S. 625 (1979).

[226] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798-99 (1973).

In fact, the statute and its accompanying guidelines permit the filing of suit after 180 days from the date a charge was filed with the EEOC, regardless of whether the agency has taken any action with respect to it during that period. *See* 42 U.S.C. § 2000e-5(f)(1) (1976); 29 C.F.R. § 1601.28(a) (1978). *See generally* B. SCHLEI & P. GROSSMAN, *supra* note 13, at 913-19.

[227] *See* Heiser, *supra* note 169, at 243-44.

[228] Although § 1981 does not apply to claims of discrimination filed by federal government employees (Brown v. General Servs. Adm'n, 425 U.S. 820, 833-34 (1976)), it provides a basis for relief for state and local government workers. *See* B. SCHLEI & P. GROSSMAN, *supra* note 13, at 608 & n.11.

could not satisfy the constitutional standard, thus circumventing the ruling in *Washington* and burdening the courts with claims of nonintentional discrimination.[229] Although this prediction is undoubtedly accurate in fact, it is not extremely compelling. The *Washington* Court itself recognized that Title VII actions, many of which could be brought under the fourteenth amendment, are not controlled by the standard of proof governing constitutional claims.[230] Thus, since the Supreme Court was not concerned about possible circumvention of its ruling in *Washington* through the use of Title VII, it is likely that the Court was similarly unconcerned about the use of section 1981 to bypass the constitutional intent requirement of *Washington*.

Others often seize on the broad scope of section 1981, extending to most contractual as well as certain noncontractual arrangements,[231] as another reason for limiting its availability to cases of intentional discrimination.[232] This sentiment parallels the concern expressed by the *Washington* Court about the effect of extending impact analysis to allegations of constitutional violations.[233] At least one commentator has noted, however, that these fears expressed by the Court in *Washington* were unfounded in light of evidence that the lower courts' application of the *Griggs* standard to constitutional claims prior to *Washington* did not result in a wholesale invalidation of statutes.[234]

Moreover, even if the Court's apprehensions are well-grounded, they are outweighed by the policy considerations promoted by applying impact analysis to section 1981 litigation. As the Ninth Circuit forcefully stated in *Davis v. County of Los Angeles*,[235] an extension of the rule in *Washington* to section 1981 cases would significantly dilute the effectiveness of this statute.[236] By requiring minority persons to show that an employer's action resulted from a discriminatory motive, the Court already has

---

[229] *See* Davis v. County of Los Angeles, 566 F.2d 1334, 1350 (9th Cir. 1977) (dissenting opinion, Wallace, J.), *vacated as moot*, 440 U.S. 625 (1979).

[230] 426 U.S. at 239.

[231] *See* note 168 *supra*.

[232] *See* Davis v. County of Los Angeles, 566 F.2d 1334, 1347 (9th Cir. 1977) (dissenting opinion, Wallace, J.), *vacated as moot*, 440 U.S. 625 (1979); Heiser, *supra* note 169, at 245-46.

[233] 426 U.S. at 247-48 & n.14.

[234] Note, *supra* note 179, at 26.

[235] 566 F.2d 1334 (9th Cir. 1977), *vacated as moot*, 440 U.S. 625 (1979).

[236] *Id.* at 1340.

erected a frequently insurmountable obstacle to successful prosecution of actions under the Constitution. Further expansion of the intent requirement to section 1981 actions would diminish the civil rights litigant's arsenal because litigants have no constitutional rights of action to attack the discriminatory practices of private employers. Section 1981's broad mandate to eliminate the evil of racial discrimination in the making and enforcing of contracts can be fulfilled only by the liberal construction given Title VII by the *Griggs* Court. Disproportionate impact must remain a possible basis for stating a claim under section 1981 if the courts are to fulfill the remedial objectives of this statute. The more sophisticated and covert, but no less real, discriminatory effects generated by facially neutral policies should not receive the immunity from attack that necessarily results from adoption of an intent requirement. Thus, as with Title VII plaintiffs, persons asserting section 1981 claims should be able to establish a prima facie case of discrimination by showing the discriminatory consequences of an employer's facially unbiased conduct.

### 3. *Application and Impact of the Intent Requirement*

Many courts, however, have rejected these arguments and have ruled that plaintiffs must show discriminatory purpose to establish a prima facie case under section 1981.[237] This judicial gloss on the statute has virtually destroyed the Act's effectiveness. An examination of these opinions graphically reveals this evisceration of section 1981 as a legislative bulwark against discriminatory employment policies.

Although the *Washington* Court announced that intent is a requisite element in a prima facie claim of unconstitutional discrimination, it failed to offer much specific guidance about the nature of the proof required to establish discriminatory motive. It stated only that disproportionate impact is a factor to consider,

---

[237] *See* Williams v. DeKalb County, 582 F.2d 2, 2-3 (5th Cir.), *reversing*, 577 F.2d 248 (5th Cir. 1978); Donnell v. General Motors Corp., 576 F.2d 1292, 1300 (8th Cir. 1978); Chicano Police Officer's Ass'n v. Stover, 552 F.2d 918, 920-21 (10th Cir. 1977); City of Milwaukee v. Saxbe, 546 F.2d 693, 705 (7th Cir. 1976); United States v. City of Montgomery, 19 Empl. Prac. Dec. ¶ 9239 (N.D. Ala. 1979); Johnson v. Baylor College of Medicine, 19 Empl. Prac. Dec. ¶ 9047 (S.D. Tex. 1979); United States v. City of Buffalo, 457 F. Supp. 612, 618 (W.D.N.Y. 1978); Arnold v. Ballard, 448 F. Supp. 1025, 1027-28 (N.D. Ohio 1978); Milburn v. Girard, 441 F. Supp. 184, 188 (E.D. Pa. 1977); Jobnson v. Hoffman, 424 F. Supp. 490, 493-94 (E.D. Mo. 1977), *aff'd sub nom.* Johnson v. Alexander, 572 F.2d 1219 (8th Cir.), *cert. denied*, 439 U.S. 986 (1978).

but is insufficient in itself to support a finding of discriminatory purpose,[238] except in extreme situations.[239]

During the succeeding term, however, the Court, in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[240] described in greater detail some acceptable methods of proving intent. Recognizing that official decisions are influenced by multiple factors, the Court declared that *Washington* did not require the plaintiff to prove that discrimination was the government's exclusive, dominant, or even primary motivation. Rather, the aggrieved party need only show that discriminatory purpose was "a motivating factor" in the decision.[241] In determining whether discrimination was a motivating factor, courts should consider the totality of the circumstances. The Court mentioned several criteria that are relevant to this inquiry: the decision's historical background, the sequence of events immediately preceding the decision, the extent to which the subject act constituted a departure from standard operating procedure, the legislative or administrative history behind the decision, and the decision's discriminatory impact.[242] Only in the rare case of egregiously disproportionate exclusion, for which discriminatory purpose becomes the only convincing explanation, will the plaintiff satisfy his burden solely by showing impact.[243]

Predictably, of all the reported cases in which a court imposed the *Arlington* formula for proving intent in either a Title VII or section 1981 action, only one plaintiff successfully satisfied this stringent standard.[244] In every other case, plaintiffs were denied relief because of their inability to unearth the elusive sort of evidence required to prove such a subjective concept.[245]

This rule has saddled civil rights litigants with a serious handicap. In response, some courts have interpreted the intent requirement for both Title VII and section 1981 in a manner more

---

[238] 426 U.S. at 242.

[239] *Id.*

[240] 429 U.S. 252 (1977).

[241] *Id.* at 265-66.

[242] *Id.* at 266-68.

[243] *Id.* at 266. *See* Pennsylvania v. Local 542, International Union of Operating Eng'rs, 469 F. Supp. 329, 398 (E.D. Pa. 1978) (dictum).

[244] Pennsylvania v. Local 542, International Union of Operating Eng'rs, 469 F. Supp. 329, 392 (E.D. Pa. 1978).

[245] For further discussion of the problems associated with proving intent, see Note, *The Role of Circumstantial Evidence in Proving Discriminatory Intent: Developments Since* Washington v. Davis, 19 B.C. L. REV. 795, 798-800 (1978).

amenable to proof by objective factors. This approach relies on the venerable tort concept that an individual intends the foreseeable consequences of his voluntary conduct.[246] Under this formulation, the court will presume a discriminatory purpose if it finds that an employer continued to use a facially neutral policy after discovering its discriminatory impact.[247] By equating intent with the retention of policies known to result in discriminatory consequences, these courts have ameliorated the harshest aspects of the *Washington-Arlington* rule. Permitting plaintiffs to establish a prima facie case through the use of such objective evidence promotes the remedial policies of these statutes because it removes some unnecessarily burdensome proof problems inherent in establishing the subjective concept of motivation.[248]

The future of this formula, however, received a potentially fatal blow from a recent Supreme Court decision. In *Personnel Administrator v. Feeney*,[249] a Massachusetts statute giving veterans an absolute preference in all state civil service appointments was challenged on the ground that it discriminated against women in contravention of the equal protection clause of the fourteenth amendment. After reemphasizing that proof of disproportionate exclusionary impact, without additional evidence of discriminatory purpose, fails to make good a claim under the Constitution,[250] the Court rejected the plaintiff's efforts at satisfying the intent standard through evidence of disproportionate impact.

---

[246] *See* RESTATEMENT (SECOND) OF TORTS § 8A (1965).

[247] *See* Dickerson v. United States Steel Corp., 439 F. Supp. 55, 77, 80 (E.D. Pa. 1977), *rev'd in part*, 582 F.2d 827 (3d Cir. 1978); Delgado v. McTighe, 442 F. Supp. 725, 727-28 (E.D. Pa. 1977). *Contra*, United States v. City of Chicago, 549 F.2d 415, 435 (7th Cir. 1978), *cert. denied*, 434 U.S. 875 (1977); Vanguard Justice Soc'y v. Hughes, 471 F. Supp. 670, 698-701 (D. Md. 1979).

[248] This analysis has been attacked as circumvention of the intent requirement of *Washington*. Critics of this theory suggest that a requirement of foreseeability adds nothing to the impact standard because disproportionate exclusionary effects are, by definition, foreseeable. Thus, these commentators conclude, any real distinction between intent and impact is substantially, if not completely eliminated. *See* Perry, *supra* note 90, at 579-80; Comment, *supra* note 90, at 733-34.

If the courts presumed foreseeability simply from the fact of disparate impact, this challenge would be persuasive. But these analysts fail to mention that under the proposed definition of intent, the plaintiff must prove that the subject employment criteria was retained *after* the employer knew or should have known of its discriminatory impact. At that point, the burden should shift to the defendant to rebut the appropriate inference that continued use of such a test or other employment practice is motivated by a desire to perpetuate the discriminatory results.

[249] 99 S. Ct. 2282 (1979).

[250] *Id.* at 2293.

The plaintiffs urged that because the legislature could foresee that a veterans' preference would disproportionately exclude women applicants, the discriminatory results generated by the enactment were intentional.[251] After admitting that the state legislature must have recognized the future impact of its decision, the Court nevertheless concluded that the constitutional standard of discriminatory purpose implied more than cognizance of the challenged action's consequences.[252] The realization that a statute will create adverse consequences, the Court stated, simply did not mean that the legislators enacted it for that purpose.[253] Although it acknowledged the well-recognized principle that persons are presumed to intend the foreseeable consequences of their action,[254] the Court once again engaged in some *Gilbert*-style sleight-of-hand[255] rather than logically explaining its rejection of the discrimination claim. Producing a foreseeable discriminatory impact, the Court reasoned, evidenced intention only in the sense of volition, and not purpose. Such a showing indicated simply that the legislature acted voluntarily; it did not mean that the legislature intended to create the foreseeable results of its conduct.[256]

The Court misstated the relationship between voluntariness and intent.[257] Absent direct evidence of motive, a showing of knowledge of a foreseeable result normally creates a presumption that the actor intended the consequences of his act.[258] Whether he acted voluntarily is a separate question, demanding inquiry into the presence of factors such as fraud, incompetence, and undue influence. The Court's disingenuous linkage of intent and volition represents another attempt to judicially impair the protection of constitutionally based civil rights.

Plaintiffs in future employment discrimination litigation may avoid the prejudicial impact of this decision, however, by distin-

---

[251] *Id.* at 2295.

[252] *Id.* at 2296.

[253] *Id.*

[254] *Id.* at 2295-96, 2296 n.25.

[255] *See* notes 155-66 and accompanying text *supra*.

[256] 99 S. Ct. at 2296.

[257] *See, e.g.*, C. GREGORY, H. KALVEN, JR. & R. EPSTEIN, CASES AND MATERIALS ON TORTS 3-8 (3d ed. 1977); J. HENDERSON & R. PEARSON, THE TORTS PROCESS 13-15 (1975); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 8 (4th ed. 1971); W. PROSSER, J. WADE & V. SCHWARTZ, TORTS: CASES AND MATERIALS 16-28 (6th ed. 1976).

[258] *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 8 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 8A (1965). The Ninth Circuit recently held that the tort doctrine of respondeat superior applies to Title VII actions. Miller v. Bank of America, 600 F.2d 211, 213 (9th Cir. 1979).

guishing *Feeney* on the ground that the defendant offered several non-discriminatory justifications for the statute.[259] The Court's restrictive interpretation of intent may not necessarily control those cases where the defendant makes no showing. In such instances, plaintiffs should be able to establish intent under the foreseeability framework. If, on the other hand, *Feeney* is read expansively and applied to statutory as well as constitutional claims, then the Court will have erected another impediment to an individual's ability to protect his right to equal employment opportunity.

E. *Summary*

In *Washington v. Davis*, the Court imposed an onerous burden on civil rights litigants by requiring a showing of purposeful discrimination in any claim asserted under the Constitution.[260] Although the Court has not discussed whether this ruling applies to claims for relief brought under federal antidiscrimination statutes, many lower federal courts have sensed the Court's increasing hostility towards such claims and have extended the *Washington* rule to actions filed under Title VII and section 1981.[261] Careful examination of the legislative history, constitutional genesis, and the policies underlying the enactment of these statutes, however, reveals that they should not fall under the constitutional ruling in *Washington* and that they should be amenable to the disproportionate impact standard originally articulated by the Court in *Griggs v. Duke Power Co.*[262] If the courts choose to impose an intent requirement upon statutory claims, they should ameliorate the harshness of that rule by applying the traditional tort definition of intent.[263] Finally, although the Supreme Court has recently suggested that it does not approve of the foreseeability definition of intent, that case may be limited to its facts.

---

[259] 99 S. Ct. at 2288-89, 2296.

[260] *See* notes 86-91 and accompanying text *supra*.

[261] *See* notes 134-35 and accompanying text *supra*.

[262] *See* notes 136-48 and accompanying text *supra*.

[263] *See* note 257 and accompanying text *supra*.

## III

## THE PATTERN CONTINUES

### A. *New York City Transit Authority v. Beazer*

The antagonism towards civil rights claims and the guileful reasoning that pervaded the Court's opinions in *Washington, Furnco, Sweeney,* and *Feeney* has been perpetuated in two of its most recent employment discrimination decisions. *New York City Transit Authority v. Beazer*[264] involved a challenge to an absolute exclusion from any employment of former heroin addicts who were participating in methadone maintenance programs or who had successfully concluded such participation. Under this policy, no consideration was given to the merits of an individual employee or applicant. The plaintiffs' complaint alleged that this policy violated the fourteenth amendment due process and equal protection clauses, section 1981, and Title VII.

In connection with their claim under Title VII, the plaintiffs asserted that the policy disproportionately excluded blacks and Hispanics. This, they claimed, violated the prohibitions against racial discrimination.[265] The trial court held that because this blanket ban applied to all positions, regardless of their sensitivity or the abilities of the individual applicant, the rule was impermissibly overbroad and thus violated the equal protection and due process guarantees of the fourteenth amendment. Having thus ruled in the plaintiffs' favor on their constitutional claim, the court did not discuss the substantive statutory rights of action.[266]

Subsequently, plaintiffs renewed their claim before the district court for relief under Title VII.[267] In a supplemental opinion, the trial court found the defendants' policy generated a disproportionate exclusionary impact upon blacks and Hispanics,

---

[264] 440 U.S. 568 (1979), *rev'g,* 558 F.2d 97 (2d Cir. 1977), *aff'g,* 399 F. Supp. 1032 (S.D.N.Y. 1975).

[265] 399 F. Supp. at 1033.

[266] *Id.* at 1058-59.

[267] Beazer v. New York City Transit Auth., 414 F. Supp 277 (S.D.N.Y. 1976), *aff'd,* 558 F.2d 97 (2d Cir. 1977), *rev'd,* 440 U.S. 568 (1979). Plaintiffs admitted that the sole purpose of this effort was to obtain an award of attorney's fees. 414 F. Supp. at 278. The trial court rendered its initial judgment before Congress enacted the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988 (1976). Thus, because § 1981 did not expressly provide for an award of attorney's fees, such an award in connection with that cause of action was prohibited. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975). Title VII, of course, expressly permits the granting of attorney's fees to the prevailing party. 42 U.S.C. § 2000e-5(k) (1976).

and served no business necessity.[268] These findings led to a conclusion that the defendants had violated Title VII's ban on racial discrimination.[269]

On appeal, the Second Circuit affirmed the ruling on the plaintiffs' constitutional claim[270] but did not pass on the plaintiffs' statutory claims.[271] The Supreme Court, however, did address the Title VII issue. The Court acknowledged that the discriminatory impact standard continued to serve as a basis for establishing a violation of Title VII. But it reversed the trial judge's findings of fact and held that the plaintiffs were not entitled to relief under Title VII.[272]

Judge Griesa had based his finding of disproportionate exclusionary impact on two statistics. First, 81% of all employees defendant referred to its medical consultant for suspected violation of its drug policy were black or Hispanic. Second, between 62 and 65% of all persons participating in New York City methadone maintenance programs were black or Hispanic.[273]

The Supreme Court rejected this reasoning, stating that these statistics did not establish that the employer's policy violated Title VII. The first figure, the Court reasoned, was too general because it related only to the number of employees suspected of violating the company's rule, not the number actually dismissed.[274] A simi-

---

[268] 414 F. Supp. at 278-79.

[269] *Id.* at 279. Although District Judge Griesa applied the impact standard to plaintiffs' Title VII claim against a city agency, this opinion was rendered before the Supreme Court issued its decision in *Washington v. Davis.*

[270] 558 F.2d at 99.

[271] After Judge Griesa issued his supplemental opinion, but before his judgment became final, Congress passed the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1976). Shortly after the passage of that statute, Judge Griesa granted the plaintiffs' motion for a declaration that this enactment provided a basis for awarding attorney's fees for the constitutional claim the plaintiffs filed under § 1983. 414 F. Supp. at 279. The Second Circuit upheld that ruling which gave effect to a new statute in a pending case. 558 F.2d at 100.

Because the Title VII action was filed only for the purpose of securing a predicate for an award of attorney's fees, this intervening legislation obviated the necessity for the appellate court to rule on that statutory claim. *Id.*

[272] 440 U.S. at 583-84.

[273] 414 F. Supp. at 278-79.

[274] 440 U.S. at 585. The district court's ruling in favor of the plaintiffs' Title VII claims extended to the application of the narcotics rule to both past and present participants in methadone maintenance programs. 414 F. Supp. at 279. The appellate court did not address the statutory question. 558 F.2d at 99-100. The Supreme Court, noting the trial judge's statement that the defendant's policy towards successful past participation in methadone programs was unclear, stated that, because it could find no evidence that defendant refused employment to any former methadone user, the issue of the validity of the rule in relation to former users was not properly before it. 440 U.S. at 572 n.3.

lar criticism was leveled against the second statistic. Figures outlining the racial mix of the surrounding community, the Court declared, do not prove the impact of the defendant's narcotics rule because they do not relate directly to the racial composition of the relevant class—those transit authority job applicants and employees receiving methadone treatment. The Court characterized such general population statistics as overinclusive and thus an insufficiently probative basis upon which to predicate a prima facie case of discriminatory impact.[275] The Court concluded by stating rather harshly that this type of statistic "reveals little," "tells us nothing," and is "virtually irrelevant."[276]

The rigorous standard for statistical proof of discriminatory impact reflected in the *Beazer* opinion suggests that the Court is ignoring its prior decisions and reformulating its position on this critical issue. If *Beazer* foreshadows the rejection of the use of general population data and the limitation of the presentation of statistics restricted to those of actual applicants and employees, it represents the imposition of another onerous burden upon the prosecution of *Griggs*-type claims.

In *Griggs*, the plaintiffs established their prima facie case with general population statistics. By comparing the percentage of blacks and whites in this group who did not satisfy the employer's high school diploma requirement, they successfully proved the potential discriminatory impact of that facially neutral policy.[277]

This type of statistical proof also was utilized successfully by the plaintiffs in *Dothard v. Rawlinson*.[278] Those Title VII plaintiffs attacked the statutorily-imposed height and weight requirements for the position of correctional counselor with the Alabama Board of Corrections. They offered statistical evidence of the general relative capacity of men and women to satisfy this standard.[279] The defendants challenged this showing on the ground that plaintiffs had not introduced comparative statistics concerning actual job applicants.[280] Citing *Griggs*, the Court rejected the defen-

---

[275] 440 U.S. at 585-86. The Court added that even if this "weak" statistical showing was enough to establish a prima facie case, it was rebutted by the defendant's demonstration that the narcotics rule's application to present users of methadone was job-related. *Id.* at 586.

[276] *Id.* at 587.

[277] 401 U.S. at 430 n.6.

[278] 433 U.S. 321 (1977).

[279] *Id.* at 329-30.

[280] *Id.* at 330.

dants' assertion, stating that "[t]here is no requirement . . . that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants."[281]

The *Beazer* Court made no effort to distinguish either *Griggs* or *Dothard* or to justify this significant shift in its approach to disproportionate impact analysis.[282] The entire discussion of this issue is contained in one footnote where the Court suggested that the language it employed in *Dothard* was undermined subsequently in *International Brotherhood of Teamsters v. United States*.[283] As Justice White recognized in his dissenting opinion, however, evidence in *Teamsters* justified the inference that general population figures might not accurately measure the pool of qualified job applicants.[284] The *Beazer* majority, on the other hand, made that presumption in the absence of any such supporting evidence.[285] Moreover, as Justice White noted, the majority offered no reason for refusing to infer from the facts that individuals were rejected pursuant to the narcotics rule and that blacks are more likely to violate the rule, that therefore the application of such a policy will exclude blacks more frequently than whites.[286]

The Court also reversed the judgment rendered by the trial court rather than remand the case for reconsideration in light of the newly adopted proof standard. This action is particularly surprising because the defendants never raised this specific issue before either the trial or appellate courts. The Court concluded that the plaintiffs failed to prove their statutory claim in the absence of a ruling by the appellate court on that claim.[287]

Although this heavy burden of proof for these plaintiffs may have resulted from the Court's concern over the special problems associated with drug abuse, the Court certainly made no effort in *Beazer* to so limit its ruling. Rather, the Court's unqualified and forceful language suggests a broad scope of interpretation. If so, it could join *Washington* in seriously impairing the effectiveness of

---

[281] *Id.*

[282] For a thorough discussion of the various statistical methods of proving disproportionate impact and a catalogue of the many lower court decisions recognizing the validity of general population statistics, see B. SCHLEI & P. GROSSMAN, *supra* note 13, at 1158-81; *id.* at 318-26 (Supp. 1979).

[283] 440 U.S. at 586 n.29 (citing International Bhd. of Teamsters v. United States, 431 U.S. 324. 340 n.20 (1977)).

[284] *Id.* at 573 n.5.

[285] *Id.*

[286] *Id.*

[287] *Id.* at 599 (dissenting opinion, White, J.).

civil rights litigation. It surely will severely constrict the continued force of *Griggs* impact analysis and ultimately might effect a sub silentio erosion of that standard.

### B. *County of Los Angeles v. Davis*

In *County of Los Angeles v. Davis*,[288] the Supreme Court had an opportunity to provide much needed guidance on the nature of proof necessary to establish a prima facie case under section 1981. The Court, however, avoided ruling on the role of intent in actions brought under that statute by declaring the case moot.[289] In so ruling, the Court either ignored or impliedly reversed findings of fact made by the courts below, and also improperly applied the rules governing mootness.

In 1971, the Los Angeles Fire Department designed a new pre-employment written examination for entry-level positions to replace, in 1972, its admittedly discriminatory 1969 exam.[290] The examination was given but no appointments were made for some time because of a state action challenging the county's plan to interview randomly a portion of those who passed the exam.[291] To fill the increasing number of vacant positions, the county proposed to interview the top 544 scorers on that exam, even though whites predominantly received the highest scores. Because minority representatives objected to this proposal, the county abandoned its plan and agreed to interview all who passed the 1972 test.[292] The plaintiffs, representing a class of present and future black and Mexican-American job applicants, claimed that the county's use of the 1969 test as a hiring criterion and the 1972 test as a screening device to select candidates for interviews constituted unlawful discrimination under Title VII and section 1981.[293] The trial court ruled in the plaintiffs' favor on both statutory claims and issued a comprehensive, racially-based, accelerated hiring order.[294]

---

[288] 440 U.S. 625 (1979), *vacating as moot*, 566 F.2d 1334 (9th Cir. 1978), *aff'g in part, rev'g in part*, 8 Fair Empl. Prac. Cas. 239 (C.D. Cal. 1973).

[289] 440 U.S. at 633.

[290] *Id.* at 628.

[291] *Id.*

[292] 566 F.2d at 1345-46 (dissenting opinion, Wallace, J.).

[293] 440 U.S. at 627. Before the 1972 test, a 1969 test was used to rank job candidates. This procedure was discontinued after 1969. *Id.* at 627-28.

A minimum height and weight requirement was also attacked by plaintiffs, but this issue was not discussed by the Supreme Court. *Id.* at 630 n.2.

[294] 8 Fair Empl. Prac. Cas. at 241-43.

On appeal, the Ninth Circuit upheld that portion of the trial judge's opinion dealing with the invalidity of the 1972 test.[295] The appellate court then stated that the county's decision not to limit interviews to the top achievers on the 1972 test did not render the case moot, because the continuing threat that the examination might be used was unlawful by itself.[296]

The Supreme Court vacated the judgment of the court of appeals and ordered it to direct the district court to dismiss the action on the ground that it had become moot during the litigation.[297] The Court reasoned that because the county did not use the results of the 1972 examination in any contested fashion, a live controversy between the parties no longer existed. In making this determination, however, the Court articulated[298] but then misapplied the two conditions for mootness set forth in *United States v. W.T. Grant Co.*[299]

Although voluntary cessation of purportedly unlawful conduct does not render a controversy moot, a court loses jurisdiction if the defendant proves the absence of any reasonable expectation that the challenged action will be repeated.[300] This condition, the Court stated, was satisfied because the emergency conditions that compelled the county to consider using the 1972 examination as a ranking device—a temporary emergency shortage of fire fighters and the absence of an alternative method of screening job applicants—were unique and unlikely to recur.[301] As Justice Powell recognized in his dissenting opinion, however, this assumption flies in the face of the findings of the lower courts and the evidence in the record.[302]

In support of its conclusion, the Court noted that the county had now adopted a nondiscriminatory method of screening job applicants. This new procedure, however, directly resulted from the trial court's imposition of the hiring order and injunction upon defendant.[303] While the Court found no reason to believe that the defendant would terminate its use of this new screening

---

[295] 566 F.2d at 1341.
[296] *Id.* at 1341 & n.14.
[297] 440 U.S. at 627, 633.
[298] *Id.* at 631.
[299] 345 U.S. 629 (1953).
[300] *Id.* at 632-33.
[301] 440 U.S. at 632.
[302] *Id.* at 641.
[303] *See* 8 Fair Empl. Prac. Cas. at 242-43.

method if the trial court's injunction and order was dissolved, it offered no evidentiary support for this inference.[304] In addition, the Court ignored the court of appeals' finding that the instant lawsuit prompted the county's decision to refrain from using the 1972 examination to rank applicants.[305] In light of the presumption against mootness and the defendant's heavy burden to demonstrate the absence of a controversy, the Court's willingness to make this inference was unjustified.

A case also may become moot if intervening events irrevocably eradicate any effects generated by defendant's purported unlawful conduct.[306] This criterion was satisfied, the Court announced, because the county's compliance with the trial court's injunction and hiring order during the five years since its promulgation had resulted in a substantial increase in minority hiring.[307] Once again, however, the Court too readily discounted the possibility that following dissolution of the trial court order, the defendant would revert to a discriminatory method of selecting future employees.

Thus, by engaging in unjustified speculation and either disregarding or refuting findings of fact made by the trial and appellate courts, the Supreme Court eschewed ruling on the merits and perpetuated the uncertainty surrounding the proper role of intent in establishing a section 1981 prima facie case.

## CONCLUSION

Commentators frequently have portrayed the Burger Court as less than sympathetic to the plight and claims of civil rights litigants. They have described its decisions in the area of constitutional criminal procedure, the first amendment and the right to privacy as narrow and restrictive in substance, and imprecise and manipulative in analysis. This attitude also pervades the Court's

---

[304] Moreover, in his dissenting opinion, Justice Powell reveals that in its reply brief, the county admitted that its hiring procedures were undertaken under the compulsion of the trial court order. 440 U.S. at 642.

[305] 566 F.2d at 1341. Justice Powell's opinion also indicates that the trial judge made an identical finding of fact. 440 U.S. at 639.

[306] 440 U.S. at 631.

[307] *Id.* at 633.

rulings on the requirements of a prima facie case in employment discrimination litigation.

In *Furnco Construction Corp. v. Waters* and *Board of Trustees v. Sweeney*, the Court attempted to clarify the nature of plaintiff's original burden of production in actions based on a claim of disparate treatment. Unfortunately, by using imprecise and ambiguous language as well as frequent question-begging, the Court did little to refine its thinking and merely contributed further to the confusion surrounding this question.

The continued efficacy of constitutionally-based claims of discrimination was severly limited by the imposition of an intent requirement in *Washington v. Davis*. The Court predicated this landmark ruling on a misguided interpretation of its own precedent and wholesale summary rejection of an extensive body of appellate case law.

The Court's ruling in *Personnel Administrator v. Feeney* further enhanced *Washington's* prejudicial effect on actions to preserve plaintiffs' constitutional rights. The *Feeney* Court held that showing the defendant could foresee the discriminatory impact of its facially neutral policy did not establish intent.

The *Washington* decision also raised the question of whether intent was a necessary element of plaintiff's prima facie case in actions brought under the federal antidiscrimination statutes. Although the Court has yet to rule directly on this question, in *General Electric Co. v. Gilbert* it did equate, in another context, the constitutional and statutory definitions of discrimination by engaging in an unparalleled exercise of semantic legerdemain. Many of the lower courts have interpreted *Washington* and *Gilbert* broadly and extended the intent requirement to statutory claims. Although the Court has never explicitly supported that expansion of *Washington*, it undermined the *Griggs* impact theory in *New York City Transit Authority v. Beazer*. In *Beazer*, the Court rejected the plaintiffs' attempt to establish a prima facie case of disproportionate impact with general population statistics. Instead, it announced that plaintiffs must provide statistical evidence of the policy's impact on actual applicants. This substantial departure from precedent proceeded without any discussion of the Supreme Court's prior decisions.

Finally, in *Country of Los Angeles v. Davis*, the Court eschewed an opportunity to rule definitively on the role of intent in section 1981 actions. In dismissing the action because of mootness, the Court relied upon inferences and speculation unsupported by the

record and contrary to findings of fact made by the lower courts.

Although some of these decisions may be distinguished and their impact avoided in the short term, the essence of the opinions reflects an underlying antipathy towards civil rights claims. The unprincipled and contrived reasoning running through these opinions manifests an intentional effort by the Court to impede litigants' ability to secure their rights to equal employment opportunity by raising the requirements of the prima facie case. The merits of this policy decision notwithstanding, the Court's opinions too frequently demonstrate a level of legal reasoning falling far short of the standard expected from our nation's highest tribunal.