SECTION 1981 AND EMPLOYMENT TESTING: DISCRIMINATORY IMPACT ESTABLISHES A PRIMA FACIE CASE

When a member of a racial minority group is denied a job because of a racially discriminatory employment qualification test,[1] he may sue the employer under section 1981 of the Civil Rights Act of 1870,[2] the Fourteenth Amendment equal protection clause,[3] or Title VII of

1. An employment qualification test is said to be racially discriminatory when a significantly larger proportion of blacks or other racial minorities fail it than whites. 3 A. LARSON, EMPLOYMENT DISCRIMINATION § 74.10 (1977). *See, e.g.*, Bridgeport Guard., Inc. v. Members of Bridgeport Civ. Serv. Comm'n, 482 F.2d 1333, 1335 (2d Cir. 1973) *aff'd per curiam*, 497 F.2d 1113 (2d Cir. 1974), *cert. denied*, 421 U.S. 991 (1975) (passing rate for whites on civil service examination was 3 1/2 times the black passing rate); Castro v. Beecher, 459 F.2d 725, 729 (1st Cir. 1972) *prob. juris. noted*, 365 F. Supp. 655 (D. Mass. 1973) (passing rate of 65% for whites, 25% for blacks on police department entrance examination); Chance v. Board of Examiners, 458 F.2d 1167, 1171 (2d Cir. 1972), *amended on other grounds*, 496 F.2d 820 (2d Cir. 1974) (passing rate for whites was 1 1/2 times that for blacks in examination for supervisory positions in New York City school system).

The qualification tests most commonly used by employers are: general intelligence tests, tests of specific intellectual abilities, knowledge and skill tests, measures of dexterity and coordination, and inventories of personality traits. 2 PERSONNEL TESTING AND EQUAL EMPLOYMENT OPPORTUNITY (B. Anderson & M. Rogers eds. 1970).

2. 42 U.S.C. § 1981 (1976) (originally enacted as part of the Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, re-enacted in the Civil Rights Act of 1870, ch. 114, § 16, 16 Stat. 144).

42 U.S.C. § 1981 (1976) provides:

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

"Relief under § 1981 is limited to correcting racial discrimination." Patterson v. American Tobacco Co., 535 F.2d 257, 270 (4th Cir. 1976), *cert. denied*, 429 U.S. 920 (1976), *modified on other grounds*, 586 F.2d 300 (4th Cir. 1978). The courts, however, have not limited § 1981 to the technical or restrictive meaning of "race." Manzanares v. Safeway Stores, Inc., 593 F.2d 968 (10th Cir. 1979) (§ 1981 applies to discrimination against Mexican-Americans).

3. U.S. CONST. Amend. XIV, § 1 provides in part that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The Fourteenth Amendment is only applicable where some form of state action exists. *See, e.g.*, Shelly v. Kraemer, 334 U.S. 1, 13 (1948). (Judicial enforcement of a private

the Civil Rights Act of 1964.[4] The proof necessary to establish a prima facie case of racial discrimination differs according to the statutory or constitutional provision under which the aggrieved employment applicant sues.[5] Federal courts have yet to clearly determine the standard of proof required for a minority plaintiff to establish a prima facie case in a section 1981 suit.[6] In *Davis v. County of Los Angeles*,[7] the Ninth Circuit held that plaintiffs established their section 1981 prima facie case merely by presenting statistical evidence of the qualification test's discriminatory impact.[8] Since section 1981 applies to situations not covered by Title VII or the Fourteenth Amendment,[9] the proof required by federal courts in a section 1981 suit will

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agreement that excludes blacks from use or occupancy of real estate for residential purposes is a state action within the meaning of the Fourteenth Amendment and is contrary to the equal protection clause of that Amendment); Civil Rights Cases, 109 U.S. 3, 11-19 (1883).

4. 42 U.S.C. §§ 2000e to 2000e-17 (1976).

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin.

Id. at § 2000e-2(a)(1).

5. Soon after the enactment of Title VII many lower courts assumed Title VII replaced § 1981. *See* Note, *Desegregation of Private Schools: Is Section 1981 the Answer?*, 48 N.Y.U. L. REV. 1147, 1159-61 (1973). It is now clear, however, that Title VII was designed to supplement, not supplant § 1981. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 48-49 (1974). *See also* 118 CONG. REC. 3371 (1972) (statement of Sen. Williams).

6 *See* notes 39-42 and accompanying text *infra*.

7 566 F.2d 1334 (9th Cir. 1977), *vacated as moot*, 440 U.S. 625 (1979). By a five-to-four decision the Supreme Court held that because plaintiffs' claim had become moot, a decision on the merits was not required. In a dissenting opinion, Justice Powell stated: "We should reach, rather than seek a questionable means of avoiding, the important question—heretofore unresolved by this court—whether cases brought under 42 U.S.C. § 1981, like those brought directly under the Fourteenth Amendment, require proof of racially discriminatory intent or purpose." *Id.* at 637 (Powell, J., dissenting).

Justice Powell also noted that although a decision vacating a judgment necessarily prevents the lower court opinion from being the law of the case, the opinion of the court of appeals on the merits is likely to be viewed as persuasive authority in the Ninth Circuit. *Id.* at 646 n.10 (Powell, J., dissenting).

8. 566 F.2d at 1334.

9. A comparison of the scope of § 1981 to Title VII indicates that while each statute was designed to prevent racial discrimination by both public and private employers, Title VII is less accessible as a remedy because of its many administrative requirements and the exemption of several private employers from its coverage. *See*

largely determine the success of suits challenging racially discriminatory qualification tests.[10]

In *Davis v. County of Los Angeles*, plaintiffs, black and Mexican-

generally Comment, *Private Discrimination Under the 1866 Civil Rights Act: In Search of Principled Constitutional and Policy Limits*, 7 TOL. L. REV. 139 (1975). Title VII is limited to employers in interstate commerce with 15 or more employees. 42 U.S.C. § 2000e(b) (1976). *Cf.* Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) (a person aggrieved under § 1981 may bring suit immediately). Olson v. Rembrandt Printing Co., 511 F.2d 1228 (8th Cir. 1975) (Title VII suit must be preceded by a resort to administrative procedures). *See also*, Kaemmerer, *Jurisdictional Prerequisites to Private Actions Under Title VII of the Civil Rights Act of 1964*, 41 MO. L. REV. 215 (1976) (lists all required procedural steps under Title VII).

Title VII contains its own limitations period. 42 U.S.C. § 2000e-5(f)(1) (1976) (requires an initial complaint be filed with the Equal Employment Opportunity Commission (EEOC) within 180 days after the alleged act of discrimination and permits suit to be filed within 90 days after the EEOC exhausts it administrative procedures). The applicable state statute of limitations is used in a suit under § 1981. 421 U.S. 454 (1975). *See generally* 42 MO. L. REV. 100 (1977).

Unlike § 1981, Title VII exempts from coverage bona fide tax exempt private membership clubs. 42 U.S.C. § 2000e(b)(2) (1976). However, Title VII is the exclusive individual remedy available to a federal employment applicant. Brown v. General Serv. Adm'n, 425 U.S. 820, 824-25 (1976).

The primary difference in scope between § 1981 and the Fourteenth Amendment is the latter's requirement of state action. *See* note 3 *supra*. Section 1981 applies to discrimination in private employment. Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975).

10. Section 1981 was not used as a remedy against racially discriminatory employment practices for nearly a century after its enactment. *See* Note, *The Expanding Scope of Section 1981: Assault on Private Discrimination and a Cloud on Affirmative Action*, 90 HARV. L. REV. 412 (1976). The Supreme Court ruled that Congress was only empowered by the Thirteenth Amendment to proscribe slavery. Hodges v. United States, 201 U.S. 1 (1906). *See also* Civil Rights Cases, 109 U.S. 3 (1883). Because § 1981 was enacted under the authority of the Thirteenth Amendment and prohibited actions other than slavery, courts held it to be ineffective. *Id.* at 18.

It was not until 1968 that the Supreme Court finally decided in a series of four cases that § 1981 prohibits racially discriminatory employment practices, both public and private. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), first upheld the use of 42 U.S.C. § 1982 (1970), a companion statute of § 1981, as a valid exercise of Congress' powers under the Thirteenth Amendment to prohibit both public and private racial discrimination in the sale and rental of property. In Sullivan v. Little Hunting Park, 396 U.S. 229 (1969), the Court applied § 1982 to prohibit racial discrimination in a neighborhood recreational facility. Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973), used §§ 1981 and 1982 to require a swimming pool membership club to admit blacks living in the area. Finally, in Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975), the Supreme Court held that § 1981 affords a federal remedy against racial discrimination in employment by either state or private action. *See generally* Larson, *The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment*, 7 HARV. C.R.-C.L. L. REV. 56 (1972); 10 U. RICH. L. REV. 339 (1976).

American[11] applicants for positions as firemen, alleged that defendant employers[12] were guilty of racial discrimination in their use of written examinations[13] to rank applicants.[14] Although there was no dispute that these examinations had a discriminatory impact on minority job applicants,[15] plaintiffs were unable to prove defendants had a discriminatory intent in their use of the qualification examina-

11. For a discussion of the application of § 1981 to Mexican-Americans, see Greenfield & Kates, *Mexican-Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 CALIF. L. REV. 662 (1975).

12. Defendants were Los Angeles County, the County Board of Supervisors and the County Civil Service Commission. 566 F.2d at 1336.

13. For an explanation of the standards developed for determining whether a written examination is sufficiently job-related to rebut a challenge in a Title VII suit, see Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Guidelines on Employee Selection Procedures, 29 C.F.R. § 160 (1979). *See generally* Johnson, *Albemarle Paper Company v. Moody: The Aftermath of Griggs and the Death of Employee Testing*, 27 HASTINGS L.J. 1239 (1976); 37 LA. L. REV. 973 (1977).

14. 566 F.2d at 1337. Suit was originally filed under the Fourteenth Amendment, 42 U.S.C. §§ 1981, 1983 and Title VII of the Civil Rights Act of 1964. 566 F.2d at 1336. The Decision, however, was based solely on § 1981. *Id.* at 1341.

Section 1983 was not applied here because at the time of the decision a municipality was not a "person" who could be sued under § 1983. *Id. See* City of Kenosha v. Bruno, 412 U.S. 507, 511-13 (1973); Monroe v. Pape, 365 U.S. 167, 187-92 (1961). After *Davis v. County of Los Angeles*, the Supreme Court overruled *Monroe*. Monell v. Department of Social Serv. of the City of New York, 436 U.S. 658, 701 (1978). *Monell* held that local governing bodies *could* be sued directly under § 1983 where plaintiff alleges an unconstitutional action that implements or executes a policy officially adopted and promulgated by that body's officers. *Id.* at 690. However, *Monell* could not have helped these plaintiffs because they were unable to show the discriminatory intent necessary to prove a constitutional violation. *See* Washington v. Davis, 426 U.S. 229 (1976).

Title VII was not applicable because the parties stipulated that defendants abandoned use of the written examinations before March 24, 1972, the date Title VII first became applicable to state public employers. 566 F.2d at 1347 n.2 (Wallace, J., dissenting).

The court did not use the Fourteenth Amendment as the basis for its decision because there was no showing that defendants administered the challenged examination with any intent or purpose to discriminate against minority applicants. *Id.* at 1338. *See* Washington v. Davis, 426 U.S. 229 (1976) (discriminatory intent must be shown in order to establish a *prima facie* case of unconstitutional employment discrimination violative of the Fourteenth Amendment).

15. Despite a minority population of 29.1% in Los Angeles County, only 3.3% of the firemen employed by defendants at the time of trial were black or Mexican-American. Defendants interviewed the top 544 scorers on the challenged written qualification tests. While 25.8% of the white applicants were among the top 544 scorers on the test, only 5.1% of the black applicants were among the top scorers. 566 F.2d at 1337.

tions.[16]

The trial court concluded that statistical evidence of discriminatory impact alone established a prima facie case under section 1981.[17] On appeal the Ninth Circuit rejected defendants' contention that in a section 1981 action discriminatory intent also must be proven to establish a prima facie case,[18] as required in a suit brought under the Fourteenth Amendment.[19] The court held that, without an express contrary pronouncement from the Supreme Court, there remains no operational distinction between liability based upon Title VII and section 1981 in determining whether plaintiffs have established a prima facie case of racial discrimination.[20]

Any job applicant who alleges the use of racially discriminatory employment tests has a federal cause of action against state, federal, and private employers under Title VII.[21] The Fourteenth Amendment provides a federal cause of action only against a state and its political subdivisions.[22]

16. *Id.* at 1338.

17. *Id.* at 1337.

18. *Id.* at 1338-39.

19. *See* note 37 and accompanying text *infra.*

20. 566 F.2d at 1340. Section 1981 is limited to racial discrimination suits. *See* note 2 *supra.* Title VII covers discrimination on the basis of race, color, religion, sex, and national origin. Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974).

The court also faced two other issues. Under Title VII, plaintiffs challenged defendant's use of a 5'7"-height requirement that effectively excluded 41% of the otherwise eligible Mexican-American applicants. The court, noting that no scientifically approved test had been used to determine whether the height requirement was job-related, held the height requirement invalid. 566 F.2d at 1341-42. *See* Dothard v. Rawlinson, 433 U.S. 267 (1977) (Title VII prohibits the use of height requirements which have a discriminatory effect unless an employer can show that this requirement is job-related).

Another issue decided by the court was whether affirmative § 1981 relief should have been granted to remedy the effects of past discrimination. The majority stated that because affirmative relief has been ordered frequently for violations of Title VII, the court has equal power under § 1981 to order affirmative relief. 566 F.2d at 1342. *See* United States v. Ironworkers Local 86, 443 F.2d 544, 553 (9th Cir. 1971), *cert. denied*, 404 U.S. 984 (1971) (affirmative relief available where a Title VII violation is found). *But see* Chance v. Board of Examiners, 534 F.2d 993 (2d Cir. 1976), *cert. denied*, 431 U.S. 965 (1977) (affirmative relief not warranted under § 1981 or Title VII); Kirkland v. New York State Dep't of Correct. Serv., 520 F.2d 420 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976) (imposition of affirmative relief unwarranted).

21. 42 U.S.C. §§ 2000e to 2000e-17 (1976). Employers in private industry who employ fewer than 15 persons and bona fide private membership clubs are exempted. *Id.* § 2000e(b).

22. *See* note 3 *supra.* A federal cause of action against the District of Columbia is

The Supreme Court in *Griggs v. Duke Power Co.*[23] determined the standard for establishing a prima facie case in a Title VII employment discrimination suit.[24] Thirteen black employees challenged under Title VII the requirement that applicants have a high school diploma or pass an intelligence test as a prerequisite to employment at defendant's plant.[25] The Court held that plaintiffs had established a prima facie case by producing statistical evidence showing the qualification tests had a racially discriminatory impact.[26] The *Griggs* court did not require evidence of the employer's discriminatory intent.[27]

Lower federal courts extended the *Griggs* holding to suits brought under the Fourteenth Amendment and section 1981.[28] In *Chicano*

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provided by the Fifth Amendment due process clause. U.S. CONST., Amend V. *See* Washington v. Davis, 426 U.S. 229, 239 (1976). Title VII is the exclusive individual remedy available to a federal employment applicant. Brown v. General Serv. Adm'n, 425 U.S. 820, 824-25 (1976).

23. 401 U.S. 424 (1971).

24. Before *Griggs* a conflict existed among the lower courts as to whether Title VII required a plaintiff to prove an employer's discriminatory intent. *See* Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970) (Title VII requires proof of intent to discriminate); Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970) (proof of discriminatory intent not required).

25 401 U.S. at 425-26.

26 *Id.* at 431-32. Many cases have held that statistics alone may prove a prima facie case of employment discrimination under Title VII. *See, e.g.*, General Elec. Co. v. Gilbert, 429 U.S. 125, 136-37 (1976) (dicta); Rule v. Local 396, Int'l Ass'n of Bridge, Structural and Orn'l Ironworkers, 568 F.2d 558, 566 (8th Cir. 1977) (statistics may be used to prove discrimination in apprenticeship program); James v. Stockham Valves & Fittings Co., 559 F.2d 310, 328 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978) (evidence that 70% of all black workers were assigned to highly repetitive jobs as compared with only 31.7% of white employees, in a formerly segregated plant, adequate to establish prima facie case).

27. 401 U.S. at 43. Although a plaintiff has made a showing of discriminatory impact, to obtain individual relief he must also prove that:

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

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). *See generally* Note, *Employment Testing: The Aftermath of Griggs v. Duke Power Company*, 72 COLUM. L. REV. 900 (1972).

28. For decisions applying the *Griggs* standard to employment discrimination suits brought under the Fourteenth Amendment, see Douglas v. Hampton, 512 F.2d

Police Officer's Ass'n v. Stover,[29] plaintiffs[30] alleged under section 1981 that defendants[31] used qualification tests that had the effect of excluding a disproportionate number of Chicanos from employment and promotions in the police department.[32] Holding the plaintiffs were only required to show that the challenged procedures had a discriminatory impact, the Tenth Circuit Court of Appeals stated the measure of a prima facie case in a section 1981 action is the same as in a suit brought under Title VII.[33]

The Supreme Court later limited *Griggs* by indicating that the *Griggs* standard[34] does not apply to all employment discrimination suits brought under provisions other than Title VII. In *Washington v. Davis*,[35] plaintiffs contended that defendants' use of a written personnel test violated their Fourteenth Amendment rights solely because the test was shown to have a racially discriminatory impact.[36] The

976 (D.C. Cir. 1975) (*Griggs* standard used in Fourteenth Amendment challenge to employment entrance examination); Bridgeport Guardians, Inc. v. Civil Serv. Comm'n, 482 F.2d 1333 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1973) (evidence of discriminatory impact in policemen's written examination establishes prima facie case).

For decisions applying the *Griggs* standard to § 1981 suits, see Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir. 1976), *cert. denied*, 429 U.S. 920 (1976), *modified on other grounds*, 586 F.2d 300 (1978) (*Griggs* standard equally applicable to Title VII and § 1981); Waters v. Wisconsin Steel Works of Int'l Harv. Co., 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976) (*Griggs* standard should be used in § 1981 suits to avoid undesirable substantive law conflicts); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972) (statistical evidence adequate to make a prima facie case).

29. 526 F.2d 431 (10th Cir. 1975), *cert. granted, vacated and remanded*, 426 U.S. 944 (1976).

30. Plaintiffs were 12 Chicano employees of the Albuquerque, New Mexico Police Department and the Chicano Police Officer's Association. 526 F.2d at 433.

31. Defendants were the Chief of Police, the City Commissioners and the City Manager of Albuquerque. *Id.*

32. *Id.*

33. *Id.* at 438.

34. *See* notes 23-27 and accompanying text *supra*.

35. 426 U.S. 229 (1976).

36. The Fourteenth Amendment equal protection clause is not applicable because *Washington v. Davis* involves the District of Columbia. The Fourteenth Amendment only applies to the states and their political subdivisions. The Fifth Amendment due process clause, however, contains an equal protection component that prohibits the federal government from discriminating against any person on the grounds of race, color, religion or national origin. *Id.* at 239. *See* Bolling v. Sharpe, 347 U.S. 497 (1954).

Plaintiffs originally brought suit under the Fifth Amendment, § 1981, and D.C.

Supreme Court held that evidence of discriminatory impact, although relevant, was not enough to establish a prima facie case under the Fourteenth Amendment.[37] Plaintiffs were required to prove that defendants had a discriminatory intent in their use of the personnel test.[38]

Since *Washington v. Davis*, only a few federal courts have considered whether a plaintiff under section 1981 needs to prove discriminatory intent. In *Croker v. Boeing Co. (Vertol Division)*,[39] for example, the court noted that *Washington v. Davis* had not explicitly held proof of intentional discrimination a necessary component of a section 1981 claim.[40] The *Croker* court mentioned, however, the similarities between section 1981 and the Fourteenth Amendment,[41] and held that the Fourteenth Amendment requirement of proof of discriminatory intent must be met in order to establish a prima facie case under section 1981.[42]

CODE § 1-320 (1973). During the trial they filed a motion for partial summary judgment solely on Fifth Amendment grounds, raising no issue under § 1981. 426 U.S. at 234.

37. *Id.* at 242.

38 *Id.* at 238-39. Since *Washington*, the Court has elaborated on the factors that may be examined to find circumstantial or direct evidence of discriminatory intent in official actions. Relevant factors include the historical background of the challenged action, the specific sequence of events leading up to the action, departures from the normal procedural sequence, and substantive departures in decision making where factors usually considered important strongly favor a contrary decision. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977). *See generally* Castaneda v. Partida, 430 U.S. 482 (1977) (discriminatory intent proved by a showing that Mexican-Americans constituted only 39% of those called for grand jury duty during an 11-year period in a county with a 79% Mexican-American population); 37 LA. L. REV. 973 (1977).

39 437 F. Supp. 1138 (E.D. Pa. 1977).

40. *Id.* at 1181. *Accord* Davis v. County of Los Angeles, 566 F.2d 1334, 1339-40 (9th Cir. 1977); *vacated as moot*, 440 U.S. 625 (1979); *id.* at 1347 (Wallace, J., dissenting).

41. The court stated that § 1981 and the Fourteenth Amendment were passed at about the same time to deal with the problems of blacks after the Civil War. Also, the language of § 1981 was said to parallel the Fourteenth Amendment. 437 F. Supp. at 1181. For a comparison of the language of § 1981 and the Fourteenth Amendment, see notes 50-51 and accompanying text *infra*.

42. 437 F. Supp. at 1181. Since the Supreme Court decision in *Washington v. Davis*, lower federal courts have been divided as to whether a plaintiff in a § 1981 suit needs to prove defendant's discriminatory intent. Many of these cases, however, fail to show the reasoning behind the court's conclusion.

Cases indicating that a showing of racially discriminatory impact is adequate include Kinsey v. First Reg'l. Sec., Inc., 557 F.2d 830, 838 n.2 (D.C. Cir. 1977) (court

In *Davis v. County of Los Angeles*,[43] the Ninth Circuit faced a clear choice—either to follow the pre-*Washington v. Davis* decisions[44] and require only a showing of discriminatory impact, or to continue the post-*Washington* trend[45] requiring proof of discriminatory intent. The court decided it was free to follow the pre-*Washington* decisions because *Washington* did not address the question of whether section 1981 requires a showing of discriminatory intent.[46] The majority reasoned that since both Title VII and section 1981 apply to employment discrimination cases,[47] and since the available remedies are "parallel or overlapping,"[48] the *Griggs* discriminatory impact standard should

stated in dictum, and without analysis, that a plaintiff proceeding under § 1981 need not meet the *Washington v. Davis* constitutional standard); Dawson v. Pastrick, 441 F. Supp. 133, 140-41 (N.D. Ind. 1977) (cited several pre-*Washington v. Davis* cases, holding that statistical evidence is adequate in a § 1981 suit); Neely v. City of Grenada, 438 F. Supp. 390, 406 (N.D. Miss. 1977) (standards for determining whether a prima facie case is made are virtually identical for § 1981 and for Title VII); Winston v. Smithsonian Science Info. Exch., 437 F. Supp. 456, 473 (D.D.C. 1977), *aff'd mem.*, 595 F.2d 888 (D.C. Cir. 1979) (in fashioning a substantive body of law under § 1981 the courts should look to Title VII principles to avoid undesirable substantive law conflicts); Woods v. City of Saginaw, Michigan, 13 Empl. Prac. Dec. ¶ 11,299 (E.D. Mich. 1976) (no analysis given).

Cases holding that plaintiff must prove intentional discrimination under § 1981 include Williams v. DeKalb County, 582 F.2d 2, 2-3 (5th Cir. 1978), *modifying* 577 F.2d 248 (5th Cir. 1978) (held that *Washington v. Davis* requires application of a constitutional standard to a § 1981 claim); Harkless v. Sweeney Indep. School Dist., 554 F.2d 1353, 1357-58 (5th Cir. 1977), *cert. denied*, 434 U.S. 966 (court assumed, without discussion, that § 1981 requires proof of discriminatory intent, and held plaintiff showed discriminatory intent); Chicano Police Officer's Ass'n v. Stover, 552 F.2d 918 (10th Cir. 1977); City of Milwaukee v. Saxbe, 546 F.2d 693, 705 (7th Cir. 1976) (without analysis court held that where no Fifth Amendment claim proved, no § 1981 claim had been made out either); Arnold v. Ballard, 448 F. Supp. 1025, 1028 (N.D. Ohio 1978) (legislative history of § 1981, prior Supreme Court opinions dealing with the Civil Rights Act of 1866 and *Washington v. Davis* can be harmonized only by holding that proof of discriminatory intent is required for § 1981 claims); Lewis v. Bethlehem Steel Corp., 440 F. Supp. 949, 965 (D. Md. 1977); Johnson v. Hoffman, 424 F. Supp. 490, 494 (E.D. Mo. 1977), *aff'd sub nom.* Johnson v. Alexander, 572 F.2d 1219, 1223 (8th Cir. 1978), *cert. denied*, 439 U.S. 986 (1978) (since § 1981 is derived in part from the Fourteenth Amendment, similar standards should apply).

43. 566 F.2d 1334 (9th Cir. 1977), *vacated as moot*, 440 U.S. 625 (1979).

44. *See* notes 28-33 and accompanying text *supra*.

45. *See* notes 38-42 and accompanying text *supra*.

46. 566 F.2d at 1340. Although the dissent did not agree with the majority's overall conclusion, it did concede that *Washington v. Davis* did not consider which standard should govern § 1981. *Id.* at 1350 n.10 (Wallace, J., dissenting).

47. *See* note 9 *supra*.

48. Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 & n.7 (1973). The

apply to both statutes.[49]

The court's analysis, however, fails to examine the similar language of section 1981 and the Fourteenth Amendment. As several post-*Washington v. Davis* opinions indicate,[50] the similarities in language present a forceful argument for using the same standard of proof for both provisions. The broad language of section 1981, that "[a]ll persons . . . shall have the right . . . to the full and equal benefits of all . . . laws . . ."[51] is clearly parallel to the Fourteenth Amendment's statement that "[n]o State shall . . . deny to any person . . . the equal protection of the laws."[52]

The justifications given by the *Washington v. Davis* Court for requiring discriminatory intent in Fourteenth Amendment suits may also apply to section 1981 suits.[53] The possibility that using the discriminatory impact standard would validate governmental decisions susceptible to judicial invalidation troubled the Court in *Washington v. Davis*.[54] The Court also was concerned about limiting the judiciary's role in the drive for racial equality.[55] Since section 1981 could

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Supreme Court used the terms "parallel or overlapping" to mean that Title VII remedies are designed to supplement, not supplant, other applicable statutes. *Id.* at 48.

49. 566 F.2d at 1340. The assertion that both Title VII and § 1981 apply to the same fact situations and provide similar remedies is not a persuasive reason for applying the same standard to both statutes. As the dissent in *Davis v. County of Los Angeles* points out, a similar statement can be made about Title VII and the Fourteenth Amendment. Yet *Washington v. Davis* indicates that the same standard does not apply to suits brought under these provisions. *Id.* at 1348.

50. Lewis v. Bethlehem Steel Corp., 440 F. Supp. 949, 965 (D. Md. 1977) (§ 1981 and the Fourteenth Amendment contain parallel language); 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. 1978), *cert. denied*, 439 U.S. 986 (1978) (§ 1981 is designed to provide equal protection under the law).

51. 42 U.S.C. § 1981 (1976).

52. U.S. CONST., Amend. XIV, § 1.

The language of Title VII, however, does not parallel either § 1981 or the Fourteenth Amendment. Title VII is a complex statute that specifically identifies proscribed conduct and exempts some activities from its coverage. *See* note 9 *supra*; 42 MO. L. REV. 100 (1977).

53. *See* Lang, *Toward a Right to Union Membership*, 12 HARV. C.R.-C.L. L. REV. 31, 56 (1977).

54. The *Washington v. Davis* Court was concerned that any governmental decision possibly could be subject to judicial review at any time if it happened to place a greater burden on one group than on another. Washington v. Davis, 426 U.S. 229, 248 (1976).

55. The Court indicated that the Congress and the President should decide what specific types of discriminatory employment practices should be proscribed. *Id.*

be applied in every Fourteenth Amendment claim of racially discriminatory employment practices, these same concerns should exist in a section 1981 suit.[56]

Davis v. County of Los Angeles could severely limit the harsh impact of *Washington v. Davis*[57] by allowing a plaintiff to avoid the Fourteenth Amendment intent requirement when committing a section 1981 violation.[58] The court provides members of racial minority groups who are unable to obtain a Title VII remedy a realistic chance of obtaining relief.[59]

The *Davis v. County of Los Angeles* decision indicates the Ninth Circuit sympathizes with minority groups discriminated against by employers' use of qualification tests. Nevertheless, the court fails to compare the language of section 1981 to the Fourteenth Amendment, or to apply the *Washington v. Davis* rationale to section 1981. These failures make the court's use of the *Griggs* discriminatory impact standard a decision of questionable validity.

J. Michael Benson

56. Croker v. Boeing Co. (Vertol Division), 437 F. Supp. 1138, 1181 (E.D. Pa. 1977).

These concerns do not, however, apply to Title VII. Title VII's requirement of resort to administrative procedures can operate to eliminate frivolous claims. 42 U.S.C. § 2000e-5 (1976); 566 F.2d at 1350 (Wallace, J., dissenting). The fact that Congress has specifically defined the conduct proscribed by Title VII eliminates any problems of judicial reluctance to act where Congress has failed to act. *Id.*

57. *E.g.*, Washington v. Davis, 426 U.S. 229 (1976) (although plaintiffs were able to prove that defendant's use of an employment qualification test discriminated against minority applicants, their failure to prove and intent to discriminate left them without a remedy).

58. *Contra* Croker v. Boeing Co. (Vertol Division), 437 F. Supp. 1138, 1181 (E.D. Pa. 1977).

59. For an example of the difficult proof problem in showing discriminatory intent, see Village of Arlington Heights v. Metropolitan Dev. Corp., 429 U.S. 252 (1977).