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Federal Statutes

PATENT LAW—THE STANDARD OF SYNERGISM SHOULD NOT BE USED TO DETERMINE THE VALIDITY OF COMBINATION PATENTS UNDER SECTION 103 OF THE PATENT ACT.


In August 1974, Rengo Company, Ltd., received patent No. 3,831,502 (the '502 patent) from the United States Patent Office for an apparatus that increased the speed and efficiency of a corrugator, a machine that produces corrugated paperboard used in cardboard boxes. The plaintiff's apparatus consisted of a combination of several well-known elements: a rotary shear, slitter-scorer units, and a movable feeder plate. The major innovation of the plaintiff's device was that it enabled the operator to change the size of the box blanks without stopping the machine to change the slitting and scoring pattern as was required when using a traditional corrugator.

1. Rengo Co. v. Molins Mach. Co., No. 78-2000 (D.N.J. July 31, 1980). The inventor of the device involved in this case is Masateru Tokuno, Senior Managing Director of the plaintiff Rengo. Id. slip op. at 1 n.1. Mr. Tokuno assigned his rights to his invention to Rengo, a Japanese corporation that manufactures corrugated paperboard. Id. slip op. at 2 n.1. An additional plaintiff, Simon Container Machinery Ltd., is a British corporation that manufactures equipment for producing corrugated paperboard. Id. A subsidiary of the British corporation conducts business in the United States. Id.

2. Id. slip op. at 6. A corrugator consists of seven components: 1) a single facer machine; 2) a bridge; 3) a double facer machine; 4) a rotary shear; 5) slitter-scorer units; 6) a cut-off machine; and 7) a stacker or sheet delivery machine. Id. slip op. at 3. The plaintiff's patent encompassed only elements four through six. Id.


4. 657 F.2d at 537.

5. Rengo Co. v. Molins Mach. Co., No. 78-2000, slip op. at 6-9 (D.N.J. July 31, 1980). The plaintiff conceded that its machine consisted of a conventional rotary shear and slitter-scorer unit and had no components which were novel to the industry at the time it filed its patent application. Id. slip op. at 6-7. By combining these well-known elements with a movable feeding plate, the Rengo corrugator could direct the flow of the paperboard after it emerged from the rotary shear to any one of three separate paths, each of which had its own slitter-scorer unit. Id. slip op. at 7-8. The plaintiffs argued that this development, a corrugator with change order capability at full running speed, was a major advance in the manufacturing of paperboard. Id. slip op. at 8-9. The defendant, however, contended that this combination of well-known elements did not constitute a patentable inventive contribution because it did not produce a new or unexpected result. Id. slip op. at 9.

6. 657 F.2d at 537. In a conventional corrugator, three webs of paper are first corrugated into paperboard. Id. The paperboard then flows along a single pathway until it is cut to a predetermined width and creased by the
The plaintiff installed the corrugator device in two of its Japanese plants in January 1972 and filed Japanese patent applications for the apparatus in February and April of 1972.\(^7\) The plaintiff's application for a United States patent was filed in January 1973.\(^8\)

The defendant, the Langston Division of the Molins Machine Company,\(^9\) sent two representatives to Japan in 1976 to observe the operation of the Rengo corrugator.\(^10\) By December 1977, the defendant had begun development of a corrugator that could perform instant order changes and was similar to the Rengo corrugator except that the defendant's apparatus had two, rather than three, flow paths.\(^11\) In early 1978, the defendant began soliciting orders for its instant change system.\(^12\) In August 1978, Rengo brought suit in the United States District Court for the District of New Jersey,\(^13\) alleging that Molins had infringed claims slit-scoring unit. \(\text{id}\) Finally, it is cut into box blanks of predetermined length by the rotary shear. \(\text{id}\) The plaintiff's apparatus, in contrast, was capable of diverting the paperboard to three separate pathways, thereby enabling the operator of a Rengo corrugator to achieve "instant order changes" by changing the slitting and scoring pattern without slowing down the corrugator. \(\text{id}\)

7. Id. at 557-58.
8. Rengo did not receive its American patent until August 27, 1974. \(\text{id}\) at 557.
10. 657 F.2d at 538.
11. \(\text{id}\). The defendant had begun to develop an instant change system in the mid-1970s in response to market pressures and customer demands. \(\text{id}\).
12. \(\text{id}\).

The defendant denied infringement and filed a counterclaim seeking a judgment that the plaintiff's patent was invalid for obviousness under 35 U.S.C. § 103 (1976) and indefiniteness under 35 U.S.C. § 112 (1976). No. 78-2000, slip op. at 1-2 n.2.

At the close of the plaintiff's case, the defendant moved to dismiss the plaintiff's patent infringement claim, arguing that the plaintiff failed to establish that the defendant had actually violated 35 U.S.C. § 271(a) prior to the initiation of the lawsuit. \(\text{id}\). slip op. at 13-14. Specifically, Molins contended that it had done no more than advertise and solicit orders for its instant change system when Rengo filed its complaint and that this did not constitute a "sale" in violation of § 271. \(\text{id}\). slip op. at 13-15. The district court concluded that it could assert jurisdiction over the action on the basis of the defendant's counterclaim since one who has a "reasonable and well grounded fear" that he is vulnerable to an action for patent infringement may bring an action for declaratory judgment before he actually manufactures, uses or sells the potentially infringing device. \(\text{id}\). slip op. at 16 n.29b, 17.
and 24 of the '502 patent.\textsuperscript{14} The district court found that the Japanese rather than the American patent applications established the date of invention\textsuperscript{15} and held that the '502 patent was invalid for obviousness.\textsuperscript{16}

On appeal, the United States Court of Appeals for the Third


\textsuperscript{15} Id. slip op. at 26. In determining whether the '502 patent was invalid for obviousness, the court was faced with the critical threshold question of whether the plaintiff was entitled to claim the date of its Japanese application as the reference point for the analysis of the prior art. For a discussion of the Third Circuit's resolution of this issue, see note 95 infra. The defendant argued that the foreign applications were not entitled to priority since the plaintiff's omission of certain circuitry diagrams from the specifications did not comport with the disclosure requirements of 35 U.S.C. §112 (1976). Rengo Co. v. Molins Mach. Co., No. 78-2000, slip op. at 21 (D.N.J. July 31, 1980).

For the disclosure requirements of §112, see note 95 infra. The district court noted that the "enabling disclosure" requirement of §112 must be evaluated in terms of the level of skill in the pertinent art. No. 78-2000, slip op. at 22. The court further noted that the level of skill in the Rengo case was very high since those involved in the corrugator industry generally have a degree in engineering and a familiarity with corrugator systems. Id. slip op. at 23. Thus, the district court concluded that because the disclosures in Rengo's Japanese patent would make it possible for one skilled in the pertinent art to make and use the invention without "extensive experimentation" or "inventive effort," the requirements of §112 had been satisfied. Id.

\textsuperscript{16} Rengo Co. v. Molins Mach. Co., No. 78-2000, slip op. at 33 (D.N.J. July 31, 1980). In deciding that the Rengo patent was invalid for obviousness, the district court initially noted that the obviousness of a patent must be determined on the basis of §103 (1976). Id. slip op. at 18. For the provisions of §103, see note 43 and accompanying text infra. In applying §103, the court must employ the "factual inquiries established by the Supreme Court. No. 78-2000, slip op. at 18, citing Graham v. John Deere Co., 383 U.S. 1 (1966).

For a discussion of Graham, see notes 45-48 and accompanying text infra. In making the factual inquiries required by Graham, the district court examined the prosecution history of the Rengo patent and discussed five patents of record considered by the Examiner as well as seven other patents that the defendant alleged had not been considered by the Patent Office prior to issuing the '502 patent. No. 78-2000, slip op. at 26-29. The court found that all of the component elements of the Rengo patent appeared in the prior art. Id. slip op. at 30. The plaintiff argued that since its device was capable of instant order changes, the combination of these elements created a patentable improvement over the prior art. The court rejected this argument and noted that "the inquiry to be made is whether the combination produces a 'nonobvious synergistic result' in which 'the whole in some way exceeds the sum of its parts.'" Id. (citation omitted). The court concluded that "the difference between the prior art and the claims in suit would have been obvious to a person having ordinary skill in art in 1972." Id. In reaching this conclusion the court declined to consider the "secondary factors" that were described in Graham v. John Deere Co., 383 U.S. 1 (1966). Id. slip op. at 32. For a description of these secondary factors, see note 48 and accompanying text infra.

The court also stressed that it was significant that the patent in the instant case was a combination patent since the Third Circuit, in Hadco Prod., Inc. v. Walter Kidde & Co., 462 F.2d 1265 (3d Cir.), cert. denied, 409 U.S. 1023 (1972), had indicated that combination patents should be scrutinized with special care. No. 78-2000, slip op. at 18-19, citing Hadco Prods., Inc. v. Walter Kidde & Co., 462 F.2d 1265 (3d Cir.), cert. denied, 409 U.S. 1023 (1972).
Circuit,\(^{17}\) while agreeing with the district court that the plaintiff could assert the Japanese filing date as the date of invention,\(^{18}\) vacated and remanded,\(^{19}\) holding that the synergism standard should not be used to determine the validity of a combination patent. *Rengo Co. v. Molins Machine Co.*, 657 F.2d 535 (3d Cir. 1981), cert. denied, 50 U.S.L.W. 3402 (1981).

Article I, section eight of the United States Constitution gives Congress the power to issue patents.\(^{20}\) In enacting the Patent Act of 1793,\(^{21}\) Congress established two criteria for patentability: novelty and utility.\(^{22}\) In 1851, a third criteria for patentability, “invention,” was mandated by the United States Supreme Court in *Hotchkiss v. Greenwood.\(^{23}\) In *Hotchkiss*, the Court held that a patent for a door knob made of porcelain or clay rather than the conventional materials of wood

\(^{17}\) The case was heard by Circuit Judges Adams and Garth and Judge Dumbauld of the United States District Court for the Western District of Pennsylvania, sitting by designation. Judge Adams wrote the opinion of the court and Judge Dumbauld filed a concurring opinion.

\(^{18}\) 657 F.2d at 550.

\(^{19}\) Id. at 546.

\(^{20}\) The Constitution provides that “[t]he Congress shall have the power . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” U.S. Const. art. I, § 8, cl. 8. The Supreme Court has observed:

> The clause is both a grant of power and a limitation. This qualified authority, unlike the power often exercised in the sixteenth and seventeenth centuries by the English Crown, is limited to the promotion of advances in the “useful arts.” It was written against the backdrop of the practices—eventually curtailed by the Statute of Monopolies—of the Crown in granting monopolies to court favorites in goods or businesses which had long before been enjoyed by the public.


\(^{22}\) Act of February 21, 1793, ch. 11, 1 Stat. 318 (1793). In the 1793 Act, Congress provided that any American citizen who had invented “any new and useful art, machine, manufacture or composition of matter” was entitled to apply for a patent. 1 Stat. at 319. Although this Act referred to inventions and inventions, it was generally interpreted as requiring only novelty and utility for a patent. See *Graham v. John Deere Co.*, 383 U.S. 1, 10 (1965); Fenton, *Combination Patents and Synergism: Must 2 + 2 = 5?*, 37 Wash. & Lee L. Rev. 1206, 1208 (1980). The first patent law was enacted on April 10, 1790 in the second session of the first Congress of the United States. See 1951 Hearings, supra note 21 (statement of P.J. Federico); S. Rep. No. 1979, supra note 21, at 2996.

\(^{23}\) 52 U.S. (11 How.) 248 (1851).
or metal was invalid for lack of invention. In so doing, it established the rule that "unless more ingenuity . . . were required . . . than were possessed by an ordinary mechanic acquainted with the business, there was an absence of that degree of skill and ingenuity which constitute essential elements of invention."

The Supreme Court adhered to the invention standard for the next one hundred years despite its lack of precision and inconsistent application by the lower courts. As early as 1891, the Supreme Court acknowledged the difficulty of defining "invention." In attempting to apply the invention standard in subsequent years, the Court utilized the imprecise but increasingly strict rubrics of "intuitive genius" and "flash of creative genius."

24. Id. at 262.
25. Id. at 267.
26. See Fenton, supra note 22, at 1209 n.25; Note, Patentability of Mechanical Combinations: A Definition of Synergism, 57 Tex. L. Rev. 1043, 1045 (1979). See also Republic Indus., Inc. v. Schlage Lock Co., 592 F.2d 963, 967 (7th Cir. 1979).
27. See McClain v. Ortmary, 141 U.S. 419, 427 (1891) (invention "cannot be defined in such manner as to afford any substantial aid in determining whether a particular device involves an exercise of the inventive faculty or not").
28. Several commentators have suggested that by the 1930's and 1940's courts used the invention standard to impose increasingly severe standards of patentability. See Note, Sakaida v. Ag Pro, Inc.: Combination Patents Now Require Synergistic Effects, 15 Hous. L. Rev. 157, 160 n.34 (1977); Note, supra note 26, at 1046. For instance, one commentator noted that while in the 1920's courts found 30% to 40% of the patents in infringement cases to be valid, in 1942 courts found only 10% of litigated patents to be valid. See Note, supra note 28, at 160 n.34.
29. Potts v. Creager, 155 U.S. 597, 607-08 (1895). The Court found a patent for a clay disintegrator valid after noting that it often requires as acute a perception of the relation between cause and effect, and as much of the peculiar intuitive genius which is a characteristic of great inventors, to grasp the idea that a device used in one art may be made available in another, as would be necessary to create the device de novo.
Id. at 607-08.
30. Cuno Eng' r Corp. v. Automatic Devices Corp., 314 U.S. 84, 91 (1941). Another problem with the invention standard was that the Patent and Trademark Office tended to ignore it, adhering instead to a more liberal standard of patentability. See Fenton, supra note 22, at 1209. The Supreme Court was critical of this leniency: "We have observed a notorious difference between the standards applied by the Patent Office and by the courts. While many reasons can be adduced to explain the discrepancy, one may well be the free rein often exercised by Examiners in their use of the concept of 'invention.'
Application of the invention standard to combination patents proved especially difficult.\(^{31}\) In the 1873 case of *Hailes v. Van Wormer*,\(^{32}\) the Court articulated general guidelines for determining when a combination consisting of old, well-known elements was an invention for patent purposes.\(^{33}\) The Court concluded that a combination of old elements could constitute an invention only if the combination created a new and different result.\(^{34}\) In subsequent cases,\(^{35}\) the principles articulated in *Hailes* were reduced to the rule that the mere aggregation of well-known parts that failed to produce a new or different effect was not a patentable invention.\(^{36}\)

\(^{31}\) See Note, *Synergism Fails to Add Up: Republic Industries, Inc. v. Schlage Lock Co.*, 41 U. Prrr. L. Rev. 761, 765 (1980). A combination patent is a patent “issued for a device comprised solely of old elements known to those skilled in the art.” *Id.* at 762 n.5. For a discussion of the difficulty in distinguishing a combination patent from other patents, see note 91 infra.

\(^{32}\) 87 U.S. (20 Wall.) 353 (1873).

\(^{33}\) *Id.* at 368. The device at issue in *Hailes* combined the best elements of a reservoir stove with those of a retractible-draft stove to create an improved self-feeding stove. *Id.* at 367-68.

\(^{34}\) *Id.* at 374. The Court concluded that the plaintiff’s patent lacked invention. *Id.* It also found that because the defendants’ combination of well-known parts did not create a new or different result, their device was not an invention and thus could not infringe the plaintiff’s patent. *Id.* at 372. In reaching these conclusions, the Court established the following rule for deciding whether a combination patent possessed the requisite inventiveness:

> The results must be a product of the combination, and not a mere aggregate of several results each the complete product of one of the combined elements. . . . No one by bringing together several old devices without producing a new and useful result the joint product of the elements of the combination and something more than an aggregate of old results, can acquire a right to prevent others from using the same devices.

*Id.* at 368.


\(^{36}\) In 1881, the Court found a combination patent for a plastic mold for making crucibles invalid because none of the well-known elements of this patent “contributes to the combined result any new feature” or “adds to the combination anything more than its separate independent effect.” Pickering v. McCullough, 104 U.S. 310, 318 (1881). Thirty years later, the Court invalidated a combination patent for a gearing device to improve the wringing operation of a washing machine because “[n]o new function is evolved from this combination; the new result, so far as one is achieved, is only that which arises from the well-known operation of each one of the elements.” Grinnell Washing Mach. Co. v. E.E. Johnson Co., 247 U.S. 426, 433 (1918). Finally, in 1938 the Court concluded that a combination patent for lubricating bearings that consisted of well-known parts was invalid because “[t]he mere aggregation of a number of old parts or elements which, in the aggregation, perform or produce no new or different function or operation than that theretofore performed or produced by them, is not patentable invention.” Lincoln Co. v. Stewart-Warner Corp., 303 U.S. 545, 549 (1938). See also Great Atl. & Pac. Tea Co. v. Supermarket Equip. Corp., 340 U.S. 147 (1950). The Court noted that in the course of attempting to decide when a combination patent displayed the requisite invention, “the term ‘aggregation’ came to signify its absence.” *Id.* at 151.
In 1950, the Court attempted to establish a more definite standard of invention for combination patents in *Great Atlantic and Pacific Tea Co. v. Supermarket Equipment Corp.* 37 by determining that "only when the whole in some way exceeds the sum of its parts is the accumulation of old devices patentable." 38 This definition of patentability has subsequently been described as "synergism." 39 The Court emphasized that this was a rigorous test, and it cautioned that "[c]ourts should scrutinize combination patent claims with a care proportioned to the difficulty and improbability of finding invention in an assembly of old elements." 40

Soon after the Court handed down the *Great Atlantic* decision, Congress revised and codified American patent law in the Patent Act of 1952. 41 This Act retained the requirements of novelty and utility for patentability, 42 but in section 103 Congress substituted a requirement of "nonobviousness" for "invention." 43 Under this standard, a

37. 340 U.S. 147 (1950). The Court observed that while it had sustained combination patents in the past, it had never elaborated a consistent test for these patents. *Id.* at 150-51.
38. *Id.* at 152.
39. *See*, e.g., Note, *supra* note 31, at 766. Courts have found synergism an elusive term to define. Two of the most common definitions of synergism are that the combination as a whole displays an effect greater than the sum of its parts and that one of the elements functions differently in combination than it does when used alone. Republic Indus., Inc. v. Schlage Lock Co., 592 F.2d 963, 969-70 (7th Cir. 1979). For other judicial definitions of synergism, see *id.* at 970 n.29.
40. 340 U.S. at 152. Justice Douglas emphasized that this strict standard of patentability reflected the constitutional limitations on the granting of patents. *Id.* at 154 (Douglas, J., concurring). For a discussion of the constitutional power to issue patents and the limitations on that power, see note 20 supra.
43. *See* 35 U.S.C. § 103 (1976). Section 103 provides:
A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.
*Id.* *See also* 1951 *Hearings, supra* note 21, at 38 (statement of P.J. Federico). During this hearing, Mr. Federico, Examiner in Chief of the United States Patent Office, noted:
Section 103 does something attempted for the first time in our statute, and that is to write down a condition which exists in the law and has existed for well over 100 years, but only by decisions of the court. . . . This section may introduce more definiteness and have some stabilizing effect, and may prevent great departures which have appeared in some cases.
patent was invalid "if the differences between the subject matter sought to be patented and the prior art [were] such that the subject matter as a whole would have been obvious at the time the invention was made." 44

Thirteen years after the enactment of section 103, the Supreme Court in Graham v. John Deere Co. 45 concluded that the statutory test of nonobviousness was a codification of the prior judicial invention standard but the court noted that "nonobviousness" was more objective and more amenable to several basic factual inquiries. 46 Specifically, the Court held that in determining whether an invention is nonobvious, courts should consider three factors: the extent of the prior art; the differences between the prior art and the claims at issue; and the level of skill in the pertinent art. 47 In addition, the Court emphasized the relevance to the nonobviousness test of such secondary considerations as


45. 383 U.S. 1 (1965). In Graham, the Court tested the validity of two patents, one for a clamp to prevent vibrating plow shanks and the other for a "hold-down" cap commonly used on insecticide bottles prior to shipment. Id. at 4-5. In the suit involving the plow shank clamp, the plaintiff, Graham, obtained a patent in 1950 (the '811 patent) for a spring clamp that was designed to enable chisel plows to move through rocky soil by absorbing the shocks that would otherwise break the plow shanks. Id. at 21. Shortly after receiving the '811 patent, Graham attempted to improve his design and he received another patent (the '798 patent) for a vibrating plow shank clamp in 1958. Graham brought suit, claiming that the defendant had manufactured devices that infringed the '798 patent. Id.

The Court applied § 103 and found both the '798 patent and the '811 patent invalid. Id. at 4-5. The Court noted that there had been a conflict between the Fifth and Eighth Circuits over the validity of the '798 patent. The Fifth Circuit found the patent valid because it produced an advantageous result with less expense. The Eighth Circuit found the patent invalid because the combination of old mechanical elements that comprised the device failed to create a new result. Id. The Graham Court concluded that both of these circuits had applied the wrong test. Id. at 4.

46. Id. at 17. In reaching its decision that § 103 was a codification of the judicial invention standard, the Court relied on the legislative history of the Act. Id. at 12-17. For a discussion of this legislative history, see note 43 supra. The Court also concluded that § 103 was not intended to lower the standard of patentability. 383 U.S. at 17. One commentator, however, has argued that § 103 rejected the rigorous patentability standards set by Great Atlantic. See Note, supra note 26, at 1048 n.39.

47. 383 U.S. at 17-18. The Court applied these factors in its analysis of the validity of the patent for the vibrating plow shank clamp. The Court first outlined the extent of the prior art by noting that five prior patents had been cited by the Patent Office in the prosecution of the '798 application. Id. at 22. It also noted that the defendants claimed that the prior art was established by four of these patents as well as by ten other patents and two prior-use spring clamp arrangements that were not of record in the '798 file wrapper. Id. The Court then compared the '798 patent to the '811 patent that had previously been issued to the plaintiff. See note 45 supra. It concluded that Graham's two patents were similar in all respects but two: 1) in the '798 patent, there was a stirrup and the hinge plate was bolted to the shank, and 2) the position of the shank and the hinge plate was reversed. 383 U.S. at 22. Graham claimed that the interchanging of the shank and hinge plate created an effect that was not disclosed in the prior art because it allowed the entire length of the shank to vibrate when under stress. Id. at 23. The Court,
commercial success, long felt but unsolved needs, and the failure of others to produce the invention that is the subject of the patent.48

Neither section 103 nor Graham set forth any special test for combination patents.49 Nonetheless, the Supreme Court has, in two post-Graham decisions, referred to the test enunciated in Great Atlantic that a combination patent should display a synergistic effect.50 In Anderson's Black Rock, Inc. v. Pavement Salvage Co.51 the Court held that a patent for a device that combined a radiant heater with a standard bituminous paver to produce a means for treating bituminous pavement was invalid for obviousness.52 The Court decided the issue of patentability on the basis of section 103 and Graham,53 but it noted that the claimant had not argued that the combination of old elements created a synergistic effect.54 Similarly, in Sakraida v. Ag Pro, Inc.55 the Supreme Court held

however, rejected the plaintiff's argument that this was a nonobvious patentable invention:

We assume that the prior art does not disclose such an arrangement as the petitioner claims in patent '798. Still we do not believe that the argument on which petitioner's contention is bottomed supports the validity of the patent. The tendency of the shank to flex is the same in all cases. If free-flexing, as petitioner now argues, is the crucial difference above the prior art, then it appears evident that the desired result would be obtainable by not boxing the shank within the confines of the hinge. The only other effective place available in the arrangement was to attach it below the hinge plate and run it through a stirrup or bracket that would not disturb its flexing qualities. Certainly a person having ordinary skill in the art, given the fact that the flex in the shank could be utilized more effectively if allowed to run the entire length of the shank, would immediately see that the thing to do was what Graham did, i.e., invert the shank and hinge plate.

Id. at 24-25.

48. 385 U.S. at 17-18. In its analysis of Graham's '798 patent, the Court did not consider these secondary considerations. See id. at 19-26.

49. See Nickola v. Peterson, 580 F.2d 898, 912 n.22 (6th Cir. 1978), cert. denied, 440 U.S. 961 (1961) (there is no statutory basis for "treating the patentability of 'combination' inventions differently in law from the patentability of some other type of invention undescribed and undefined").

50. See notes 37-40 and accompanying text supra.


52. Id. at 59, 62-63. The Court concluded that the "combination was reasonably obvious to one with ordinary skill in the art." Id. at 60.

53. Id.

54. Id. at 59. Specifically, the Court observed that a "combination of elements may result in an effect greater than the sum of the several effects taken separately. No such synergistic result is argued here." Id. at 61. The Court also cited the requirement articulated in pre-1952 cases that a combination patent must display a "new or different function to be valid." Id. at 60-61, citing Great Atl. & Pac. Tea Co. v. Supermarket Equip. Corp., 340 U.S. at 147.

a patent for a water flush system that removed animal wastes from a barn floor invalid for obviousness after analyzing the prior art as required by *Graham.* The Court, however, cited *Great Atlantic* in support of its statement that a combination patent should be scrutinized with special care. It also noted, in response to the court of appeals' finding of patent validity, that the water flush system displayed no synergistic effect.

The federal courts of appeals have split on the issue of whether *Anderson's-Black Rock* and *Sakraida* require a showing of synergism before a combination patent will be upheld. The Fifth and the Eighth

56. *Id.* at 274.
57. *Id.* As part of its analysis of the prior art, the Court reached back to ancient mythology and examined the labors of Hercules to support its conclusion that "systems using flowing water to clean animal wastes from barn floors have been familiar on dairy farms since ancient times." *Id.* at 275 n.1.
58. *Id.* at 281.
59. *Id.* at 282. The substantive history of *Sakraida* may offer some insight regarding the Supreme Court's discussion of synergism. The Fifth Circuit's decision that the water flush system patent was valid rested on two conclusions. *Id.* at 280-82. First, the court of appeals concluded that the district court erred in finding the patent obvious under § 103 and under the three-pronged *Graham* test. *Id.* at 280. Second, the Fifth Circuit found the patent valid because it displayed synergism. *Id.* at 282. Immediately after stating the Fifth Circuit's conclusions, the Court referred to synergism as follows:

We cannot agree that the combination of these old elements to produce an abrupt release of water directly on the barn floor from storage tanks or tools can properly be characterized as synergistic, that is 'resulting in an effect greater than the sum of the several effects taken separately.' Rather, this patent simply arranges old elements with each performing the same function it had been known to perform, although perhaps producing a more striking result than in previous combinations. Such combinations are not patentable under standards appropriate for a combination patent.

*Id.* at 282 (citations omitted).

60. For general background on this split among the circuits, see *Fenton,* supra note 22, at 1215-19; Note, *To Determine Whether a Device That Combines Well-Known Elements None of Which Performs Any New or Different Function in the Combination, Is Obvious to a Man of Ordinary Skill, A Court Should Apply the Graham Test and Not a Synergy Test,* 48 GEO. WASH. L. REV. 110, 116-17 (1979); Note, *supra* note 31, at 782.

61. See *Whiteley v. Road Corp.,* 624 F.2d 698, 700 (5th Cir. 1980) (combination patent for a boat trailer guide and support mechanism held invalid for obviousness under § 103 because it was "not viable as a combination patent made up of old and known elements which are put together in such a fashion as to produce an unexpected, unusual or synergistic result"). *See also John Zink Co. v. National Airoil Burner Co.,* 613 F.2d 547 (5th Cir. 1980). In *John Zink,* the Fifth Circuit stated that when a patent involves a combination of elements known in the prior art, "[t]he combined elements must perform a new or different function, produce 'unusual or surprising consequences,' or cause a synergistic result." *Id.* at 551, quoting *Great Atl. and Pac. Tea Co. v. Supermarket Equip. Corp.,* 340 U.S. at 152. Although the Fifth Circuit quoted this synergism language with approval, it found a combination patent for a flare stack gas burner to be valid only after an extensive analysis of the prior art which supported its holding that this patent "would not have been obvious to one skilled in the art at the time of the invention." 613 F.2d at 555. After
Circuits have adopted the synergism standard when analyzing the validity of combination patents, but these circuits have not specified whether synergism is an alternative or a supplemental test to Graham for determining patent validity. The Seventh Circuit emphatically rejected the synergism test in Republic Industries, Inc. v. Schlage Lock Co., and that decision has been followed by the Second and Tenth Circuits.

its analysis of the prior art, the Fifth Circuit did not specifically report any synergistic effects of the patent at issue. See id. at 554-55. It is therefore unclear whether synergism is an alternative or a supplemental test for obviousness in the Fifth Circuit.

62. See Reinke Mfg. Co. v. Sidney Mfg. Co., 594 F.2d 644 (8th Cir. 1979) (combination patents for circular irrigation ditch held invalid for obviousness). Although in Reinke the court analyzed the prior art extensively in accordance with Graham, it noted that "if the claims cover a structure that combines old and well known elements, one of the factors this court must look for in determining whether the patents meet section 103 requirements is synergism." Id. at 648. The Reinke court thus suggested that synergism is a supplemental test to the Graham test.

63. See notes 61 & 62 supra.

64. 592 F.2d 963 (7th Cir. 1979). In Republic Industries, the court found a patent for a fire door closer invalid because it was clearly obvious in light of the prior art. In rejecting the synergism standard, the Seventh Circuit concluded that:

Neither Sakraida nor Black Rock can be cited as prescribing some other, special test for the evaluation of combination claims. Nowhere in these two decisions did the Court hold a synergistic effect to be a necessary condition of patentability; nor did it hold that to (sic) synergism supersedes a finding of nonobviousness under the Graham analysis. To the contrary, each case quoted Graham with approval.

Id. at 969. The court supported its conclusion regarding the synergism test with at least five arguments: 1) since nearly all mechanical devices consist of a combination of old elements, nothing would be patentable; 2) synergism has proven to be a particularly elusive term to define; 3) in a literal sense, synergism can never exist in mechanical inventions if synergism is defined as meaning the whole is greater than the sum of its parts; 4) in enacting § 103, Congress established nonobviousness and not synergism as the test for patentability; and 5) while synergism focuses on the result of a combination, § 103 requires that the obviousness of an invention be determined "at the time invention was made to a person having ordinary skill in the art." Id. at 969-71. Although the Seventh Circuit unambiguously rejected synergism in Republic Industries, it is unclear whether it also decided that combination patents should no longer be subject to special scrutiny by the courts. See id. at 972 n.25. The court indicated that neither Sakraida nor Black Rock could be interpreted as setting special standards for combination claims, but the court also stated that it would maintain the high standard of patentability set forth in Black Rock. Moreover, it quoted with approval the language of the Supreme Court that "courts should scrutinize combination patent claims with a care proportionate to the difficulty and improbability of finding [a patentable] invention in an assembly of old elements." Id. at 972 n.25, quoting Great Atl. & Pac. Tea Co. v. Supermarket Equip. Corp., 340 U.S. at 152.

65. See Champion Spark Plug Co. v. Gyromat Corp., 603 F.2d 361, 372 (2d Cir. 1979), cert. denied, 445 U.S. 916 (1980) (citing Republic Industries in support of its statement that Sakraida did not overrule the statutory test for nonobviousness established by § 103 and interpreted by Graham).
Circuits. The decisions of the Sixth and Ninth Circuits have been ambiguous in their stances towards the synergism test.

The Third Circuit's position on synergism has also lacked clarity. In an early interpretation of section 103, the Third Circuit, in R.M. Palmer Co. v. Ludens, Inc. analyzed design combination patents for four fanciful chocolate animal molds. After only a cursory survey of the prior art, the court focused on the result of the combination and found the patents valid and nonobvious, since the patentee had created "a pleasing impression and substantially different aesthetic effect." In subsequent combination patent cases, the Third Circuit and district courts within the circuit continued to analyze the prior art as required by section 103 and Graham, but frequently supplemented these criteria.

66. See Plastic Container Corp. v. Continental Plastics of Okla., Inc., 607 F.2d 885, 904-05 (10th Cir. 1979), cert. denied, 444 U.S. 1010 (1980) (the Supreme Court in Graham did "not require that, for a combination of known elements to be nonobvious, the result achieved by the combination must be synergistic").

67. See Smith v. Acme Gen. Corp., 614 F.2d 1086 (6th Cir. 1980). In Smith, the Sixth Circuit attempted to reconcile synergism with the Graham test:

We agree that definitional deficiencies, theoretical flaws and judicial application of synergism have contributed to muddy the patent waters. It seems apparent from the Black Rock and Sakraida decisions that the Supreme Court has recognized synergism to a limited extent as a term symbolizing the more stringent standard for combination patent claims. Unquestionably this standard was not meant to reduce emphasis on the Graham analysis for obviousness under § 103. If we understood synergism to require such, synergism would be tossed aside immediately. Rather, it is merely a symbolic reminder of what constitutes nonobviousness when a combination patent is at issue.

Id. at 1095.

For the Ninth Circuit's position on synergism, see Palmer v. Orthokinetics, Inc., 611 F.2d 316, 324 n.17 (9th Cir. 1980) ("without rejecting the 'synergism test,' we conclude that a Graham analysis is necessary in this case").

68. See notes 69-77 and accompanying text infra.

69. 236 F.2d 496 (3d Cir. 1956).

70. Id. at 497. The plaintiff's design patents were for molds to make chocolate rabbits, ducks, squirrels and lambs. Id. Unlike the traditional realistic forms, the plaintiff's molds produced animals with exaggerated features that were "ornamental caricatures." Id.

71. Id. at 501.

72. See, e.g., United States Expansion Bolt Co. v. Jordan Indust., Inc., 488 F.2d 566 (3d Cir. 1973); Hadco Prods., Inc. v. Walter Kidde & Co., 462 F.2d 1265 (3d Cir.), cert. denied, 409 U.S. 1025 (1972); Novelart Mfg. Co. v. Carlin Container Corp., 365 F. Supp. 58 (D.N.J. 1973); Allen-Bradley Co. v. Air Reduction Co., 273 F. Supp. 950 (W.D. Pa. 1967), aff'd per curiam, 391 F.2d 282 (3d Cir. 1968). Three lines of analysis concerning combination patents have emerged in the Third Circuit. In one line of cases, the district courts and the Third Circuit have employed synergistic language to suggest that combination patents should be held to a higher standard without expressly holding that the synergism standard should apply. See note 73 infra. In a second, more ambiguous line of cases, courts in the Third Circuit have stated that the tripartite Graham analysis was the accepted test for nonobviousness under § 103.
with statements that combination patents should be held to stricter standards \(^73\) or with synergistic phraseology.\(^74\) In a recent combination patent case, Sims v. Mack Truck Corp.,\(^75\) the Third Circuit expressed its reluctance to commit itself on the synergism issue.\(^76\) In applying the Graham test to invalidate a patent for a front discharge concrete mixer, the court nonetheless suggested that a combination patent should be subjected to special scrutiny.\(^77\)

Against this background, the Third Circuit in Rengo forthrightly addressed the issue of whether a combination patent must display a synergistic effect to be valid.\(^78\) In its analysis, the Third Circuit focused on the statutory requirements for patentability, Supreme Court precedent and the policy underlying patent law.\(^79\)

First, the court noted that in amending the patent laws of 1952, Congress imparted to the invention requirement the new rubric of nonobviousness.\(^80\) The court emphasized that in an effort to achieve

but these courts have also referred specifically to the synergism test, thereby suggesting that it might be an alternative or a supplement to the Graham test. See note 74 infra. Finally, in a case involving a design patent for a Tudor style lighting fixture, the Third Circuit specifically identified the higher standard for combination patents as the synergism test. See Hadco Prods., Inc. v. Walter Kidde & Co., 462 F.2d 1265, 1269-70 (3d Cir.), cert. denied, 409 U.S. 1023 (1972).

\(^73\) See Gould-National Batteries, Inc. v. Gulton Indus., Inc., 361 F.2d 912, 915 (3d Cir. 1966) (finding a patent for an electrolytic cell invalid since, as an aggregation of known elements performing no new functions, it did not "meet the rigid test of patentability"); Sperry Rand Corp. v. Knapp-Monarch Co., 307 F.2d 344, 347 (3d Cir. 1962) (noting that mere aggregations of old elements that perform no new functions "do not meet the rigid test of patentable invention"); Aluminum Co. v. Amerola Prods. Corp., 408 F. Supp. 1352, 1357 (W.D. Pa. 1976), aff'd, 552 F.2d 1020 (3d Cir. 1977) (a combination patent is invalid if it is a mere "aggregation of old elements assembled with only mechanical skill"); Leesona Corp. v. Seigle, 281 F. Supp. 575, 578 (E.D. Pa. 1968) (in order for a combination patent to be valid, "the elements of combination must have some new functional relationship, accomplishing a new and not readily anticipated result").

\(^74\) See United States Expansion Bolt Co. v. Jordan Indus., Inc., 488 F.2d 506, 571-72 (3d Cir. 1973) (Supreme Court has stated that a patent may be valid if it creates a synergistic effect, but the patent at issue did not display synergism). See also Novelart Mfg. Co. v. Carlin Container Corp., 363 F. Supp. 58, 73 (D.N.J. 1973) (patent at issue created no synergistic effect).

\(^75\) 608 F.2d 87 (3d Cir. 1979), cert. denied, 445 U.S. 930 (1980).

\(^76\) 608 F.2d at 98. The court concluded that "[i]n view of our holding that the patent at issue fails to meet the test for obviousness set down by Graham, we need not rule on the question whether a finding of synergism is a precondition to validity in all such cases." Id. (footnote omitted). The court also noted that the circuit courts were split on this issue and that there was language in recent Supreme Court decisions "suggesting that combination patents, to be valid, must produce a synergistic effect." Id.

\(^77\) Id. at 90-91, 98.

\(^78\) 657 F.2d at 536-37.

\(^79\) Id. at 540-47. See notes 80-95 and accompanying text infra.

\(^80\) 657 F.2d at 542. See notes 43-44 and accompanying text supra.
uniformity, Congress intended that the single standard of nonobviousness apply to all patent applications.\(^{81}\)

Turning to recent Supreme Court decisions, the court concluded that Graham\(^ {82}\) had established the basic factual inquiries for deciding whether a claimed invention is obvious.\(^ {83}\) According to the Rengo court, Graham imposed a unitary standard for patent evaluation and abolished the negative rules of invention.\(^ {84}\) Moreover, the court stated that Graham explicitly rejected the requirement that a valid patent must reveal "a new or different result."\(^ {85}\)

In analyzing more recent Supreme Court cases, the Third Circuit conceded that the Supreme Court had invoked pre-1952 language in Anderson's-Black Rock and in Sakraida.\(^ {86}\) While noting that both of these decisions discussed whether the patents at issue displayed a synergistic result,\(^ {87}\) the Rengo court stressed that the Supreme Court's findings of patent invalidity in both cases hinged on a Graham analysis of the prior art.\(^ {88}\) Thus, the Third Circuit concluded that the primacy of the Graham test was unaffected by Anderson's-Black Rock and Sakraida.\(^ {89}\) The court did state, however, that while Anderson's-Black Rock and Sakraida "do not compel adoption of a synergism requirement, neither do these decisions by their terms preclude such a result."\(^ {90}\)

\(^{81}\) 657 F.2d at 541, 544, citing S. Rep. No. 1979, supra note 21; 1951 Hearings, supra note 21.

\(^{82}\) For a discussion of Graham, see notes 45-49 and accompanying text supra.

\(^{83}\) Id. at 542. The Rengo court noted that in Graham the Supreme Court had examined the conflicting approaches of the Fifth and Eighth Circuits in evaluating the validity of a combination patent. \textit{Id.} While the Fifth Circuit had concluded that if the invention produced the same result in a cheaper manner it was patentable, the Eighth Circuit had required a "new or different" result before a patent should be granted. \textit{Id.} In Graham, the Third Circuit concluded, the Supreme Court rejected both of these approaches by directing "that courts should inquire solely into whether the improvement in question would have been obvious to one skilled in the art." \textit{Id.}

\(^{84}\) 657 F.2d at 542-43.

\(^{85}\) Id. at 543. The Rengo court observed that "[n]otwithstanding Graham, the Supreme Court, in two more recent decisions, has resorted to language which evokes the rule of \textit{Hicks v. Kelsey and A & P Tea Co. v. Supermarket Corp.}" \textit{Id.}

\(^{86}\) \textit{Id.}

\(^{87}\) \textit{Id.}

\(^{88}\) \textit{Id.} at 543-44. The court emphasized that although there may have been references to synergism in Black Rock, the Supreme Court actually applied the Graham test and thereby reaffirmed its principles. \textit{Id.} at 543. For a discussion of the Graham analysis in Black Rock and Sakraida, see notes 53 & 57 and accompanying text supra. In explaining the Sakraida decision, the Third Circuit suggested that the Supreme Court had employed synergistic language only as a response to the Fifth Circuit's holding that the combination patent was valid because it displayed synergism. 657 F.2d at 543-44. The Seventh Circuit expressed a similar view in Republic Industries. See note 64 supra.

\(^{89}\) 657 F.2d at 543-44.

\(^{90}\) \textit{Id.} at 544.
The Third Circuit buttressed its rejection of the synergism test with many of the policy considerations that the Seventh Circuit had emphasized in Republic Industries and maintained that the synergism test should be abandoned as an analytically imprecise standard. Finally, the Third Circuit endorsed the Seventh Circuit’s view that a synergism standard incorrectly stresses the result of a combination rather than the creation of a combination. The Rengo court therefore held that synergism was not a prerequisite for a valid combination patent, and that a combination patent should be judged by the same standards as any other patent.

91. Id. at 544-46. For a discussion of these policy concerns, see note 64 supra. Citing Judge Learned Hand’s opinion in 1935, the Rengo court pointed out that while synergism is presumably a characteristic of combination patents, it is often difficult to distinguish a combination patent from other patents since every invention is a combination of old elements. Id. at 545. Judge Hand, in a frequently cited passage, observed that

All machines are made up of the same elements; rods, pawls, pitmans, journals, toggles, gears, cams, and the like, all acting their parts as they always do and always must. All compositions are made of the same substances, retaining their fixed chemical properties. But the elements are capable of an infinity of permutations, and the selection of that group which proves serviceable to a given need may require a high degree of originality. It is that act of selection which is the “invention” and it must be beyond the capacity of common-place imagination.


On a more empirical level, the Third Circuit maintained that synergism can rarely, if ever, occur in a mechanical patent. 657 F.2d at 545. Therefore, the court concluded, virtually all mechanical combinations would be unpatentable if courts required synergism. Id.

92. 657 F.2d at 544-45. The court emphasized that the term synergism has been notoriously difficult for courts to define or to apply consistently. Id. at 544 n.20.

93. Id. at 545-46. The Rengo court emphasizes that under § 103 courts should focus on whether the decision to combine certain elements was obvious at the time of invention. Id. It concluded that the synergism test, in contrast, improperly highlighted the result of the combination by focusing on the performance of the elements in combination. Id.

94. Id. at 546. The Rengo court stated:

Because the synergism requirement is neither mandated by the Supreme Court nor commended by independent consideration, we decline to adopt it as a prerequisite to the validity of a combination patent. Instead, we regard the three-part test of Graham as applicable to combination, as well as to other patents: to ascertain the non-obviousness of a patent, a court should look to the prior art, to the differences between the claimed invention and the prior art, and to the level of skill in the industry, with appropriate weight accorded to “secondary considerations.”

Id.

95. Id. The court noted that “[i]n contrast to the district court, we doubt that the Supreme Court’s recent decisions impose distinctive barriers to the validity of combination patents.” Id. at 544 (footnote omitted). Judge Adams suggested that the mere use of “synergistic aphorisms” would not have been
Judge Dumbauld concurred with the disposition of the case, although he indicated that he would have been willing to affirm the district court's holding on the patent validity issue, since he characterized the district court's references to synergism as more rhetorical than substantive. An additional but related issue considered by the Rengo court was whether Rengo's Japanese patent application should be accorded priority. The court first considered the requirements of §119 which provides in relevant part:

An application for patent for an invention filed in this country by any person who has, or whose legal representatives or assigns have, previously regularly filed an application for a patent for the same invention in a foreign country which affords similar privileges in the case of applications filed in the United States or to citizens of the United States, shall have the same effect as the same application would have if filed in this country on the date on which the application for patent for the same invention was first filed in such foreign country, if the application in this country is filed within twelve months from the earliest date on which such foreign application was filed.


The court then analyzed the provisions of §112 which provides in relevant part:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Id. § 112.

Finally, the court held that §119 incorporates the requirements of §112 for a valid patent application. 657 F.2d at 548. The court reasoned that if a foreign application did not have to meet the requirements of §112, an inventor could file a foreign application for an unperfected invention and use the remaining year to perfect the invention before he had to file an American application. Id. The Third Circuit therefore stated that an inventor could claim his foreign application as the basis for an analysis of the obviousness of his invention only if the foreign application satisfies the enablement requirement of §112. Id. at 548-50. Because Rengo's Japanese patent satisfied these requirements, the court concluded that Rengo could assert its Japanese filing date. Id.

96. 657 F.2d at 553 (Dumbauld, J., concurring).

97. Id.

98. For a discussion of Republic Industries, see note 64 and accompanying text supra. Not only did both courts reach the same conclusions, but the rationale of Rengo paralleled that of the Seventh Circuit in Republic Industries.
by Supreme Court precedent. In interpreting section 103, Judge Adams carefully noted that the synergism standard, with its focus on the result of the combination, appeared inconsistent with the statutory determination of a combination's obviousness at the time of invention. In addition, it is suggested that Judge Adams correctly emphasized that the analytical defects of the synergism test encouraged inconsistent application of the patent laws, a conclusion that is amply supported by even a cursory analysis of the numerous decisions by courts in the Third Circuit that have blended synergistic phraseology with a Graham analysis.

While the Third Circuit reached a sound conclusion in rejecting synergism, the court's analysis of the district court's decision in Rengo suffered from a lack of clarity that may create further confusion. The Rengo court characterized the district court's analysis in three ways: 1) the Third Circuit stated that the district court applied the Graham test; 2) it suggested that the district court "supplemented" its Graham analysis with a synergistic analysis; and 3) it concluded that the district court sporadically "substituted" synergism for a Graham analysis. Although the Third Circuit stated that the district court erred to the extent that it deviated from Graham, it is submitted that these varying characterizations of the district court's analysis obfuscate the precise nature of that deviation. This lack of clarity is particularly troublesome since the district court found the patent invalid for obviousness after a detailed, painstaking analysis of the prior art, the difference between that art and the '502 patent, and the level of skill in that art as required by Graham. Admittedly, the lower court supplemented this

99. 657 F.2d at 542-43, 545, 546.
100. See 657 F.2d at 545. For the text of § 103, see note 43 supra. Judge Adams perceptively buttressed this conclusion with the insight of Learned Hand that "it is the art of selection which is the 'invention'" rather than the results of the combination. 657 F.2d at 545, citing B.G. Corp. v. Walter Kidde & Co., 79 F.2d 20, 22 (2d Cir. 1935). For a more complete quotation of this influential observation by Learned Hand, see note 91 supra.
101. See 657 F.2d at 544-45.
102. For a discussion of the varied analyses of patent validity by courts in the Third Circuit, see notes 69-77 and accompanying text supra.
103. See 657 F.2d at 546. It is submitted that the Rengo court engaged in a thorough analysis of the ramifications of a synergistic approach and provided compelling reasons for rejecting the synergism test. See id. at 540-46.
104. Id. at 542. The court stated: "In the case at hand, the district court adhered to the Graham decision by identifying the scope of the prior art, the difference between the art and the '502 patent, and the relevant level of skill."
105. Id.
106. Id. at 546.
107. Id.
108. For a discussion of the district court's analysis, see note 16 supra.
analysis with synergistic verbiage, but the *Rengo* court adopted a permissive view of "synergistic aphorisms," suggesting that the use of these aphorisms, alone, would not require reversal.

Perhaps even more disturbing than the *Rengo* court's lack of precision in explaining the district court's error was the implication that a *Graham* analysis may be inadequate without an extremely detailed explanation of why the combination of elements was obvious. Specifically, the *Rengo* court criticized the district court for its failure to develop an adequate explanation of why the placement of the diverter plate between the rotary shear and the slitter-scorer unit was obvious to one skilled in the art at the time of the invention. Upon close examination, however, it can be seen that the district court carefully analyzed the level of skill in this particular industry and concluded that because it was so high, the arrangement of the diverter plate before the slitter-scorer unit was obvious. This explanation seems at least as

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109. See *Rengo Co. v. Molins Mach. Co.*, No. 78-2000, slip op. at 31 (D.N.J. July 31, 1980) (blending *Graham* prior art analysis with synergistic language to explain why the placement of the diverter plate was obvious).

110. 657 F.2d at 546. Although the court clearly stated that it declined to adopt the synergism standard "as a prerequisite to the validity of a combination patent," it tempered its rejection of synergism by suggesting that "a mere reference to synergistic aphorisms" by the district court would not have necessitated reversal of its determination that the '502 patent was invalid. *Id.*

111. *Id.*

112. *Id.*

113. *Rengo Co. v. Molins Mach. Co.*, No. 78-2000, slip op. at 22-23 (D.N.J. July 31, 1980) (the level of skill in the art of designing corrugator machinery was "very high" since the typical designer had a degree in engineering, three years experience in designing precision machinery for manufacturing paperboard and three years experience in designing pneumatic, hydraulic and electrical system). *Id.* slip op. at 22.

114. *Id.* slip op. at 29-30. The extent of the district court's analysis can best be illustrated through the following statement:

In summary, although the prior art does not teach the placement of a diverter plate upstream of the cutting and grooving tools for diverting the web to either of two vertically disposed slitter-scorer units, it does teach: (1) the alternative use of two slitting and scoring devices whether arranged in tandem or in some vertical fashion; (2) the vertical arrangement of other component parts of corrugators (e.g. cut-off machine); (3) a diverter mechanism extending from the inlet of the slitter-scorers. I find that the difference between the prior art and the claims in suit would have been obvious to a person having ordinary skill in the art in 1972, as that term has previously been defined. Each element of the combination performs in the same manner and with the same result as in the prior art machines. The placement of the diverter plate between the rotary shear and the slitter-scorer units, while having no identical antecedent in the art, would not have been an unobvious concept to a person possessing the high level of skill in the pertinent art.

*Id.* (emphasis added).

Although the district court included synergistic language in its analysis of obviousness when it noted that "each element of the combination" functioned in the "same manner" as in prior machines, it explained the obviousness in terms of the prior art as required by *Graham*.
tial as the one advanced by the Supreme Court in *Graham* when it invalidated a patent on a clamp for vibrating plow shanks because of obviousness.\(^{115}\) Since the *Rengo* court failed to give a concrete example of the kind of explanation that would suffice, it appears to have adopted a higher level of scrutiny for obviousness without providing any guidelines for its future application.

Despite these potential sources of confusion, *Rengo* has significantly clarified the Third Circuit's position on the determination of patent validity not only by rejecting synergism but also by suggesting that combination patents should not be subjected to a special test.\(^{116}\) By clearly mandating a uniform test for all patents, it has taken a step beyond the precedents set by the Supreme Court\(^{117}\) and perhaps by the Seventh Circuit.\(^{118}\) Although the Seventh Circuit was the first circuit to reject synergism, the *Republic Industries* decision seemed to suggest that combination patents should still be subjected to special scrutiny.\(^ {119}\) The *Rengo* court, in contrast, suggested that there should be no special criteria of patentability for a combination patent.\(^ {120}\)

The most obvious impact of the *Rengo* decision is that it will encourage the application of a consistent nonobviousness analysis under section 103 in place of the ambivalence that has pervaded Third Circuit opinions on this issue in the past.\(^ {121}\) Admittedly, the factual inquiries

\(^{115}\) For a discussion of the Court's application of the principles of *Graham* to the facts of that case, see notes 45 & 47 supra.

\(^{116}\) 657 F.2d at 544 & 546.

\(^{117}\) See 425 U.S. at 281. In *Sakraida*, for instance, the Supreme Court cited language from *Great Atlantic* that combination patents should be scrutinized with a special care "proportioned to the difficulty and improbability of finding invention in an assembly of old elements." *Id.*, citing *Great Atl. & Pac. Tea Co.* v. *Supermarket Equip Co.*, 340 U.S. at 152.

\(^{118}\) See note 64 supra.

\(^{119}\) See 592 F.2d at 972. The Seventh Circuit's position on whether combination patents should be subjected to special scrutiny remains unclear. In *Republic Industries*, there is language that a uniform standard should be applied when analyzing combination patents. See note 64 supra. In addition, however, the Seventh Circuit quoted with approval the Supreme Court's statement in *Great Atlantic* that combination patents should be scrutinized with special care. *Id.* at 972 n.25.

\(^{120}\) 657 F.2d at 544, 546. See note 95 and accompanying text supra. But cf. *Smith* v. *Acme Gen. Corp.*, 614 F.2d 1086, 1095 (6th Cir. 1980) (recent Supreme Court decisions suggest that combination patents be subjected to special scrutiny). In *Smith*, the Sixth Circuit apparently retreated from its earlier position that "[n]o statutory warrant appears, therefore, for treating the patentability of 'combination' inventions differently in law from the patentability of some other type of invention undescribed and undefined." *Id.*

\(^{121}\) See notes 69-77 and accompanying text supra. A desire to encourage "the development of a consistent predictable body of law under section 103" was one of the factors that induced the Seventh Circuit to reject synergism. *Republic Indus., Inc.*, 592 F.2d at 972.
mandated by Graham are not always straightforward and objective,\textsuperscript{122} but the tripartite analysis required by Graham provides more guidance for future determinations of patent validity than is offered by the vague notion of synergism.\textsuperscript{123} Because the Graham test has been applied by numerous courts since 1966, there is a substantial body of case law to which courts can look for guidance.\textsuperscript{124}

The Rengo decision should also have the practical effect of making it easier for combination patents to withstand a validity challenge in the Third Circuit.\textsuperscript{125} This, in turn, should offer some incentive for inventors to make their inventions public rather than conceal them as trade secrets.\textsuperscript{126} Finally, if the Rengo decision inspires other circuits to reject synergism, thus leaving Graham as the sole test of nonobviousness throughout the circuits, forum shopping by those involved in patent litigation may be discouraged.\textsuperscript{127}

\textit{Nancy G. Eshelman}


\textsuperscript{123} For the elements of the Graham analysis, see notes 45-48 and accompanying text supra.

\textsuperscript{124} See Crossan, \textit{supra} note 122, at 348.

\textsuperscript{125} See Note, \textit{supra} note 28, at 169.

\textsuperscript{126} See Note, \textit{supra} note 60, at 117 (uncertain standards and a “widespread perception that most courts possess an anti-patent bias” have induced some inventors to conceal their inventions as trade secrets rather than patenting them).

\textsuperscript{127} \textit{Id.} The author suggests that forum shopping in patent litigation has been encouraged by the differing views among the circuits on the definition and application of synergism. \textit{Id.}
CIVIL RIGHTS ACT OF 1964—TITLE VI—A SHOWING OF DISCRIMINATORY EFFECTS ALONE IS SUFFICIENT TO ESTABLISH A PRIMA FACIE VIOLATION OF TITLE VI, BUT ULTIMATE BURDEN OF PROOF REMAINS ON THE PLAINTIFF.

NAACP v. Medical Center, Inc. (1981)

The Wilmington Medical Center, Inc. (WMC) located in Wilmington, Delaware, devised a reorganization plan, Plan Omega, in order to resolve the serious problems facing it. Plan Omega consisted of the relocation and consolidation of WMC's facilities, which decreased the Center's accessibility to various minority groups. Black, Puerto Rican, and handicapped individuals, and groups representing them, filed suit charging that Plan Omega was intentionally discriminatory, and that, if implemented, would create a disparate, adverse

1. 657 F.2d 1322 (3d Cir. 1981). The WMC was organized in 1965 by the merger of three nonprofit hospitals located in different areas of Wilmington. Id. at 1324. The WMC provides general medical and surgical services in addition to secondary and tertiary hospital care. Id.

2. Id. at 1325. Due to the age of WMC's physical structures and their resulting noncompliance with Delaware's licensing law, WMC was confronted with many problems, the most serious of which was the possible loss of accreditation. Id. Loss of accreditation would have been financially disastrous, as it would have resulted in WMC being denied Medicare and Medicaid reimbursements. Id. Because WMC provides the largest amount of unreimbursed medical care in the country, its financial problems were already severe. Id.

The population shift from the City of Wilmington to the southwestern suburbs, along with the potential establishment of another health care facility, posed additional problems for WMC. Id. If a competitor were established, WMC would lose the patronage of the suburban residents, most of whom either pay for their services or are insured. Id.

Acknowledging the need for remedial action, the board of WMC considered its options and, after studying approximately 50 plans for relocation and consolidation, chose the "Plan Omega." Id.

3. Id. Specifically, Plan Omega proposed to close General and Memorial hospitals in downtown Wilmington, renovate a third city facility (the Delaware hospital), and build a new hospital in the southwest suburbs of Wilmington. Id.


(797)
impact on minorities, the handicapped and the elderly. The plaintiffs maintained that Plan Omega violated Title VI of the Civil Rights Act of 1964, and sought an injunction against the proposed relocation and reorganization of WMC. The defendant claimed that Plan Omega would improve service, prevent the loss of accreditation, and preserve the patronage of suburban residents who were more likely to pay for services. WMC also claimed that discriminatory intent was necessary to state a cause of action under Title VI and that no such intent was present.

The district court concluded that there was no discrimination violative of Title VI and entered judgment for the defendant. The district court found that the plaintiff could not prevail under either the intent or the disparate impact theory. In a disparate impact case, the plaintiff must prove discriminatory effect, after which the burden shifts to the defendant to show that he took the action for a valid business reason. The plaintiff can rebut a valid business justification by showing that a feasible alternative which is less discriminatory exists. In the Wilmington Medical Center case, the plaintiffs failed to show that a feasible alternative to Plan Omega was available, and the defendant's business justification was unrebutted. Consequently, Plan Omega was found not to be violative of Title VI and judgment was entered for the defendant WMC.
United States Court of Appeals for the Third Circuit\footnote{11} affirmed,\footnote{12} \textit{holding} that proof of disparate impact is sufficient to establish a prima facie violation of Title VI, and that the ultimate burden of persuasion was on the plaintiffs who had failed to meet their burden of proof. \textit{NAACP v. Medical Center, Inc.}, 657 F.2d 1322 (3d Cir. 1981).

The Civil Rights Act of 1964 (Act) was enacted "to provide a more effective means of enforcing civil rights and prohibiting discrimination."\footnote{13} Title VI of the Act prohibits "discrimination" in any program or activity receiving federal financial assistance.\footnote{14} Although there is evidence that Title VI was designed to address more than just intentional discrimination,\footnote{15} Congress did not include an exact definition of "discrimination" nor a statement of its scope in the Act.\footnote{16}

The first Supreme Court decision dealing with the question of what constitutes a prima facie violation of Title VI was \textit{Jefferson v. Hackney}.\footnote{17} In \textit{Jefferson}, the plaintiffs challenged Texas' system of allocating welfare payments which indirectly resulted in minority groups getting smaller grants than nonminority groups.\footnote{18} The Court found

\begin{quote}
11. The case was heard by Circuit Judges Gibbons and Weis, and District Judge Bechtle. The case was argued on May 11, 1981 before Circuit Judges Aldisert, Adams, Gibbons, Hunter, Weis, Garth, Higginbotham and Sloviter. Judge Weis wrote the opinion of the court. Judge Adams concurred and Judge Gibbons dissented in part.

12. 657 F.2d at 1331, 1338. The court assumed, \textit{arguendo}, that the plaintiffs had established a prima facie case. \textit{Id.} at 1332-33.


14. \textit{See} 42 U.S.C. \textsection{} 2000d (1976). For the text of \textsection{} 2000d see note 6 \textit{supra}. The goal of prohibiting discrimination was to be achieved through a refusal to grant or continue financial assistance to programs or activities that fail to comply with the requirements of Title VI. H.R. Rep. No. 914, 88th Cong., 2d Sess. 999, \textit{reprinted in} 1964 U.S. Code Cong. & Ad. News 2391-92.

15. \textit{See} 110 Cong. Rec. 6543 (1964) (remarks of Sen. Humphrey). During debate on the Civil Rights Act of 1964, Senator Humphrey repeated the language in President Kennedy's transmittal of the Civil Rights Bill to Congress: "Simple justice requires that public funds \ldots{} not be spent in any fashion which encourages, entrenches, subsidizes, or \textit{results} in racial discrimination." \textit{Id.} (emphasis added).

16. \textit{Id.} at 5863 (remarks of Senators Humphrey and Eastland). The lack of definition was an intentional attempt by Congress to make Title VI as far-reaching as possible. \textit{Id.} at 6546 (remarks of Sen. Humphrey). Senator Humphrey thought it "wise to leave the [executive] agencies a good deal of discretion as to how they will act." \textit{Id.}


18. \textit{Id.} at 537-49. The Texas system gave recipients of Aid to Families with Dependent Children (AFDC) a lesser percentage of their total needs than that given to other aid recipients. \textit{Id.} Since a proportionately larger number of minority groups were AFDC recipients, minorities had a smaller percentage of their needs met through the welfare system. \textit{Id.}
\end{quote}
that the Texas welfare system did not violate Title VI since there was a rational relationship between the procedure for allocating money and the purposes of the welfare system.

The Supreme Court found a Title VI violation based solely on disparate impact, or disparate effects, in *Lau v. Nichols*. The plaintiffs in *Lau* claimed that Chinese students in the San Francisco public schools were unable to benefit from the schools as much as white students due to their lack of fluency in English. Although all students received the same instruction, the plaintiffs sought relief from the "unequal educational opportunities" which the Chinese students had. The Court found that the school system's policies did result in an inferior education for the Chinese students and that this disparate effect alone, was enough to constitute a Title VI violation.

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19. Id. at 536-39. Minority groups (blacks and Mexican-Americans) receiving the lesser grade claim a violation of the equal protection clause of the fourteenth amendment. Id. The Court found no equal protection violation. Id. It also stated that the welfare allocation system did not violate Title VI although the plaintiffs had not raised a Title VI claim. Id. at 549-50 n.19.

20. Id. at 549-50. The state allocated welfare payments on the basis of the ability to bear hardships of an inadequate standard of living. Id. The Court found this to be sufficient justification, stating that "since the Texas procedure challenged here is related to the purposes of the welfare programs, it is not proscribed by Title VI simply because of variances in the racial composition of the different categorical programs." Id. at 550 n.19 (emphasis supplied by the Court).


22. Id. at 564-66. The San Francisco school district was integrated in 1971, resulting in 2,856 students of Chinese ancestry being placed in the public schools without the ability to speak fluent English. Id. The opportunity for these students to take full advantage of the educational program was therefore unequal to that of the non-Chinese students. Id.

23. Id.

24. Id. at 566-69. The Court stated that "[d]iscrimination is barred which has that effect even though no purposeful design is present . . . ." Id. at 569 (emphasis by the Court).

Although a violation of the equal protection clause of the fourteenth amendment was also alleged, the Court stated that "[w]e . . . rely solely on § 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, to reverse the Court of Appeals." 414 U.S. at 566. However, the Court's decision seemed to rely heavily on Department of Health Education and Welfare (HEW) regulation, 45 C.F.R. § 80.3(b)(2), which bars actions that have a discriminatory effect even without purposeful design. See 414 U.S. at 567-68. Section 80.3(b)(2) states that it is unlawful to "[p]rovide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program." 45 C.F.R. § 80.3(b)(2) (1972). This regulation was authorized by § 602 of the Civil Rights Act. See 42 U.S.C. § 2000d-1. For a further discussion of the significance of these regulations, see generally Board of Educ. v. Califano, 584 F.2d 576 (2d Cir. 1978).

In addition to finding a Title VI violation, the *Lau* Court also required the school system to take corrective action based on an HEW clarifying guideline. 414 U.S. at 568. That guideline states in pertinent part: "Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency." Id. at 568, quoting 35 Fed. Reg. 11,595 (1975). The case was remanded in order to fashion appropriate relief. 414 U.S. at 569.
The Supreme Court decisions after *Lau* evidenced a more restrictive approach to discrimination claims whether based on constitutional or statutory provisions. Although most of these cases dealt only with constitutionally based claims grounded in due process or equal protection, the Court also questioned the validity of the *Lau* disparate impact standard for Title VI claims.

The move toward a more restrictive approach in Title VI claims began in *Regents of the University of California v. Bakke*, where the Supreme Court held that Title VI did not permit the use of a quota system to admit members of minority groups to medical school. Although...
though the Bakke decision primarily addressed the constitutionality of affirmative action programs which utilize quotas, the decision also cast doubt upon the continued validity of the Lau impact standard.\textsuperscript{30} Four of the Justices expressed the view that disparate impact alone would not be sufficient to establish a prima facie violation of Title VI.\textsuperscript{31} 

Although Lau was not expressly overruled by Bakke, the question of whether disparate impact is sufficient to create a Title VI violation became unsettled in the wake of Bakke.\textsuperscript{32} For example, in Board of Education v. Harris, decided one year after Bakke was decided, three members of the United States Supreme Court stated that Title VI did not contain a disparate impact standard.\textsuperscript{33} Also, some of the courts of past discriminatory admissions policies. \textit{Id.} at 353 (Brennan, J., concurring in part and dissenting in part). Justice Stevens, joined by Chief Justice Burger, and Justices Stewart, and Rehnquist, did not discuss the issue of whether race could ever be a factor in admissions policies. \textit{Id.} at 411-21 (Stevens, J., concurring in part and dissenting in part). He did conclude, however, that the medical school's existing policy had violated Title VI by excluding this applicant because of his race. \textit{Id.} at 421 (Stevens, J., concurring in part and dissenting in part).

\textsuperscript{30} See \textit{id.} at 284-87. See also \textit{id.} at 324-54 (Brennan, J., concurring in part and dissenting in part). Brennan expressed the view that Title VI merely extended the application of the fourteenth amendment to private parties receiving federal funds. \textit{Id.} at 327 (Brennan, J., concurring in part and dissenting in part). This discussion of the proper interpretation of Title VI led to a questioning of the validity of Lau:

Since we are now of the opinion, for reasons set forth above, that Title VI's standard, applicable alike to public and private recipients of federal funds, is no broader than the Constitution's, we have serious doubts concerning the correctness of what appears to be the premise of [the Lau] decision.

\textit{Id.} at 352 (Brennan, J., concurring in part and dissenting in part). Justice Powell, while not questioning the vitality of Lau, gave that decision a narrow reading, stating that "[t]he [Lau] decision rested solely on the statute which had been construed by the responsible administrative agency to reach educational practices 'which have the effect of subjecting individuals to discrimination.'" \textit{Id.} at 304. Justice Powell further indicated that the impact standard may be too broad, stating that "Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." \textit{Id.} at 287.

\textsuperscript{31} \textit{Id.} at 352 (Brennan, J., concurring in part and dissenting in part). Justice Brennan stated that "Lau's implication that impact alone is in some contexts sufficient to establish a prima facie violation of Title VI, [is] contrary to our view that Title VI's definition of racial discrimination is absolutely coextensive with the Constitution's . . . ." \textit{Id.} See also note 30 supra. Although Justice Brennan expressed doubts about the holding of Lau, he did not state that Lau should be overruled. See generally 438 U.S. at 352-54 (Brennan, J., concurring in part and dissenting in part).

\textsuperscript{32} See notes 33-42 and accompanying text infra.

\textsuperscript{33} 444 U.S. 130, 160 (1979). In Harris, the Court determined that an impact standard applied to \textsection 702(b) of the Emergency School Aid Act of 1972, 20 U.S.C. \textsection\textsection 1601-1619 (1976). 444 U.S. at 149. The Court found no need to consider Title VI in making this decision, as a Title VI violation was not alleged. \textit{Id.} However, in a dissenting opinion, Justice Stewart, joined by Justices Powell and Rehnquist, stated that Title VI prohibits only intentional
appeals interpreted Bakke to state that the impact standard for Title VI was no longer valid.34 Citing Bakke for support, the Seventh Circuit, in Cannon v. University of Chicago,35 stated that disparate impact alone does not establish a Title VI violation.36 Similarly, a concurring opinion in Guardians Association v. Civil Service Commission,37 a Second Circuit case, relied on Bakke to conclude that Title VI required proof of discriminatory intent.38

More recently, however, a plurality of the Supreme Court cited Lau with approval in Fullilove v. Klutznick.39 In Fullilove, the Court upheld the validity of Commerce Department regulations which required that ten percent of the federal funds granted for public construction projects be earmarked for minority group members.40 A plurality of the Court found that these regulations were necessary to discrimination. Id. at 160 (Stewart, J., dissenting). Further, Stewart interpreted Bakke to find that Title VI only prohibited discrimination violative of the fifth amendment or the equal protection clause of the fourteenth amendment. Id. The dissent reasoned that because Washington v. Davis, 426 U.S. 229 (1976), had found that the fifth and fourteenth amendments only prohibited intentional discrimination, it followed that Title VI was likewise restricted to intentional discrimination. 444 U.S. at 160 (Stewart, J., dissenting). For a discussion of Washington, see note 26 supra.

34. For a discussion of the Second and Seventh Circuits' treatment of this issue, see notes 35-38 and accompanying text infra.

35. 648 F.2d 1104 (7th Cir. 1981).

36. Id. at 1106-08. The Seventh Circuit looked to Title VI for guidance in ruling on a Title IX claim, since no cases have interpreted Title IX (which bars sex discrimination in federally assisted educational programs). Id. at 1106. The Seventh Circuit cited Bakke as supporting the proposition that the Supreme Court would hold that "a violation of Title VI requires an intentional discriminatory act and that disparate impact alone is not sufficient to establish a violation." Id. at 1109.

37. 633 F.2d 232, 272 (2d Cir. 1980) (Coefrin, J., concurring).

38. Id. at 274 (Coffrin, J., concurring). In Guardians, the court reversed the district court's finding of a Title VI violation based on disparate impact. Id. at 254. The majority held that there was no private cause of action under Title VI, and did not reach the question of disparate impact. Id. at 255. The concurrence cited Bakke in support of the position that proof of discriminatory intent is required in a Title VI case, stating that the majority of the Supreme Court seems to take the position that a Title VI claim must meet an "intent" standard. Id. at 274-75 (Coefrin, J., concurring).


correct past discriminatory effects. Lau was cited as supporting the principle that affirmative action can be taken to correct the effects of past discrimination.

The question of who bears the ultimate burden of persuasion in a Title VI case has not been addressed to any great extent by the Supreme Court. However, the Court has discussed that question as applied to Title VII of the Civil Rights Act of 1964. In Title VII actions the Court has held that the ultimate burden of persuasion remains on the plaintiff.

41. 448 U.S. at 479. In upholding the regulations, the plurality opinion stated that Congress had “abundant” evidence that past discrimination was being perpetuated by current procurement practices, and that this denied effective participation to minority businesses in public contracting opportunities. Id. at 477-78. The Court noted that these barriers had to be lifted to ensure that minority businesses had equal opportunity to participate in federal grants. Id.

In a concurring opinion, Justice Marshall, joined by Justices Brennan and Blackmun, found that the “set-aside” provision was constitutional because it was substantially related to the furtherance of important governmental objectives. Id. at 495 (Marshall, J., concurring).

42. Id. at 478. In the discussion of Lau, Chief Justice Burger pointed out that Lau upheld the constitutionality of federal regulations in a case in which no discriminatory intent was present. Id. Those regulations prohibited the use of “methods of administration which have the effect . . . of defeating or substantially impairing accomplishment of the objectives of the [educational] programs as respect individuals of a particular race, color, or national origin.” Id. at 479 (emphasis supplied by the Court).

43. There was some discussion of this issue in Board of Educ. v. Harris. See 444 U.S. at 151; note 33 supra. In that case, the Court stated “We conclude, however, that the burden is on the party against whom the statistical case has been made. . . . That burden perhaps could be carried by proof of ‘educational necessity’ analogous to the ‘business necessity’ justification applied under Title VII of the Civil Rights Act of 1964.” Id. (citation omitted).

44. See notes 45-59 infra. Title VII of the Civil Rights Act was enacted to “eliminate discriminatory employment practices.” H.R. Rep. No. 914, 88th Cong., 2d Sess. 999, reprinted in 1964 U.S. CODE CONG. & AD. NEWS 2391, 2392. Section 703 of Title VII provides:

(a) Employer practices.

It shall be an unlawful employment practice for an employer—

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

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex or national origin.


The first Supreme Court decision addressing the burden of proof in Title VII cases was *Griggs v. Duke Power Co.* In *Griggs*, the plaintiffs charged the Duke Power Company with engaging in racially discriminatory hiring and employment practices. The Court indicated that after the plaintiff has established a prima facie case, the burden shifts to the defendant to show a "business necessity" which would permit the defendant to use a hiring practice which had discriminatory effects.

The Court offered further guidance on the issue of the burden of proof in Title VII cases in *McDonnell Douglas Corp. v. Green*. In *McDonnell*, the Court held that after the defendant has articulated a legitimate, nondiscriminatory reason for his actions, the plaintiff could produce evidence to show that the defendant's reason, though valid, was only a pretext for discrimination. In *Albemarle Paper Co. v. Moody*, the Court narrowed the scope of the "business necessity"

In disparate impact cases such as *Griggs* and *Albermarle*, the burden of proof is essentially the same as in intent cases such as *McDonald* and *Furnco*. For a discussion of burden of proof in those cases, see notes 46-59 and accompanying text infra. The Court has indicated that there are differences between impact and intent cases. In cases where discriminatory intent is claimed, proof of a discriminatory motive is required. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977). Proof of motive is not required, however, in disparate impact cases. *Id.* Other evidence of a divergence of treatment of impact and intent cases is found in Texas Dep't of Community Affairs v. *Burdine*, 101 S. Ct. 1089 (1981). In *Burdine*, the Court stated: "We have recognized that the factual issues, and therefore the character of the evidence presented, differ when the plaintiff claims that a facially neutral employment policy has a discriminatory impact on protected classes." *Id.* at 1095 n.5 (citations omitted).

47. *Id.* at 426-27. The plaintiffs, job applicants and employees, claimed that the defendant's intelligence test, which was required for hiring and promotion, was racially discriminatory. *Id.* The question before the Court was whether or not Title VII required discriminatory intent. *Id.* at 428.
48. *Id.* at 431-32. The Court held that if an employment procedure produced discriminatory effects, lack of intent to discriminate would not redeem that procedure. *Id.* at 432. Instead, the employer must justify that procedure by showing a relationship between it and job performance. *Id.*
50. *Id.* at 802. The Court held that the defendant's business need must be a reasonable one. In a later case, the Court added that the defendant need not prove an absence of discriminatory intent. Board of Trustees v. Sweeney, 439 U.S. 24, 24-25 (1978).
51. 411 U.S. at 804-05. The Court stated that the plaintiff must be given a full opportunity to demonstrate that the presumably valid reason was in fact a coverup for racial discrimination. *Id.* at 805. Relevant evidence includes the defendant's general policy with respect to minority employment, and statistics demonstrating a pattern of racial discrimination. *Id.*
52. 422 U.S. 405 (1975).
defense by making it easier for the plaintiff to show that the defendant's justifications were merely pretexts for discrimination.\textsuperscript{53} The 	extit{Albemarle} Court held that after the defendant has offered evidence of a business need, the plaintiff can show that alternative, nondiscriminatory procedures would also fulfill the defendant's business need.\textsuperscript{54} Such a showing could be used as evidence that the defendant's actual procedure was but a pretext for discrimination.\textsuperscript{55}

The Court refined its 	extit{Albemarle} decision in 	extit{Furnco Construction Corp v. Waters}.\textsuperscript{56} In 	extit{Furnco}, the Court pointed out that a showing of an alternative nondiscriminatory procedure, or even a better nondiscriminatory procedure, would not always prove that a procedure having disparate effects violates Title VII.\textsuperscript{57} The 	extit{Furnco} Court stated that the defendant's course of action need not be the one which produced the minimum of discriminatory effects.\textsuperscript{58} It is sufficient that the defendant's procedure be based on some legitimate consideration.\textsuperscript{59}

Against this background the Medical Center court considered whether intent to discriminate is an essential element of a Title VI violation, or whether proof of disparate impact is sufficient to establish a prima facie case.\textsuperscript{60} The court began its analysis by pointing out that \textit{Lau} had clearly established that disparate impact is enough to constitute a violation of Title VI.\textsuperscript{61} The court then considered whether \textit{Lau} had been overruled by the Supreme Court in \textit{Bakke} and \textit{Harris}.\textsuperscript{62}

\begin{footnotesize}
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\item \textsuperscript{53} \textit{Id.} at 436.
\item \textsuperscript{54} \textit{Id.} at 425.
\item \textsuperscript{55} \textit{Id.}
\item \textsuperscript{56} 438 U.S. 567 (1978).
\item \textsuperscript{57} \textit{Id.} at 578. In this Title VII case, Furnco's job superintendent hired only those persons whom he knew personally to be experienced and competent. \textit{Id.} at 569-70. The plaintiff claimed that this practice was discriminatory, because it did not give everyone an equal opportunity to be hired. \textit{Id.} at 569-74. The Court found that this was a rational method of getting satisfactory employees, and therefore was not a Title VII violation. \textit{Id.} at 576-79.
\item \textsuperscript{58} \textit{Id.} at 576-78. The Court stated that the employer's procedure did not have to be one which resulted in the greatest number of minority applicants being hired in order to be valid. \textit{Id.}
\item \textsuperscript{59} \textit{Id.} at 577.
\item \textsuperscript{60} 657 F.2d at 1328. The court first noted that the Medicare and Medicaid payments made to WMC subjected the Center to the provisions of Title VI. \textit{Id.} The court also stated that its conclusion would apply to the Rehabilitation Act and Age Discrimination Act claims as well, since both are patterned after Title VI. \textit{Id.} at 1328, 1331. For the text of these acts, see note 6 supra.
\item \textsuperscript{61} 657 F.2d at 1329. The court found that the \textit{Lau} decision, and the HEW regulations which it quoted, clearly prohibit acts that have the effect, even though unintentional, of discriminating. \textit{Id.} For a discussion of \textit{Lau} and the HEW regulations, see notes 21-24 and accompanying text supra.
\item \textsuperscript{62} 657 F.2d at 1329-30. For a discussion of \textit{Bakke}, see notes 28-31 and accompanying text supra. For a discussion of \textit{Harris}, see note 33 and accompanying text supra.
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Responding first to the contention that *Bakke* overruled *Lau*, the court observed that while five Justices in *Bakke* expressed doubts about *Lau*, the issue in *Bakke* was substantially different from that in *Lau* and the case at bar. The *Medical Center* court stated that the issue before the *Bakke* Court was whether some form of intentional preference to remedy past discrimination was permissible under Title VI. The Third Circuit interpreted *Bakke* to say that only those forms of intentional preferences permitted by the Constitution are also permissible under Title VI. The court reasoned that while the constitutional standard for affirmative action had been applied to Title VI, it did not necessarily follow that the constitution should determine the question of whether disparate impact constituted a Title VI violation. In the case before it, the *Medical Center* court found the issue to be one of disparate impact from a facially neutral program, and stated that in this type of case it is permissible to hold that a prima facie case can be established without proof of intent.

In response to the defendants' contention that *Harris* overruled *Lau*, the *Medical Center* court stated that the *Harris* Court did not reach the Title VI issue and in fact, noted that Congress could go further than the Constitution does in prohibiting intentional discrimination. The Third Circuit then pointed out that a plurality of the Court in *Fullilove* had cited with approval *Lau*’s validation of federal regulations prohibiting acts which are discriminatory in effect only. Based on these findings, the Third Circuit concluded that *Bakke* and *Harris* may have questioned the continued validity of *Lau* and its impact test, but could not be interpreted as overruling *Lau*.

As additional support for the validity of an impact or effects test

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63. 657 F.2d at 1329. For a discussion of the *Bakke* Court’s reservations about *Lau*, see notes 30-32 and accompanying text supra.
64. 657 F.2d at 1329.
65. Id. at 1330. *Bakke* involved the use of quotas in an affirmative action program or “reverse discrimination.” See note 29 and accompanying text supra.
66. 657 F.2d at 1330.
67. Id. The *Medical Center* court noted that, although the Brennan and Powell opinions in *Bakke* stated that “Title VI incorporates the constitutional standard,” this statement should be limited to cases of affirmative action. Id. For a discussion of Justice Brennan’s and Justice Powell’s opinions, see notes 30-32 and accompanying text supra.
68. 657 F.2d at 1330.
69. Id. The *Harris* Court was interpreting § 702(b) of the Emergency School Aid Act and did not need to rule on Title VI. 444 U.S. at 132. For a discussion of *Harris*, see note 33 and accompanying text supra.
70. 657 F.2d at 1330. The *Medical Center* court observed that only the dissenting opinion of Justice Stewart in *Harris* stated that Title VI was limited to prohibiting intentional discrimination. 657 F.2d at 1330. For a discussion of the dissent’s reasoning in *Harris*, see note 33 supra.
71. 657 F.2d at 1330. For a discussion of *Fullilove*, see notes 39-42 and accompanying text supra.
72. 657 F.2d at 1330. The court also felt that it was not within its perogative to overrule *Lau*. Id.
in Title VI cases, the court looked to the intent of Congress. Based on its analysis of Lau, Bakke, and Harris, as well as its interpretation of the legislative history, the Medical Center court concluded that plaintiffs in a Title VI case alleging discrimination in a facially neutral, federally funded program, need only establish disparate impact.

In defining the proper burden of proof in a disparate impact case, the Medical Center court looked to the case law under Title VII for guidance. The court stated that after the plaintiff establishes a prima facie Title VII case, the defendant has the burden of producing evidence justifying his actions. However, the court stated that the ultimate burden of persuasion remains on the plaintiff in a Title VII case.

The Medical Center court rejected the plaintiff's contention that a defendant in an impact case, who attempts to demonstrate a valid business purpose for his actions, presents an affirmative defense and thereby assumes the burden of persuasion. The court found this contrary to Supreme Court holdings in Title VII cases. In reviewing those cases, the Medical Center court first noted that the establishment of a prima facie case creates an inference of discrimination, and is not

73. Id. at 131.

74. Id. For a discussion of the relevant legislative history, see notes 13-16 and accompanying text supra. In addition, the court observed that an effects test would be in harmony with Title VII, and would parallel federal regulations adopted to enforce Title VI. 657 F.2d at 131. Title VII cases which applied an effects standard include Griggs and Albermarle. For a discussion of these two cases, see notes 46-48 & 52-55 and accompanying text supra.

75. 657 F.2d at 131.

76. Id. at 133. The Medical Center court stated: "The parties agree that the decisional law allocating the burdens of production and persuasion under Title VII is instructive in this case." Id. See notes 46-59 and accompanying text supra for a discussion of this case law.

77. 657 F.2d at 133. The court assumed, arguendo, as had the district court, that a prima facie case was established. Id.

78. Id. The court stated that recent cases in the Supreme Court and the Third Circuit have established that the ultimate burden on the issue of discrimination remains with the plaintiff. Id., citing Texas Dept' of Community Affairs v. Burdine, 101 S. Ct. 1089 (1981); Board of Trustees v. Sweeney, 459 U.S. 24 (1978); Furnco Const. Corp. v. Waters, 438 U.S. 567 (1978); McNeil v. McDonough, No. 80-1640 (3d Cir. April 24, 1981); Smithers v. Boular, 629 F.2d 892 (3d Cir. 1980); Kundo v. Muhlenberg College, 621 F.2d 532, 543 n.2 (3d Cir. 1980); Whack v. Peabody & Wind Eng'r Co., 595 F.2d 190, 193 (3d Cir. 1979). For a discussion of a sampling of these cases, see notes 45 & 56-59 and accompanying text supra.

79. 657 F.2d at 133. The plaintiffs contended that the defendant was presenting "something in the nature of an affirmative defense" by showing evidence which would justify his actions. Id. If the defendant's response were to be treated as an affirmative defense, the burden of proof would be shifted to the defendant, since the party affirmatively asserting a fact has the burden of proving it. See generally 29 Am. Jur. Evidence § 127 (1967).

80. 657 F.2d at 133. For a discussion of the allocation of burdens of proof in impact cases, see notes 46-48 & 52-55 supra.
necessarily proof of an ultimate Title VII violation. The defendant need only show a valid business reason to rebut this inference; the burden of persuasion remains on the plaintiff who must prove that the business reason is merely a pretext for discrimination. The court then found that demonstrating a disparate impact was simply another way for the plaintiff to establish a prima facie case and thus create an inference of discrimination. Therefore, the court reasoned, the defendant can be required to produce evidence to rebut the prima facie case, but not to prove an affirmative defense, as would be required if the plaintiff had proven his case by a preponderance of the evidence. The court also noted that requiring the defendant to conclusively prove a valid business purpose would conflict with the Supreme Court’s three-step allocation of the burden of proof by eliminating the need for the plaintiff to show that the defendant’s stated purpose was only a pretext for discrimination.

As additional support for its position the Medical Center court observed that requiring a defendant in a disparate impact case to prove an affirmative defense would be illogical, as it would impose a heavier burden on a defendant who might not have had any unlawful intent than on one who was charged with intentional discrimination. The court also felt that a procedural distinction between impact and intent cases would cause unnecessary confusion in the trial courts, and therefore should be avoided. The court observed further that the Supreme Court has not shown an inclination towards requiring a shifting of the burden of persuasion in disparate effects cases. In fact, the Third Circuit noted that the Supreme Court recently held the contrary—that the ultimate burden of proving disparate impact remains with the plaintiff. The Third Circuit concluded that the

81. 657 F.2d at 1333.
82. Id.
83. Id. at 1334.
84. Id.
85. Id. The Third Circuit stated that a prima facie case can be rebutted by a showing of evidence to the contrary; it need not be overcome by a preponderance of the evidence. Id.
86. Id. For a description of the “three-step allocation” of the burden of proof, see text accompanying notes 81-83 supra.
87. 657 F.2d at 1335. The court stated that if there was a difference, it would be more logical to impose a heavier burden on the defendant charged with an unlawful animus. Id.
88. Id. The court felt that uniformity in procedural aspects was highly desirable and found no important interest which would be served by imposing different burdens on a single defendant charged with both discriminatory intent and disparate impact. Id. For a discussion of the possibility of a distinction between intent and impact cases, see note 59 supra.
89. 657 F.2d at 1335.
90. Id. The Medical Center court found that as recently as 1979, in New York Transit Auth. v. Beazer, 440 U.S. 568 (1980), the Supreme Court had reaffirmed its position that the burden of proving discriminatory impact is on the plaintiff. Id.
burden on the defendant was to go forward with evidence to rebut the prima facie case, but not to prove an affirmative defense.91

Judge Adams concurred in the result, finding that the plaintiff had failed to make out a prima facie case.92 He therefore found it unnecessary to decide whether Title VI prohibited disparate impact93 and whether the defendants carried a burden of production or of persuasion in rebutting an initial showing of disparate impact.94

Judge Gibbons dissented from the majority on the issue of the burden of proof.95 Judge Gibbons first pointed out that the defendant can respond to the prima facie case in one of two ways: by rebutting the plaintiff's evidence, or by attempting to justify its actions.96 If the defendant in a disparate impact case attempts to justify his action, Judge Gibbons expressed the view that he can do so only by showing that such action met valid business needs and that other plans with a less discriminatory impact did not.97 Judge Gibbons stated that when the defendant attempts to justify his actions, the plaintiff would rarely have access to evidence which could refute that justification.98 Therefore, in cases where the business need defense is asserted, he felt that it would be consistent with the congressional intent to assign the burden

91. *Id.* at 1337. The *Medical Center* court stated that the district court in this case had required the defendant "to go 'forward with evidence showing that it has chosen the least stringent alternative.'" *Id.*, quoting NAACP v. Wilmington Medical Center, Inc., 491 F. Supp. 290, 340 (D. Del. 1980). The district court, therefore, had imposed a more stringent standard than was actually required. 657 F.2d at 1337. However, as the district court found for the defendant there was no prejudicial error. *Id.*
92. 657 F.2d at 1339 (Adams, J., concurring).
93. *Id.* at 1338-39 (Adams, J., concurring).
94. *Id.* at 1340 (Adams, J., concurring).
95. 657 F.2d at 1340 (Gibbons, J., concurring in part and dissenting in part). Judge Gibbons also refused to join that part of the majority's opinion which assumed, *arguendo*, that the plaintiffs had established a prima facie case since he found that the plaintiffs had clearly made this initial showing. *Id.*
96. *Id.* at 1350 (Gibbons, J., concurring in part and dissenting in part). Intentional discrimination based on an inference from evidence of a disparate impact, Judge Gibbons pointed out, can be rebutted by evidence of a proper business purpose. *Id.* In a case of disparate impact, however, rebuttal takes the form of offering evidence to show that such impact will not occur. *Id.* If the impact does occur, the defendant can justify his actions by showing that they are necessary in order to accomplish important objectives. *Id.*
97. *Id.* at 1350-51 (Gibbons, J., concurring in part and dissenting in part).
98. *Id.* at 1352 (Gibbons, J., concurring in part and dissenting in part). According to Judge Gibbons, "the means of proof of justification will not be within the reach of the protected class and allocation of the burden of persuasion will be dispositive." *Id.* The defendant in disparate impact cases, Judge Gibbons felt, would always have the proof of justification in his hands, as he was the decision-maker. *Id.* at 1355 (Gibbons, J., concurring in part and dissenting in part). He further stated that the plaintiff rarely, if ever, would have access to this information. *Id.* Judge Gibbons distinguished impact cases from intent cases by stating that in the latter, the plaintiff might be in a better position than the defendant to develop evidence of intentionally discriminatory acts. *Id.*
of persuasion to the defendant, rather than allow the case to be decided merely by a showing of evidence by the defendant.99 However, he agreed that the burden of proof should remain on the plaintiff when the defendant produces rebutting evidence.100

The dissent stated in conclusion that the majority looked only to intentional discrimination cases for support and that disparate impact cases should be treated differently.101 In support of this position, Judge Gibbons cited Harris and Texas Department of Community Affairs v. Burdine,102 both of which indicated that the burden of proof may be shifted to the defendant when the defendant attempts to justify disparate impact.103

Upon review of the Medical Center opinion, it is submitted that the court was incorrect in finding that the Supreme Court had established a Title VI impact standard.104 The Supreme Court has not found a violation of Title VI based upon disparate impact alone absent clear interpretive regulations requiring such a finding.105 In finding a violation based on disparate impact in Lau, the Supreme Court appears to have relied heavily on an HEW regulation which specifically provides for a disparate effect standard.106 The Fullilove plurality also

99. Id. at 1352 (Gibbons, J., concurring in part and dissenting in part). Congress' purpose, Judge Gibbons believed, was to protect disadvantaged classes from intentional discriminatory acts. Id. He thus concluded that the assignment of proof to the party receiving federal funds would be consistent with that intent, since the class to be protected would rarely be able to meet the burden of proof. Id. Judge Gibbons felt that the problem of developing evidence could thwart congressional intent, stating, "the problems of developing evidence and assembling it in admissible form cannot be separated from the fulfillment of statutory policy flowing from Congressional intent." Id. at 1354 (Gibbons, J., concurring in part and dissenting in part). For a discussion of Congress' intent, see notes 13-16 and accompanying text supra.

Judge Gibbons also observed that a shift of the burden of proof would not be unfair to the defendant, as the purpose of litigation in impact cases is to correct inadvertent discrimination and not to punish wrongdoers. Id. at 1353 (Gibbons, J., concurring in part and dissenting in part). He further stated that the presumption in a case such as this is that the defendant is willing to mitigate the disparate impact, but is constrained by his own needs and lack of alternatives. Id. Judge Gibbons saw the defendant's burden of proof as being somewhat akin to proving an affirmative defense. Id.

100. 657 F.2d at 1352 (Gibbons, J., concurring in part and dissenting in part).

101. Id. at 1352-53 (Gibbons, J., concurring in part and dissenting in part).

102. For a discussion of Harris, see note 33 and accompanying text supra.

For a discussion of Burdine, see note 45 supra.

103. 657 F.2d at 1353 (Gibbons, J., concurring in part and dissenting in part).

104. See id.

105. See notes 106-11 and accompanying text infra.

106. For a discussion of Lau and the HEW regulations, see notes 21-24 and accompanying text supra. In finding the Title VI violation, the Lau court pointed out the existence of the HEW regulations and the fact that they were promulgated based on the authority granted by Title VI. 414 U.S. at 566-69. The court also pointed out that the school district had contracted to comply with the HEW regulations and that the federal government has the power to
found the presence of federal regulation significant,\(^{107}\) and explicitly stated in its discussion of Lau that “we upheld the constitutionality of a federal regulation applicable to public school systems.” \(^{108}\) Thus, the Fullilove plurality seems to imply that it is upholding Lau's application of an HEW regulation to a disparate impact claim, rather than an application of Title VI to a disparate impact claim.\(^{109}\)

The Third Circuit was correct in concluding that, because the situations present different issues, Bakke's limitation of Title VI need not be extended to facially neutral, disparate impact cases.\(^{110}\) However, the Third Circuit failed to find any language in Bakke to support the position that an impact standard still exists in facially neutral cases.\(^{111}\) In fact, at least four members of the Bakke Court clearly stated that the courts should apply a constitutional standard to both intentional and disparate impact Title VI cases.\(^{112}\) Application of a

fix the terms by which money allotted to the States should be disbursed. \textit{Id.} at 568-69. This can be taken to mean that it is the federal (HEW) regulations which are imposing a disparate impact standard on the school district. \textit{Id.} Nowhere in Lau did the Court find an impact standard except in its interpretation of the HEW regulations. \textit{See generally id.} at 566-69.

\(^{107}\) 448 U.S. at 477. For a discussion of Fullilove, see notes 39-42 and accompanying text supra.

\(^{108}\) 448 U.S. at 479 (emphasis added). Chief Justice Burger noted that “congressional authority extends beyond the prohibition of purposeful discrimination.” \textit{Id.} at 477. This would imply that Congress can take positive steps to correct past discrimination (as in Fullilove) or can impose an effects test to find current discrimination (as in Lau) even though the equal protection clause of the fourteenth amendment would require neither. This does not answer the question of whether Title VI alone prohibits disparate impact, but it does imply that it would if Congress had so intended.

\(^{109}\) \textit{See id.} at 477-78. In discussing Lau's use of federal regulations to achieve congressional objectives, the Fullilove plurality did not indicate that the Lau decision was based on Title VI at all. \textit{Id.} In its discussion of the “minority business enterprise” (MBE) provision of the Public Works Employment Act of 1977, the Court stated that “[t]he MBE program, like the federal regulations reviewed in Lau, primarily regulates state action in the use of federal funds voluntarily sought and accepted by the grantees subject to statutory and administrative conditions.” \textit{Id.} at 479. For a discussion of the Fullilove Court's interpretation of Lau, see note 42 supra.

Also supporting this view is the Harris decision which upheld an effects or impact standard based on HEW regulations. \textit{See 444 U.S.} at 150. However, the Court implied that this might be a stricter standard than that of Title VI. \textit{Id.} For a discussion of Harris, see note 33 and accompanying text supra.

\(^{110}\) 657 F.2d at 1380. For a discussion of the Medical Center court's reasoning on this issue, see notes 64-68 and accompanying text supra. For a discussion of Bakke, see notes 28-31 and accompanying text supra.

\(^{111}\) 657 F.2d at 1330. The Third Circuit stated that the Powell and Brennan opinions in Bakke may be limited to charges of intentional discrimination. \textit{Id.} However, it added that it is still permissible to hold that in disparate impact suits, a prima facie case can be established without proof of intent. \textit{Id.} While the court stated that such a view is permissible, it did not present any evidence tending to show that this was the Supreme Court's intended interpretation. \textit{Id.}

\(^{112}\) \textit{See 438 U.S.} 265, 351-53. The Brennan opinion in Bakke stated that “even accepting Lau's implication that impact alone is in some contexts
constitutional standard to Title VI cases would eliminate disparate impact as a means of establishing a prima facie case, at least in those cases where the discriminatory effects are not so great as to raise an inference of an intent to discriminate.113

It is suggested that if the Supreme Court is indeed requiring the presence of interpretive regulations in order to establish a disparate impact standard, then the Medical Center court was incorrect in finding that Lau had conclusively established a disparate impact standard for all Title VI claims.114 Such an approach would help explain why Lau has not been overruled, even though seven members of the Supreme Court have at various times expressed doubts about a Title VI impact standard.115

Although the Third Circuit looked to the legislative history to find a broad, expansive, anti-discrimination intent which would support an impact standard,116 it is submitted that the debates in Congress

sufficient to establish a prima facie violation of Title VI, contrary to our view that new Title VI's definition of racial discrimination is absolutely coextensive with the Constitution's, this would not assist the respondent in the least.” Id. at 352 (emphasis added). This statement was not specifically addressed by the Third Circuit, but it does not seem to be capable of any interpretation other than that these Justices do not approve of an impact standard for Title VI. Since three other justices expressed the same view in Harris it would seem likely that the Supreme Court intends to limit Title VI to the constitutional standard in facially neutral, disparate impact cases. For a discussion of what that constitutional standard encompasses, see note 26 supra.

113. See Washington v. Davis, 426 U.S. 229, 239-46 (1976). The “constitutional standard” of Washington generally requires intent to discriminate. Id. at 250. However, the Washington Court also admitted the possibility that impact alone would be sufficient to create a constitutional violation in extreme cases. Id. at 246. For a discussion of that limited impact standard, see note 26 supra. Thus a disparate impact standard could exist for Title VI, although it would be a much more restrictive one than that adopted in Medical Center.

114. See Board of Educ. v. Califano, 584 F.2d 576 (2d Cir. 1978). The Califano court interpreted Lau as allowing Congress to establish stricter limits on discrimination than the Constitution requires. Id. at 587-89. However, the Califano court also seemed to require that standard to be defined explicitly. It stated that “[b]ecause we are dealing with an act of Congress, as amplified by HEW regulations, . . . it is permissible for Congress to establish a higher standard, . . . than the constitutional minimums require.” Id. at 588.

115. In Bakke, Justices Brennan, White, Marshall, and Blackmun expressed the view that impact alone should not create a prima facie case in Title VI. 438 U.S. at 552 (Brennan, J., concurring in part and dissenting in part). For a discussion of this opinion, see notes 28-31 and accompanying text supra. Also, in dissent in Harris, Justices Stewart, Powell and Rehnquist explicitly stated that Title VI had been construed to prohibit only intentional discrimination. 444 U.S. at 160 (Stewart, J., dissenting). For a further discussion of Harris, see note 33 and accompanying text supra.

116. 657 F.2d at 1331. Supporting the Third Circuit's position is Senator Humphrey’s speech during debate of the Civil Rights Act of 1964. See note 15 supra. Senator Humphrey, in summarizing the purpose of Title VI, indicated that racial discrimination is “contrary to national policy, and the moral sense of the Nation,” even though it might not be unconstitutional in all cases. 110 Cong. Rec. 6544 (1964) (remarks of Sen. Humphrey).
also support the view that Title VI should be restricted to a constitutional standard. Not for example, in the debates on the Civil Rights Act, several congressmen expressed a fear of the far reaching effects of Title VI. They were assured by proponents of the bill that it would not create any federal powers not already existing under the Constitution. Such statements make it difficult to infer that Congress intended to prohibit actions which unintentionally produce discriminatory effects.

With respect to the issue of burden of proof, the Third Circuit's decision that impact and intent cases include the same burdens of proof is amply supported by case law. The court correctly observed that there is no evidence that the Supreme Court has indicated any differences in the assignment of burdens of proof. It is worthy of noting that the cases cited by Judge Gibbons in dissent only provide very general, ambiguous statements to support his opinion.

117. See Regents of the Univ. of Cal. v. Bakke, 438 U.S. at 388, quoting Cong. Rec. 5012 (1964) (remarks of Sen. Ervin). Many legislators feared the excessive reach that Title VI would have, and did not want it to be applied to every alleged incidence of discrimination. Id.

118. Senator Talmadge in criticism of the Civil Rights Bill stated:

Title VI would give the President and his appointees the power to cripple entire States, entire regions of this country. . . . All that is required is "an express finding" of a failure to comply with an undefined prohibition against discrimination in the administration of any program or activity receiving Federal financial assistance.

119. See Regents of the Univ. of Cal. v. Bakke, 438 U.S. at 328-30. Proponents of the Civil Rights Bill emphasized that the Bill was to be limited to a standard consistent with the fourteenth and fifth amendments. Id. In introducing Title VI in the House, Representative Cellar, Chairman of the House Judiciary Committee, stated that "the bill . . . would, in short assure the existing right to equal treatment in the enjoyment of Federal funds. It would not destroy any rights of private property or freedom of association." 110 Cong. Rec. 1519 (1964) (remarks of Rep. Cellar). This statement was intended to reassure opponents of the Bill that it would not exceed the existing protection of the Constitution, in the sense that it would not interfere with the rights of other persons in its attempts to aid minorities. See id.

120. See Regents of the Univ. of Cal. v. Bakke, 438 U.S. at 328-40. Justice Brennan's opinion in Bakke, in extensive discussion of the congressional record, found no evidence of intent to apply an impact standard to Title VI. Id.

121. See 657 F.2d at 1937. For a review of burden of proof in Title VII and the application of that law to the case at bar, see notes 43-59 & 79-91 and accompanying text supra.

122. 657 F.2d at 1935. For a suggestion that some difference may in fact exist, see note 45 supra.

123. See, id. at 1938 (Gibbons, J., dissenting). For the support cited by the dissent, see notes 38 & 45 supra. The Burdine Court merely stated that allocations of burdens may differ in a disparate impact case. 101 S. Ct. at 1093 n.5 This statement would appear to be too general to be of much support. The Harris Court stated that the burden is on the party against whom the statistical case is made. 444 U.S. at 151. However, the Harris Court also stated that this burden could perhaps be carried by proof of "educational necessity" analogous to the "business necessity" of Title VII. Id. Therefore, it appears that the burden on the defendant is no heavier than that defined
The dissent’s observation that different evidence is needed for rebuttal and justification is valid, but it is submitted that Judge Gibbons’ conclusion that the defendant can only justify his acts by showing that no other plan produces a lesser impact is not correct. This view is in conflict with Furnco, where the Court stated that the defendant’s plan need not have the least discriminatory effects. Furthermore, the majority opinion correctly found that the Supreme Court has determined that disparate impact cases follow the same burden of proof procedures as do intent cases, thereby refuting the dissent’s claim that the majority had looked only to intent cases.

In addition, the majority’s argument that requiring a different burden of proof for impact cases would place a heavier burden on a defendant who lacked unlawful animus, and that it would impose a procedural burden on the trial courts, also weigh against a varying burden of proof. Consequently, it is submitted that the majority opinion on the issue of burden of proof is supported by both precedent and logic.

In conclusion, the Medical Center decision should assist the lower courts by establishing a standard for disparate impact cases arising under Title VI. However, the decision is incorrect in its expansion of the scope of Title VI’s prohibition of racial discrimination. Due to the difficulty in determining whether the Supreme Court actually intended an impact standard under Title VI, as evidenced by a split in the circuit courts on that issue, it is submitted that only a Supreme Court ruling on this question will provide a conclusive answer.

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in the Title VII cases. For a discussion of burden of proof in Title VII cases, see notes 46-59 and accompanying text supra.

124. 657 F.2d at 1350-51 (Gibbons, J., concurring in part and dissenting in part). For a discussion of Judge Gibbons’ reasoning, see notes 96-100 and accompanying text supra.

125. See 657 F.2d at 1352.

126. See notes 56-59 and accompanying text supra.

127. See 657 F.2d at 1353-54. For a discussion of the majority’s analysis, see notes 79-86 and accompanying text supra.

128. See id. at 1352 (Gibbons, J., concurring in part and dissenting in part).

129. Id. at 1355.

130. Id.

131. See notes 127-30 and accompanying text supra.

132. See NAACP v. Wilmington Medical Center, Inc., 491 F. Supp. 290, 311-15 (D. Del. 1980). The district court was uncertain as to what the proper standard should be, and did not, in fact, resolve that issue. Id. at 311-15.

133. While an impact standard will, of course, lessen the difficulty of establishing a prima facie case, Judge Gibbons points out that it will also encourage decision makers to consider possible discriminatory consequences of a proposal before its implementation. 657 F.2d at 1355 (Gibbons, J., concurring in part and dissenting in part).

134. For a discussion of Supreme Court Title VI decisions, see notes 17-24, 28-33 & 39-42 and accompanying text supra.

135. For a discussion of the opinions of the courts of appeals, see notes 34-38 and accompanying text supra.

_Croker v. Boeing Co._ (1981) *

Five black employees of the Vertol Division of the Boeing Company (Company), brought suit individually and as class representatives in the United States District Court for the Eastern District of Pennsylvania. The plaintiffs alleged that the Company had engaged in racially discriminatory practices in all phases of employment and that these practices violated the Civil Rights Act of

* Editor's Note: While at press, the Supreme Court handed down its decision in General Bldg. Contractors Assoc., Inc. v. Pennsylvania, 50 U.S.L.W. 4975 (June 29, 1982). The holding of that case is pertinent to the issue discussed in this Note in that the Court held that 42 U.S.C. § 1981 requires proof of discriminatory intent.


2. _Croker v. Boeing Co._, 437 F. Supp. 1138, 1145 (E.D. Pa. 1977), For a discussion of the original class certification and the district court's modification of the class, see note 7 infra.

3. _Croker v. Boeing Co._, 437 F. Supp. 1138, 1145 (E.D. Pa. 1977). The Vertol Division of the Boeing Company was formed after Boeing acquired Vertol Aircraft Corporation. _Id_. at 1146. The Company, primarily a helicopter manufacturer, is frequently engaged as a government contractor by the United States Department of Defense. _Id_. As a government contractor, the Company must comply with federal nondiscrimination requirements. _Id_. (citation omitted). Although its employment practices have been audited annually by the Office of Federal Contract Compliance, the Company has never been barred from obtaining government contracts. 437 F. Supp. at 1146.

The plaintiffs also brought suit against Local No. 1069 of International Union, United Automobile, Aerospace and Agricultural Implement Workers of America. _Id_. The plaintiffs and the Union reached a tentative settlement shortly after the commencement of the trial on the liability issues. _Id_.


5. _Croker v. Boeing Co._, 437 F. Supp. 1138, 1183-88 (E.D. Pa. 1977). The plaintiffs claimed that an inference of discrimination was raised by evidence that the percentage of black employees at the Company was never greater than 8.4% and the percentage of blacks in the relevant geographical workforce was 16.14%. _Id_. at 1183. The plaintiffs also presented evidence which contrasted the racial composition of employees hired (24.4%, black) with that of persons filing applications (31% to 37%, black). _Id_. at 1184. In addition, the plaintiffs claimed that the Company's lay-off procedure, which was based upon a formal seniority system or a "last-hired, first-fired" principle, unlawfully perpetuated the alleged prior discrimination in hiring. _Id_. at 1186 & 1188.

(816)
The plaintiffs also attacked the "job family system" of the Company. *Id.* at 1186. Under that system, job classifications were grouped into sixty-one "families" on the basis of common functional skills. *Id.* at 1142. The plaintiffs alleged that various Company restrictions made it difficult for an employee to change "families." *Id.* at 1165-66. For example, the majority of openings were filled by employees from lower classifications within the same "family" and few employees outside that family were considered. *Id.* at 1168. While blacks were represented in all "families," the plaintiffs submitted evidence showing that the lower ranking "families" included the majority of the Company's black employees. *Id.* at 1163. Plaintiffs claimed that this system was a "continuing violation of Title VII because it unlawfully perpetuate[d] the effects of prior discrimination." *Id.* at 1186.

6. *Id.* at 1145. Section 1981 provides:

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


The plaintiffs also claimed that the Company violated the Civil Rights Act of 1871, 42 U.S.C. § 1985, which establishes a cause of action against persons conspiring to deprive others of the equal protection of the laws. *Croker v. Boeing Co., 437 F. Supp. 1138, 1177-78 (E.D. Pa. 1977).* The court dismissed the § 1985 claims since the plaintiffs had failed to prove a conspiracy between the Company and the Union to commit the allegedly discriminatory acts. *Id.* at 1178. As the plaintiffs had settled with the Union, the evidence at trial related almost exclusively to the challenged actions of the Company. *Id.* The dismissal of the § 1985 claims was not appealed. 662 F.2d at 981-82.


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


Originally, the class was certified to include black persons employed by the Company from June 19, 1962 to the date of trial (June 30, 1975) and all unsuccessful applicants for employment who applied after June 6, 1967. 437 F. Supp. at 1178. However, the Company moved to dismiss from the class all persons whose claims were barred by the relevant statutes of limitations. *Id.* With regard to the Title VII claims, the court found that all claims that had accrued prior to 90 days before plaintiff Croker filed the requisite charges with the Equal Employment Opportunity Commission were time barred. *Id.* at 1178-79. Therefore, the court modified the class under Title VII to include all black persons who had been employed by the Company or had applications pending for employment with the Company on or after March 25, 1968. *Id.* at 1198. As to the claims under 42 U.S.C. § 1981, the court noted that the
The district court found the Company liable on certain of the individual plaintiffs' section 1981 and Title VII claims. The district court dismissed all Title VII class claims on the ground that the plaintiffs failed to prove that the Company had engaged in a pattern or practice of discrimination. The court further found that the racial disparities established by the plaintiffs did not justify an inference of

Civil Rights Act of 1866 did not specify a statute of limitations. Id. at 1179. Thus, the court applied Pennsylvania's six year statute governing claims of interference with contractual relations and found that all claims under § 1981 that had accrued prior to September, 1965 were barred. Id.

8. Croker v. Boeing Co., 437 F. Supp. 1138, 1198 (E.D. Pa. 1977). The district court found for plaintiffs Mamie Croker, Leolin Dockins and Chivis Davis on their Title VII claims on the basis of the Company's discriminatory refusal to promote them. Id. at 1198. Plaintiffs Croker and Eric Travis also prevailed in their Title VII and section 1981 claims regarding discriminatory harassment. Id. The plaintiffs' claims of harassment included allegations that the Company's supervisory personnel treated black employees differently and used disparaging language when referring to minority employees. Id. at 1198-95. The court also found in favor of class members Donald Ferrell and Horace Dixon on their Title VIII claims for, respectively, discriminatory refusal to promote and for discriminatory denial of a transfer. Id. The court found in favor of the Company on all claims submitted by seven additional class members. Id.

The district court subsequently reversed its finding in favor of class members Donald Ferrell and Horace Dixon based on an intervening Third Circuit decision. Croker v. Boeing Co., 23 Fair Empl. Prac. Cas. (BNA) 1788 (E.D. Pa. 1979), citing Dickerson v. United States Steel Corp., 582 F.2d 827, 834 (3d Cir. 1978) (holding that class member claimants who are not named plaintiffs are not entitled to individual relief where classwide claims are unsuccessful). The district court also reversed its finding for plaintiff Leolin Dockins on the ground that her claims of discriminatory acts under Title VII were barred by the applicable statute of limitation. 23 Fair Empl. Prac. Cas. at 1791.

9. Croker v. Boeing Co., 437 F. Supp. 1138, 1192 (E.D. Pa. 1977). The district court acknowledged that a prima facie case of discrimination under Title VII does not require a showing of intentional discrimination, but that a showing of disparate impact is sufficient. Id. at 1182. The court further noted that statistical evidence may be sufficient to show the requisite disparate impact. Id., citing International Bhd. of Teamsters v. United States, 431 U.S. 824 (1977); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239 (3d Cir.), cert. denied, 421 U.S. 1011 (1975). Even though the plaintiffs had submitted extensive statistical evidence regarding hiring and promotions, the district court found that this evidence failed to justify an inference of discrimination under Title VII. 437 F. Supp. at 1186. Noting that a large proportion of positions at the Company required various skills, the court found that the evidence presented showed that fewer blacks possessed the requisite skills. Id. at 1185. The court found that the Company's employment practices were related to various production schedules, cost considerations, and the need for skilled workers. Id. at 1146. The court noted that since the Company was in constant competition with the other helicopter manufacturers to obtain defense contracts, quality workmanship and compliance with strict delivery schedules were essential. Id. The court examined the purposes for the Company's employment practices in connection with the statistical evidence submitted by the plaintiffs and concluded that the plaintiffs failed to prove "the existence of discriminatory effects by a preponderance of the evidence." Id. at 1182-83. The court further found that the Company's procedure for laying-off employees reflected a neutral seniority system and thus, was immune from Title VII attack under International Bhd. of Teamsters. Id. at 1186-88, citing 431 U.S. 824.
purposeful discrimination and, thus, dismissed the section 1981 class claims. 10

On appeal, 11 the United States Court of Appeals for the Third Circuit 12 affirmed the district court's judgment in all respects except for the award of costs, 13 holding that section 1981 does not extend to facially neutral conduct which has the consequence of burdening one race more than another. Croker v. Boeing Co., 662 F.2d 975 (3rd Cir. 1981).

Pursuant to section two of the thirteenth amendment of the United States Constitution, 14 the Thirty-ninth Congress enacted a civil rights

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11. 662 F.2d at 975. The Company moved to dismiss portions of the appeal for lack of subject matter jurisdiction. Id. at 981. Four separate orders had been entered by the district court. First, in June of 1977, the district court found in favor of certain individual plaintiffs on the issue of liability and dismissed the class claims under Title VII and § 1981. Croker v. Boeing Co., 437 F. Supp. 1138, 1198 (E.D. Pa. 1977). See notes 8-10 and accompanying text supra. Second, on November 2, 1977, the district court determined the awards of counsel fees and costs among the parties without setting the amounts involved. Croker v. Boeing Co., 444 F. Supp. 890 (E.D. Pa. 1977). Third, in October, 1979, the district court issued an opinion and an order regarding damages. Croker v. Boeing Co., 23 Fair Empl. Prac. Cas. (BNA) 1783 (E.D. Pa. 1979). Fourth, in March, 1980, the district court determined the amount of attorney's fees. See 662 F.2d at 681. All four orders were appealed by the plaintiffs on April 8, 1980. Id. The Company contended that the October, 1979 order constituted the final judgment and that thus, the plaintiffs were required to appeal the 1977 and 1979 orders within thirty days of the October 1979 judgment. Id., citing 28 U.S.C. § 1291; Fed. R. App. P. 4(a). The Third Circuit denied the Company's motion to dismiss, finding that a judgment in a civil rights action is not to "be considered final for purposes of appeal until a district court has determined the extent of liability for any attorney's fees to be awarded." 662 F.2d at 684.

12. The case was heard on December 2, 1980 by Judges Aldisert, Hunter and Higginbotham. The case was reargued on May 12, 1981 before Chief Judge Seitz and Judges Aldisert, Adams, Gibbons, Hunter, Weis, Garth, Higginbotham and Sloviter. Chief Judge Seitz delivered the opinion of the court. Judges Gibbons and Aldisert each filed dissenting opinions.


14. See U.S. Const. amend. XIII. This amendment provides: "Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2. Congress shall have power to enforce this article by appropriate legislation." The supporters of this amendment felt that the Emancipation Proclamation was insufficient to eradicate the vestiges of slavery and that a constitutional prohibition was required. See Buchanan, The Quest for Freedom: A Legal History of the Thirteenth Amendment, 12 Hous. L. Rev. 1, 9 (1975). In reviewing the legislative history of the amendment, one commentator has stated that "phrases and con-
law in 1866 to provide equal rights for all citizens.15 Prior to 1968, the
cepts used repeatedly throughout the debates” indicate that the thirteenth
amendment was passed to guarantee equal protection of the laws, to safeguard
the constitutional privileges and immunities of all citizens and to enforce these
guarantees. TenBroek, Thirteenth Amendment to the Constitution of the
United States, 39 Cal. L. Rev. 171, 180-81 (1951). See also Note, Federal Power
to Regulate Private Discrimination: The Revival of the Enforcement Clauses
of the Reconstruction Era Amendments, 74 Colum. L. Rev. 449 (1974). In
discussing the scope of the thirteenth amendment, this commentator stated that
it was “not restricted to invalidating ‘state action’ establishing or upholding
slavery, but rather . . . had ‘a reflex character . . . establishing and decreeing
universal civil and political freedom throughout the United States. . . .’” Id.
The supporters of the thirteenth amendment disagreed as to whether it
alone would abolish slavery. Buchanan, supra, at 12. Although the amend-
ment was designed to prohibit both the system and results of slavery, section 2
was added “to remove all doubt and argument about Congress’ power to wipe
out the remnants, badges and indicia of slavery.” TenBroek, supra, at 180,
186. See also Buchanan, supra, at 15. The Supreme Court has stated that
the thirteenth amendment granted Congress the power “rationally to determine
what are the badges and the incidents of slavery, and the authority to translate
that determination into effective legislation.” Jones v. Alfred H. Mayer Co.,

15. See Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27 (1866) (codified at 42
to all persons born in the United States, except untaxed Indians, the right
to make and enforce contracts, to sue, be parties, and give evidence,
to inherit, purchase, lease, sell, hold, and convey real and personal
property, and to full and equal benefit of all laws and proceedings for
the security of person and property, as is enjoyed by white citizens,
and shall be subject to like punishment, pains, and penalties, and to
none other, any law, statute, ordinance, regulation, or custom, to the
contrary notwithstanding.

Section 1981 sets forth most of the rights enumerated in the 1866 Act,
whereas § 1982 deals specifically with the property rights listed in the 1866 Act.
Section 2 of the 1866 Act constituted the criminal enforcement provision.
See Act of April 9, 1866, ch. 31, § 2, 14 Stat. 27 (1866). The modern counter-
98 (1945).
One commentator has noted that the Thirty-ninth Congress “proceeded
on a theory that effective implementation of the thirteenth amendment required
the legislative identification of specific civil rights and provision for protection
of these rights through the executive and judicial branches of the national
government.” Buchanan, supra note 14, at 15. Buchanan further noted that
the bill’s sponsor, Senator Trumbull, stated that the 1866 Act was necessary
“‘to abolish slavery, not only in name but in fact.’” Id. at 16, quoting Cong.
Globe, 39th Cong., 1st Sess. 43 (1865). After reviewing the debates prior to
enactment of the 1866 Act, Buchanan concluded that “equal protection under
the law and equality of economic opportunity emerge as the dominant themes”
Another commentator has concluded that the 1866 Act was a direct response to the Black Codes
enacted in the South and to private acts of discrimination directed toward the
newly freed slaves. TenBroek, supra note 14, at 188-89.
For an extensive review of the legislative history of the 1866 Act, see Jones
v. Alfred H. Mayer Co., 392 U.S. 409, 422-37 (1968). The Court found that
Congress passed the 1866 Act “‘to carry out and guaranty the reality of [the
thirteenth amendment]’” and to give “‘practical effect and force’” to the
Civil Rights Act of 1866 was construed as prohibiting only governmental racial discrimination. However, in Jones v. Alfred H. Mayer Co., the Supreme Court reversed longstanding precedent and held that the 1866 Act prohibited racial discrimination in the private sale of real estate. Subsequently, in Johnson v. Railway Express Co., the Court held that section 1981’s prohibition of racial discrimination in the right to make and enforce contracts extended to private employment relationships.

Id. at 434, quoting Cong. Globe, 39th Cong., 1st Sess. 1151 (1865) (remarks of Rep. Thayer). The Court further noted that the Act was passed with the belief that Congress “was approving a comprehensive statute forbidding all racial discrimination affecting the basic civil rights enumerated in the Act.” 392 U.S. at 435 (emphasis in original). The Court also stated: “We think that history leaves no doubt that, if we are to give [the law] the scope that its origins dictate, we must accord it a sweep as broad as its language.” Id. at 437, quoting United States v. Price, 383 U.S. 787, 801 (1966). For a discussion of Jones, see notes 16-18 and accompanying text infra.

The 1866 Act was re-enacted in 1870. See Act of May 31, 1870, ch. 114, § 18, 16 Stat. 144 (1870). One commentator has stated that there was disagreement within the Thirty-ninth Congress as to the constitutionality of the 1866 Act. TenBroek, supra note 14, at 200. Some members felt that the thirteenth amendment was designed merely to free the slave from personal bondage and that the amendment did not authorize legislation beyond this narrow goal. Id. at 201. The Congress thus supported the adoption of the fourteenth amendment and re-enacted the 1866 Act pursuant to that amendment’s grant of power, to dispel any doubts as to the constitutionality of the 1866 Act. Id. at 200. See also Jones v. Mayer, 392 U.S. at 435. Prior to the Jones decision, the Supreme Court concluded that “one of the primary purposes of many members of Congress in supporting the adoption of the Fourteenth Amendment was to incorporate the guarantees of the Civil Rights Act of 1866 in the organic law of the land.” Hurd v. Hodge, 334 U.S. 24 (1948). However, any doubts as to the derivation of the 1866 Act were settled by the Jones Court which found that the Act was derived from the thirteenth amendment and that “[a]ll Congress said in 1870 was that the 1866 law ‘is hereby re-enacted.’ That is all Congress meant.” Jones v. Mayer, 437 U.S. at 436-37, quoting Act of May 31, 1870, ch. 114, § 18, 16 Stat. 144 (1870).


17. See Hurd v. Hodge, 334 U.S. 24 (1948); Hodges v. United States, 203 U.S. 1 (1906); Civil Rights Cases, 109 U.S. 3 (1883). The Jones Court stated: “Insofar as Hodges is inconsistent with our holding today, it is hereby overruled.” 392 U.S. at 441 n.78.


The Jones plaintiffs alleged that the defendant refused to sell them a home because of the plaintiffs’ race. 392 U.S. at 412. The Jones Court determined that the legislative history of the 1866 Act clearly revealed a congressional intent to provide a cause of action against private individuals for claims of racial discrimination. Id. at 423-26.

19. 421 U.S. 454 (1975). The Johnson plaintiffs claimed that their employer violated Title VII and § 1981 by discriminating against black employees in the application of seniority rules and in job assignments. Id. at 455.

20. Id. at 454. The Johnson Court noted that the issue was well-settled among the courts of appeals. Id. at 459-60 (citations omitted).
Prior to the Court's expansive interpretation of the 1866 Act, Congress specifically addressed the issue of employment discrimination and enacted Title VII of the Civil Rights Act of 1964 to eliminate "discrimination in employment based on race, color, religion, [sex] or national origin." Title VII prohibits certain employment practices and evidences Congress' intent to afford all persons equal employment opportunity. The legislative history of Title VII indicates that Congress intended that "the remedies available to the individual under Title VII [were to be] co-extensive with the individual's right to sue under the provisions of the Civil Rights Act of 1866" and that the two statutes "augment each other and are not mutually exclusive." Although both statutes afford overlapping federal remedies for claims of racial discrimination in employment, there are differences in the substantive and procedural law under each statute.

Circuit had interpreted § 1981 as encompassing private employment discrimination. See Young v. I.T. & T., 438 F.2d 757 (3d Cir. 1971). The Young court stated that "[i]n the context of the Reconstruction it would be hard to imagine to what contract right the Congress was more likely to have been referring. Certainly the recently emancipated slaves had little or nothing other than their personal services about which to contract." Id. at 760.

21. See Note, Section 1981: Discriminatory Purpose or Disproportionate Impact?, 80 COLUM. L. REV. 137 (1980). This commentator notes that "the Act lay dormant and practically unused for over a century as a result of the state action limitation grafted onto it by the Supreme Court." Id. at 187 n.2. However, the Act was "revitalized" by the Court in 1968. Id., citing Jones v. Mayer, 392 U.S. 409 (1968). For a discussion of Jones, see notes 16-18 and accompanying text supra.


26. H.R. REP. No. 238, 92d Cong., 1st Sess. 19 (1971). In 1964, the Senate defeated a proposed amendment to Title VII which would have made that statute the exclusive federal remedy for discrimination in employment. See 110 Cong. Rec. 13650-52 (1964). See also Alexander v. Gardner-Denver Co., 415 U.S. 36, 48 (1974). The Gardner-Denver Court noted that the legislative history of Title VII clearly indicated congressional intent to permit individuals to pursue their rights under both Title VII and other applicable statutes. Id.

While the Supreme Court has not addressed the standards of proof for employment discrimination claims under section 1981, the Court has determined that a Title VII claim can be supported by a showing of disparate impact. In *Griggs v. Duke Power Co.*, the Court was concerned with the framework for the analysis of disparate impact claims. Under a disparate impact theory, a plaintiff may establish a prima facie claim of discrimination by showing a "statistical disparity between the proportion of blacks in the employer's work force and the proportion of blacks in the relevant labor market." *Kinsey v. First Regional Sec., Inc.*, 557 F.2d 830, 839 (D.C. Cir. 1977). Once a prima facie case is established, the burden shifts to the employer to show the business necessity of the challenged practice. *Albemarle Paper Co. v. Moody*, 422 U.S. 315 (1975). The plaintiff must then have an opportunity to show that other practices that do not result in a discriminatory impact would serve the legitimate interest of the employer. *Id. at 425. See also L. Modjeska, Handling Employment Discrimination Cases, § 1.7 (1980).

The fact situation involved in a Title VII claim may be such that proof of disparate treatment is required. See L. Modjeska, supra, § 1.8. Disparate treatment claims involve allegations that an employer has treated an individual or group "less favorably than others because of their race, color, religion, sex or national origin." *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). The Supreme Court has adopted a framework for establishing a prima facie case of disparate treatment in which the plaintiff must show:

(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.

*McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (footnote omitted). Once a prima facie case is established, the burden shifts to the employer to show some legitimate, non-discriminatory reason for the rejection. *Texas Dep't of Community Affairs v. Burdine*, 101 S.Ct. 1089 (1981). The ultimate burden of proving intentional discrimination remains at all times with the plaintiff. *Id. at 1093. A prima facie showing is not the equivalent of a showing of intent to discriminate; intent is inferred from the prima facie showing because "experience has proved that in the absence of any other explanation it is more likely than not" that the challenged actions were the result of a discriminatory purpose. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 579-80 (1978).
fronted with an employment practice that was facially neutral, but had resulted in a disproportionate impact on black applicants for employment.\textsuperscript{31} The Griggs Court held that a claimant need not prove that his employer was motivated by a discriminatory purpose to establish a Title VII claim and fashioned the disparate impact theory.\textsuperscript{32}

The Supreme Court has also addressed the issue of the correct standard of proof to be applied in employment discrimination claims brought under the United States Constitution.\textsuperscript{33} In the 1976 case of \textit{Washington v. Davis},\textsuperscript{34} the Court held that the Court of Appeals for the

The courts of appeals have held that disparate treatment claims under §1981 involve the same burdens and allocations of proof as claims under Title VII. See Baldwin v. Birmingham Bd. of Educ., 648 F.2d 950 (5th Cir. 1981); Vaughn v. Westinghouse Elec. Co., 620 F.2d 655 (8th Cir. 1980).


31. \textit{Id.} The plaintiffs in Griggs challenged the defendant power company's practice of requiring a high school education or a passing grade on an intelligence test as a prerequisite for employment. \textit{Id.} at 425-26. The plaintiffs claimed that these requirements were unrelated to job content and resulted in a disproportionate number of black applicants failing to meet the employment standards. \textit{Id.} at 426. The court of appeals found that a Title VII claim based upon disproportionate impact did not establish a prima facie case and that the plaintiffs must prove that the defendant has a discriminatory purpose. \textit{Id.} at 163.

32. 401 U.S. at 432. The Griggs court noted that the plain intent of Congress in enacting Title VII was to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." \textit{Id.} at 429-30. The Court further stated that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." \textit{Id.} at 432. See also International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) (proof of discriminatory motive is not required under a disparate impact theory).

The Griggs impact analysis was specifically approved by Congress during presentation of the 1972 amendments to Title VII. See H.R. REP. No. 238, 92d Cong., 1st Sess. 8, \textit{reprinted in} 1972 U.S. CODE CONG. & AD. NEWS 2137, 2144. The House report notes that employment discrimination "is a far more complex and pervasive phenomenon" than was viewed by Congress in 1964. \textit{Id.} Finding that the experts on employment discrimination describe the field "in terms of 'systems' and 'effects' rather than simply intentional wrongs," the report cited Griggs with approval. \textit{Id.}


34. 426 U.S. 229 (1976). The plaintiffs challenged a qualifying test given to applicants for positions as police officers in the District of Columbia. That allegedly excluded a disproportionately higher number of black applicants and thus, was a violation of their right to equal protection. \textit{Id.} at 233. The plaintiffs filed a motion for partial summary judgment in the district court requesting a declaration that the challenged test violated the due process clause of the fifth amendment. \textit{Id.} at 234. The \textit{Washington} plaintiffs' motion for summary judgment on the constitutional issue was denied by the District Court. \textit{Id.} Relying on Griggs v. Duke Power Co., the District of Columbia Circuit reversed the district court and granted the plaintiff's motion for partial summary judgment, holding that disproportionate impact
District of Columbia had incorrectly applied the disparate impact standard to claims brought under the United States Constitution. The

is sufficient to establish a constitutional violation of employment rights. Id. at 236-37. For a discussion of Griggs, see notes 30-32 and accompanying text supra.

35. 426 U.S. at 239. The Court found that the constitutional standard for adjudicating claims of racial discrimination was not identical to that of Title VII. Id. The Court noted that the "central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." Id. After examining prior decisions, the Court concluded that proof of disparate impact, standing alone, has never been sufficient to invalidate a law on constitutional grounds. Id., citing Jefferson v. Hackney, 406 U.S. 585 (1972) (rejecting attack on various provisions of Social Security Act based on proof of disparate impact without proof of racial motivation); Alexander v. Louisiana, 405 U.S. 625 (1972) (rejecting attack on jury selection system that resulted in disproportionate black representation); Wright v. Rockefeller, 376 U.S. 52 (1964) (attack on appointment statute requires proof of discriminatory motivation); Akins v. Texas, 325 U.S. 398 (1945) (purpose to discriminate must be present in jury discrimination claim). The Court noted that a disparate impact may be relevant in cases involving discrimination claims brought under the constitution. 426 U.S. at 241. The Court stated that "[n]ecessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." Id. at 242. The Court further noted that although disproportionate impact may be relevant, it is not the "sole touchstone of an invidious racial discrimination forbidden by the Constitution." Id.

Subsequent decisions have elucidated the type of discriminatory purpose required by Washington. See, e.g., Massachusetts v. Feeney, 442 U.S. 256 (1979); City of Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977). The Feeney Court stated:

Discriminatory purpose, however, implies more than intent as volition or intent as awareness of consequences. It implies that the decision-maker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

442 U.S. at 279 (citation omitted).

Although Washington v. Davis clearly establishes that proof of intent is required under the fifth and fourteenth amendments, several courts have implicitly recognized that Congress has the power under the fourteenth amendment to enact legislation which permits proof of discrimination solely through evidence of disparate impact. See, e.g., Scott v. City of Anniston, 597 F.2d 897 (5th Cir.), cert. denied, 446 U.S. 917 (1979); United States v. City of Chicago, 573 F.2d 418 (7th Cir. 1978); Firefighters Inst. for Racial Equality v. City of St. Louis, 549 F.2d 506 (8th Cir.), cert. denied sub nom. United States v. Banta, 434 U.S. 819 (1977); Commonwealth v. Rizzo, 466 F. Supp. 1219 (E.D. Pa. 1979). In Scott, the Fifth Circuit held that the 1972 amendments to Title VII, enacted pursuant to Congress' power under the fourteenth amendment, were meant to continue the disparate impact standard of proof in actions against governmental entities. 597 F.2d at 900. The Scott court reasoned that Congress is authorized to enact more stringent standards than those provided by the fourteenth amendment. Id.

In Rizzo, the district court for the Eastern District of Pennsylvania found that Congress was aware of the impact standard articulated in Griggs v. Duke Power Co. when the 1972 amendments were enacted. 466 F. Supp. at 1226, citing Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 104 (1972). The Rizzo court held that Congress has the power under the fourteenth amendment to enact legislation permitting a disparate impact standard of proof. 466 F. Supp. at 1227.
Court found that the challenged practices established a “racially neutral qualification for employment,” and thus, could not deny any person equal protection of the laws solely because it impacted disproportionately upon one protected group. The Court concluded that the “constitutional rule required a showing of discriminatory intent.”

The Washington decision has had a profound impact on the determination of standards of proof under section 1981. Although several federal courts have applied the Title VII disparate impact standard to section 1981 claims, the majority of circuit courts have construed

36. 426 U.S. at 245. The Court noted that the test challenged by the Washington plaintiffs was administered generally to prospective government employees. Id.

37. Id. at 246. The Court stated:

Respondents, as Negroes, could no more successfully claim that the test denied them equal protection than could white applicants who failed. The conclusion would not be different in the face of proof that more Negroes than whites had been disqualified by Test 21. That other Negroes also failed to score well would alone, not demonstrate that respondents individually were being denied equal protection of the laws by the application of an otherwise valid qualifying test being administered to prospective police recruits.

Id.

38. Id. While the Court recognized the disproportionate impact of the challenged procedure on blacks, it found that the defendant’s affirmative efforts to recruit black officers and the relationship of the challenged test to job requirements negated the charge of discrimination. Id.

In addition, the Court expressed its concern that the application of disparate impact analysis to equal protection claims could result in the invalidation of numerous statutes. Id. at 248. The Court stated:

A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

Id. (footnote omitted).


In Davis v. County of Los Angeles, the Ninth Circuit declined to impose an intent requirement in section 1981 claims, stating that such a finding would: dilute what has been a potent remedy for ills of countless minority employees subjected to the unlawful discriminatory conduct of their
Washington as requiring proof of a discriminatory purpose to establish an employment discrimination claim under section 1981. For example, the Second Circuit, in Guardians Association of New York v. Civil Service Commission, rejected a section 1981 challenge by black police department employees to the lay-off policies of the department. The Guardian plaintiffs alleged that the challenged practices resulted in a racially disproportionate impact and, thus, violated Title VII and section 1981. The Second Circuit found that the section 1981 claim required a showing of discriminatory purpose rather than simply disparate impact. The Guardian court based its decision upon the language of the statute, the legislative history of the 1866 act, and the scope of the employers. Thus, we cannot conclude that [Washington v. Davis] embraced a ruling that a showing of disproportionate impact no longer will suffice to establish a prima facie case of employment discrimination under § 1981.

566 F.2d at 1340.

41. See Grano v. City of Columbus, 637 F.2d 1073 (6th Cir. 1980); Craig v. County of Los Angeles, 626 F.2d 659, 668 (9th Cir. 1980); Lee v. Washington County Bd. of Educ., 625 F.2d 1235 (5th Cir. 1980); Guardians Ass’n v. Civil Serv. Comm’n, 633 F.2d 232 (2d Cir. 1980), cert. denied; Donnell v. General Motors Corp., 576 F.2d 1292, 1300 (8th Cir. 1978); Flowers v. Crouch-Walker Corp., 552 F.2d 1277 (7th Cir. 1977); Sabol v. Snyder, 425 F.2d 1009 (10th Cir. 1970).

See also Whiting v. Jackson State Univ., 616 F.2d 116 (5th Cir. 1980).

The Whiting court stated:

There is no question that under section 1981, the plaintiff must establish purposeful discrimination equivalent to that required by those alleging fourteenth amendment dereliction. ... But when section 1981 is merely used as a companion remedy provision to [Title VII], we hold that such intent should be inferred in the same manner as Waters.

Id. at 121, citing Furnco v. Waters, 438 U.S. 567 (1978) (discussing disparate treatment prima facie case under Title VII). For a discussion of Waters, see note 29 supra.

42. 633 F.2d 232 (2d Cir. 1980).

43. Id. at 235. The plaintiffs claimed that preemployment examinations given from 1968 to 1970 were discriminatory. Id. Thus, the plaintiffs alleged that they were hired at a later date than they would have been had the examinations been fair and that, under the police department’s “last-in-first-out” lay-off policy, the plaintiffs were disproportionately dismissed. Id.

44. Id.

45. Id. at 267. The Guardian court recognized that § 1981 and Title VII overlap to a certain extent and that they complement each other in the field of employment discrimination. Id. However, the court concluded that § 1981 and Title VII “were not intended to reach precisely the same conduct.” Id. The court further noted that it lacked the power “to reshape § 1981 in the mold of Title VII” and that only Congress could do that. Id.

46. Id. at 266. The Second Circuit found that nothing in the language of § 1981 supports the theory that the statute was intended to prohibit the disparate impact of facially neutral practices. Id. Noting that as long as the challenged lists were used, no applicant, regardless of race, could secure employment with defendants without achieving a passing grade, the court found that “[a]ll applicants were in fact permitted to compete for employment on precisely the same terms.” Id.

47. Id. at 267. After noting that the proper inquiry was the intent of Congress in passing § 1981, the court found nothing in the history of the enact-
The Croker court began its analysis by stating that it had not previously squarely addressed the issue of the standard of proof required in employment discrimination claims under section 1981. Chief Judge Seitz noted that since the United States Supreme Court decision in Washington v. Davis, the majority of circuits have required a plaintiff to prove purposeful discrimination in section 1981 claims. While recognizing that the Washington Court had addressed the standard of proof in a claim under the fifth amendment and not under section 1981, the court reasoned that the Washington decision required a reexamination of the issue, in light of the numerous courts of appeals' decisions reassessing section 1981.

48. 633 F.2d at 267. The court stated:

We consider it almost inconceivable that § 1981 was intended to outlaw in one stroke, facially neutral practices bearing on the ability of persons to make contracts concerning sales, rentals, banking, public accommodations, private schooling, insurance, personal services, or anything else, where such practices have a disproportionate racial impact unjustified by some type of necessity.

Id.

This reasoning has been adopted by several federal district courts and courts of appeals. See note 41 supra. But see Kinsey v. First Regional Sec., Inc., 557 F.2d 830 (D.C. Cir. 1977). The Kinsey court found that the plaintiffs, who were proceeding under Title VII and section 1981, were not required to show a discriminatory purpose. Id. at 838 n.22. Of the circuits that have addressed this issue since the Supreme Court's decision in Washington, the District of Columbia Circuit appears to be the only one that has maintained the view that a showing of disparate impact is sufficient to support a section 1981 claim.

49. 662 F.2d at 984. The majority acknowledged that prior Third Circuit decisions could reasonably be interpreted as not requiring proof of intent in such actions. Id., citing Erie Human Relations Comm'n v. Tullio, 493 F.2d 371 (3d Cir. 1974) (a prima facie claim under § 1981 is established by evidence that blacks are under-represented and that an opportunity for racial discrimination existed).

50. For a discussion of Washington v. Davis, see notes 34-38 and accompanying text supra.

51. 662 F.2d at 984. For the courts of appeals that require proof of intent under § 1981, see note 41 supra. The court highlighted the Second Circuit's statement that: "Before Washington v. Davis, we had approached § 1981 with the belief that the Constitution itself prohibited conduct having a discriminatory effect. Now that our constitutional premise has been declared erroneous, we must of course reconsider our statutory conclusion." 662 F.2d at 985, quoting Guardians Ass'n v. Civil Serv. Comm'n, 633 F.2d at 264. For a discussion of Guardians, see notes 42-48 and accompanying text supra.

52. The analysis of the Washington Court is also applicable to cases brought under the fourteenth amendment.

53. 662 F.2d at 984.

54. 662 F.2d at 985.
In considering the language of the statute, the Third Circuit noted that section 1981's guarantee of the "'same right' to make contracts 'as is enjoyed by white citizens' is similar to the guarantee of 'equal protection' embodied in the fourteenth amendment." The Croker majority also stressed that the language of section 1981 is "less susceptible of an interpretation permitting an impact standard" than that of Title VII. The court found, based on the express language of the statute, that it could not conclude that the thrust of section 1981 was directed to the consequences of employment practices. Noting that the language of the statute was inconclusive, the court turned to the legislative history of section 1981 in order to ascertain congressional intent.

In reviewing the enactment history of section 1981 and the statute's ties to both the thirteenth and fourteenth amendment, the Croker

55. Id. at 986. For the text of §1981, see note 6 supra. The court stated that the language of §1981 was inconclusive. 662 F.2d at 986.

56. 662 F.2d at 986. The Croker majority stated that "as long as both white and nonwhite employees are subject to the same employment requirements or restrictions, both may be said to have been granted the right to contract on equal terms." Id. Chief Judge Seitz noted that the Supreme Court could not view for employment as racially discriminatory as a denial of equal protection "simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups." Id., quoting Washington v. Davis, 426 U.S. at 245. The Croker court found that it was faced with the same difficulty in construing §1981's similar guarantee of the right to make contracts. 662 F.2d at 986.

57. 662 F.2d at 986. The court examined the language of Title VII, which prohibits practices that "limit, segregate, or classify" employees or applicants in a way which would deprive or tend to deprive them of opportunities because of their race or color. Id. For the relevant text of Title VII, see note 7 supra. The Croker majority found that language consistent with an impact standard of proof, but determined that the language of §1981 required no such conclusion. 662 F.2d at 986. For the text of §1981, see note 6 supra.

58. 662 F.2d 986. The Croker court recognized that where facially neutral employment practices have a disparate impact on nonwhite citizens, those citizens cannot be said to enjoy the same rights as white citizens. Id. Although the court found this a tenuous reading of the language of §1981, it noted that such a reading was indicative of the statute's inconclusiveness. Id.

59. Id. at 986-87.

60. Id. at 987. The Third Circuit noted that §1981 was first enacted by Congress pursuant to the authority granted by section 2 of the thirteenth amendment. Id. at 987. The Croker majority acknowledged the plaintiffs' argument that under the thirteenth amendment "motivation is irrelevant when one is concentrating on the destruction of the institution of slavery and its lingering manifestations in private employment practices." Id., citing Civil Rights Cases, 109 U.S. 3, 20 (1883). However, the court found §1981 has "some ties to the fourteenth amendment," since it was reenacted in 1870, after the adoption of the fourteenth amendment. 662 F.2d at 987 (citations omitted). For a discussion of the history of the enactments of section 1981, see note 15 supra.

61. 662 F.2d at 988. For the text of the thirteenth amendment and its connection with §1981, see notes 14-15 supra. The Croker court acknowledged that "the scope of the thirteenth amendment and §1981 is not co-extensive with the scope of the fourteenth amendment." 662 F.2d at 988.
court found that the Civil Rights Act of 1866 was promulgated to “give real content to the freedom guaranteed by the Thirteenth Amendment.”62 However, the court noted that the legislative history did not reveal whether that content includes protection from “facially neutral actions having a discriminatory impact.”63 Rather, the Third Circuit found it more likely that the 1866 Act was directed towards intentional conduct.64 While admitting that both the language and legislative history of section 1981 failed to provide a definitive answer to the standard of proof issue, the Croker majority found that a standard requiring intent was “more consistent with the language of and impetus behind” the statute.65

Turning to policy considerations, the Third Circuit noted that section 1981 covers private as well as governmental conduct.66 As such, the Croker court found that the application of an impact standard to section 1981 claims would be even more intrusive than its application to fourteenth amendment claims.67 Finally, the Croker majority rejected the plaintiffs’ argument that liability under section 1981 and Title VII is coextensive.68 While noting that proof of disparate impact may be

\[\text{citing City of Memphis v. Greene, 101 S. Ct. 1584, 1604 (1981) (White, J., concurring). For a discussion of Justice White’s concurring opinion in City of Memphis, see note 28 supra. The Croker court noted that the Supreme Court has consistently held that the thirteenth amendment grants to Congress the “power to pass all laws necessary and proper for abolishing all badges and incidents of slavery.” Id. at 987, citing Civil Rights Cases, 109 U.S. 3, 20 (1883).}\]


63. 662 F.2d at 987-88.

64. Id. at 988. The court found that the 1866 act was a response to the power of the Ku Klux Klan and to the adoption of the black codes. Id. While the court acknowledged that the black codes did contain some facially neutral provisions, it found that they were designed to be and were purposefully applied in a discriminatory manner. Id.

65. Id. The Third Circuit reemphasized the fact that the majority of circuits faced with this issue since Washington v. Davis have required proof of discriminatory intent. Id.

66. Id. See Jones v. Alfred H. Mayer Co., 392 U.S. at 413; notes 14-18 and accompanying text supra.

67. 662 F.2d at 988. The Croker court emphasized the Supreme Court’s concern that a disparate impact standard of proof for fourteenth amendment claims might “invalidate a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.” Id., quoting Washington v. Davis, 426 U.S. at 248. The court noted that a disparate impact standard under § 1981 would, to a significant extent, have the same consequences. 662 F.2d at 988. For a discussion of the policy considerations addressed in Washington v. Davis, see note 38 supra.

The court voiced its reluctance to ignore the concerns expressed in Washington without a clear indication that Congress intended § 1981 to include “nonpurposeful conduct or neutral regulations having a disproportionate impact.” 662 F.2d at 989.

68. 662 F.2d at 989. The Croker court distinguished Title VII on the basis of its detailed administrative procedures, limitation of coverage to the
significant in proving discriminatory intent, the Croker court affirmed
the finding of the district court that the plaintiffs’ evidence was insuf-
cient to prove purposeful discrimination against the class.

Judge Aldisert, dissenting in part and concurring in part, initially
noted that the court faced a statutory void in that the question raised
had never occurred to Congress. Thus, Judge Aldisert approached the
issue in the context of employment discrimination law as a whole.

While recognizing the differences between Title VII and section 1981,
Judge Aldisert found that they did not require proof of different ele-
ments to sustain a claim for relief. After a discussion of judicial
interpretations of employment discrimination statutes, Judge Aldisert

area of employment discrimination and its language. Id. For a discussion
of the substantive and procedural differences between the two statutes, see
note 27 and accompanying text supra.

69. 662 F.2d at 989, citing Village of Arlington Heights v. Metropolitan

70. 662 F.2d at 989. The Third Circuit affirmed the finding of the dis-

tribution court that intentional discrimination had been proven in certain in-
dividual plaintiffs’ claims under § 1981. Id. For a discussion of the individual
§ 1981 claims, see note 8 supra.

71. 662 F.2d at 999 (Aldisert, J., concurring in part and dissenting in part).
Judge Higginbotham joined in the opinion. Id. Judge Aldisert
joined in all parts of the majority opinion with the exception of the majority’s
holding on the § 1981 issue. Id.

72. Id. Judge Aldisert noted that the § 1981 issue was solely one of
statutory construction and agreed with the majority’s finding that neither the
language nor the legislative history of § 1981 provided guidance for its con-
struction. Id. Thus, he found that the court was confronted with “a problem of
lacuna, a non-existent norm.” Id. (footnote omitted).

73. Id. In view of the statutory void which existed with respect to § 1981,
Judge Aldisert concluded that he would follow the “sound law approach:
‘sound in terms of the new use and demands of society as related to the
particular area of law to which the statute refers.’” Id. at 999-1000, quoting
R. Leflar, Statutory Construction: The Sound Law Approach, in R. ALDISERT,
The Judicial Process 177, 180 (1977). Judge Aldisert found that this approach
required a consideration of § 1981 in conjunction with Title VII. 662 F.2d
at 1000 (Aldisert, J., concurring in part and dissenting in part).

74. 662 F.2d at 1000 (Aldisert, J., concurring in part and dissenting in part).
Judge Aldisert noted that the legislative history of Title VII indicates
a congressional intent for Title VII remedies to be co-extensive with those
under section 1981. Id., citing H.R. REP. No. 238, 92d Cong., 1st Sess. 19,
found that Congress “deliberately designed the twin remedies [§ 1981 and
Title VII] to cover the entire field of employment discrimination based on
race.” 662 F.2d at 1000 (Aldisert J., concurring in part and dissenting in part).
Judge Aldisert then stated that “public policy as manifested by congres-
sional activity is to expand, and not to contract, the reach of statutes
dealing with employment discrimination.” Id. Noting that Congress en-
acted “massive amendments to Title VII in 1972,” Judge Aldisert thought it
relevant that Congress did not attempt to change the judicially created impact
standard. Id.

75. 662 F.2d at 1001 (Aldisert, J., concurring in part and dissenting in part).
Judge Aldisert found that the “colossus of our employment discrimina-
tion law” had not been established through judicial gloss on the language
concluded that the “traditional wisdom” that had evolved from judicial construction of Title VII should be applied to section 1981 cases. Finally, Judge Aldisert observed that racial discrimination can be “the most virulent of strains that infect a society” and that the “profound national policy of opposition to racial discrimination must continuously and unstintingly concentrate on its eradication in employment.”

Judge Gibbons, dissenting in part and concurring in part, found that the impetus behind and legislative history of the Civil Rights Act of 1866 indicate that section 1981 was meant to redress facially

of §1981, but rather on the text of Title VII. Id. Noting that the courts, rather than Congress, had formulated the dichotomy under which claims can be established through proof of disparate impact as well as disparate treatment, Judge Aldisert found that the courts should not now unduly complicate employment discrimination actions. Id. Judge Aldisert stated that consistency of judicial interpretation in all areas of employment discrimination law would result in increased understanding and acceptability of this body of law by the lay public. Id. at 1002 (Aldisert, J., concurring in part and dissenting in part).

76. Id. Judge Aldisert stated that he did not believe that Congress intended for §1981 to be interpreted in one way with regard to the standard of proof and Title VII in another. Id.

77. Id. at 1002 (Aldisert, J., concurring in part and dissenting in part). Judge Aldisert would have reversed the district court’s judgment insofar as it held that the plaintiffs were required to prove intentional discrimination to prevail in their §1981 claims. Id.

78. Id. at 1002 (Gibbons, J., concurring in part and dissenting in part). Judges Higginbotham and Sloviter joined in the opinion. Id. Judge Gibbons concurred with the majority in all parts of the majority opinion except for the holding that a plaintiff relying on §1981 must establish a racially discriminatory purpose. Id.

79. Id. Judge Gibbons examined the history of the first session of the Thirty-ninth Congress, noting that the session was largely devoted to reconstructing the post-war society in the South. Id. at 1003-04 (Gibbons, J., concurring in part and dissenting in part). Judge Gibbons reasoned that the impetus behind this reconstruction must be considered in analyzing the Civil Rights Act of 1866. Id. After an extensive review of the program of post-slavery redevelopment Judge Gibbons found it a bit “far fetched” for the majority to suggest that the state was not “intended to reach facially neutral conduct having a disproportionate impact upon the job opportunities of Blacks.” Id.

80. Id. at 1003-06. (Gibbons, J., concurring in part and dissenting in part). Judge Gibbons relied, in part, upon a working paper prepared for a committee of the Thirty-ninth Congress indicating the extent of employment discrimination against Blacks in the South. Id. at 1004 (Gibbons, J., concurring in part and dissenting in part), citing Senate Executive Document No. 2 (Dec. 19, 1865), 39th Cong., 1st Sess., reprinted in Virginia Commission on Constitutional Government, The Reconstruction Amendments’ Debates 87, 88 (1967). The report included extensive documentation of discrimination in the South against blacks in employment opportunities. 662 F.2d at 1004 (Gibbons, J., concurring in part and dissenting in part). Judge Gibbons found that the report also described laws which were facially neutral. Id. Finding that this report was central to the deliberations of the Thirty-ninth Congress, Judge Gibbons noted that the Congress in 1866 had the desire to invalidate facially neutral job requirements having a discriminatory impact. Id.
neutral practices having a disparate impact upon black citizens.\textsuperscript{81} Further, Judge Gibbons noted that the majority decision conflicted with the prior policy of the Third Circuit in harmonizing Title VII and section 1981.\textsuperscript{82}

It is submitted that the\textit{Croker} majority has disregarded the long-standing rule that laws proscribing discrimination should be broadly construed.\textsuperscript{88} The court recognized that the language and legislative history of section 1981 are ambiguous,\textsuperscript{84} and under such circumstances, a liberal interpretation of the statute was warranted.

In analyzing the language of the statute, the Third Circuit focused on the similarity between the guarantee of the right to contract contained in section 1981\textsuperscript{85} and the constitutional guarantee of equal rights examined by the Supreme Court in\textit{Washington v. Davis}.\textsuperscript{86} However, the guarantee of equal opportunity intended by Congress in 1866\textsuperscript{87} is also similar to the equality of opportunity underlying the enactment of

\begin{itemize}
\item \textsuperscript{81} 662 F.2d at 1004 (Gibbons, J., concurring in part and dissenting in part). Judge Gibbons reasoned that the Thirty-ninth Congress was concerned with the result of slavery and that, therefore, the intent of Congress would have been to require disparate impact as a standard of proof under §1981.\textit{Id.} at 1006 (Gibbons, J., concurring in part and dissenting in part).
\item \textsuperscript{82} \textit{Id.} at 1006 (Gibbons, J., concurring in part and dissenting in part), citing\textit{Young v. I.T.&T.}, 438 F.2d 757 (3d Cir. 1971) (holding that section 1981 was not affected by the enactment of Title VII).
\item Judge Gibbons also found that the Thirty-ninth Congress failed to provide for issues such as the standard of proof under the 1866 Act because it "expected that in filling in the interstices in civil litigation, the courts would do so mindful of the social purpose of the legislation." 662 F.2d at 1007 (Gibbons, J., concurring in part and dissenting in part). Reviewing the history of judicial enforcement of the 1866 Act, Judge Gibbons found that the\textit{Croker} majority chose an interpretation of §1981 that would inhibit its purpose as had judicial interpretations prior to the 1960's. \textit{Id.} Finally, Judge Gibbons distinguished\textit{Washington v. Davis}, relied upon by the majority, on the basis that\textit{Washington} failed to address the question of whether Congress has the authority under the thirteenth or fourteenth amendments to enact a statute providing for liability based upon proof of impact. \textit{Id.}
\item For a discussion of\textit{Washington v. Davis}, see notes 34-38 and accompanying text supra.
\item \textsuperscript{83} See, e.g.,\textit{Jones v. Alfred H. Mayer Co.}, 392 U.S. at 439. For a discussion of\textit{Jones}, see notes 16-18 and accompanying text supra, notes 14-15 supra.
\item 662 F.2d at 986-88. For the text of §1981, see note 6 supra. For a discussion of the legislative history of §1981, see notes 14-15 supra.
\item 662 F.2d at 886. For the text of §1981, see note 6 supra.
\item 662 F.2d at 886. For a discussion of\textit{Washington}, see notes 34-38 and accompanying text supra.
\item \textsuperscript{85} See\textit{Buchanan}, supra note 14, at 15-21. Buchanan's review of the legislative history of the 1866 Act indicates that equality of economic opportunity was one of the dominant themes of the civil rights bill. \textit{Id.} at 16. For a discussion of the legislative history of the 1866 Act, see notes 14-15 supra.
\end{itemize}
Title VII.\textsuperscript{88} In addition, the fact that section 1981 was re-enacted in 1870 pursuant to the authority granted Congress under the fourteenth amendment does not support the adoption of the Washington rationale,\textsuperscript{89} as the dominant constitutional foundation for the 1866 Act was not the fourteenth, but the thirteenth amendment.\textsuperscript{90} Moreover, as the Croker court noted, the plaintiffs' claim in Washington of a constitutional infringement must be distinguished from the Croker plaintiffs' allegations of a statutory violation.\textsuperscript{91} However, the Third Circuit failed to give sufficient weight to this distinction. There is ample authority for the proposition that Congress had the power under the fourteenth amendment to enact amendments to Title VII which imposed liability upon proof of disparate impact.\textsuperscript{92} In avoiding the determination of whether Congress has the power to enact legislation under the thirteenth amendment imposing the disparate impact standard of proof in section 1981 claims, the Croker court failed to address a cogent basis for finding that the Washington holding does not apply to a statutory claim.\textsuperscript{93}

Regardless of the appropriateness of applying the Washington rationale to section 1981 claims, it is suggested that the legislative intent behind the 1866 Act should be the touchstone for determining the correct standard of proof in section 1981 employment discrimination actions.\textsuperscript{94}

\textsuperscript{88} See H.R. REP. No. 914, supra note 23. See also Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974); note 25 supra. See also H.R. REP. No. 238, 92d Cong., 1st Sess. 8, reprinted in 1972 U.S. CODE CONG. & AD. NEWS 2137, 2144. Congress acknowledged that discrimination in employment is a "far more complex and persuasive phenomenon" than was acknowledged in 1964 and "can be described in terms of 'effects' rather than simply intentional wrongs." \textit{Id.}

\textsuperscript{89} See Jones v. Alfred H. Mayer Co., 437 U.S. at 437-38; note 15 supra. The Jones Court found no compelling connection between the fourteenth amendment and the 1870 re-enactment of the 1866 Act. See 437 U.S. at 437-38. For a discussion of the re-enactment history of the 1866 Act, see note 15 supra. For a discussion of Washington, see notes 34-38 and accompanying text supra.

\textsuperscript{90} See notes 14-15 supra.

\textsuperscript{91} See 662 F.2d at 985; \textit{id.} at 1006 (Gibbons, J., concurring in part and dissenting in part).


\textsuperscript{93} \textit{Id.} at 1006 (Gibbons, J., concurring in part and dissenting in part). Judge Gibbons noted that the majority's reliance on Washington was "peculiar" in that the Washington Court had not addressed the question of congressional authority to enact legislation including a disparate impact theory. \textit{Id.}

\textsuperscript{94} As the Croker majority noted, the language and history of the 1866 Act do not conclusively provide an answer to the disparate impact/discriminatory intent issue. However, the history of the 1866 Act does reveal that Congress intended that Act to eradicate the vestiges of slavery and to enforce the guarantees of the thirteenth amendment. See notes 14-15 supra. It is suggested that the Thirty-ninth Congress could not foresee the precise issue
Finding that the intent of the Thirty-ninth Congress was ambiguous, the Third Circuit relied upon the fact that the majority of the courts of appeals have found that intent is required under section 1981.\textsuperscript{96} The Thirty-ninth Congress, however, intended section 1981 to "give practical effect and force" to the thirteenth amendment.\textsuperscript{96} It is suggested that an impact standard supports this legislative purpose more fully than an intent standard. The impact standard also comports with the power of Congress to define the substantive scope of the thirteenth amendment.\textsuperscript{97} As the Thirty-ninth Congress determined that discrimination in employment is a badge and incident of slavery,\textsuperscript{98} it is submitted that section 1981 should be construed in a manner that would guarantee its continuing vitality\textsuperscript{99} and its role in furthering the social policy of eradicating discrimination in employment. In conclusion, the requirement of proof of intent in section 1981 employment discrimination actions will erode the practical effect and force of this statute, contrary to the intent of Congress.

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before the Croker court. Consequently, this issue should be decided in a manner consistent with the general intent and spirit behind the 1866 Act. See Jones v. Alfred H. Mayer Co., 392 U.S. 409. The Jones Court noted that the 1866 Act's history revealed congressional intent to prohibit "all racial discrimination affecting the basic civil rights enumerated in the Act." \textit{Id.} at 435 (emphasis supplied by the court). The purpose behind the 1866 Act was to assure that slavery was abolished "not only in name but in fact." See Buchanan, supra note 14, at 16. It has been noted that the disparate impact of employment practices upon blacks results in part from conditions that are "part of the legacy of slavery and racial oppression." See Perry, \textit{supra} note 88, at 572.

95. 662 F.2d at 985, 988.


97. \textit{Id.} at 433, 440. \textit{See also} Buchanan, \textit{supra} note 14, at 849. Buchanan has stated that: "Jones affirmed the power of Congress to define the substantive scope of the thirteenth amendment." \textit{Id.}

98. \textit{See}, e.g., Young v. I.T. & T., 438 F.2d 757 (3d Cir. 1971); note 20 \textit{supra}.

99. \textit{See} Buchanan, \textit{supra} note 14, at 848. Buchanan notes: "Unless a statute's language and legislative history plainly require it, a statute should not be construed into practical impotence." \textit{Id.}