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DEAD-END STREET: DISCRIMINATION, THE THIRTEENTH AMENDMENT, AND SECTION 1982

City of Memphis v. Greene
451 U.S. 100 (1981)

One hundred and fifteen years have passed since the enactment of the Civil Rights Act of 1866. The purpose of the Act was to insure that the abolition of slavery was accomplished in fact as well as in theory and to implement the protections afforded by the thirteenth amendment.

1. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27 (1866) (current version at 42 U.S.C. § 1982 (1976)).
2. The first African Blacks in the British North American colonies were brought ashore at Jamestown in 1619. Between the American Revolution and the Civil War, the United States became a nation that was, as Abraham Lincoln observed, "half slave and half free." Speech by Abraham Lincoln, Republican State Convention, Springfield, Illinois (June 16, 1858), reprinted in D. Fehrenbacher, Slavery, Law, and Politics 258 (1981).

The most important judicial precedent on slavery at the founding of our republic was the British case of Somerset v. Stewart, 98 Eng. Rep. 499 (K.B. 1772), in which the court ruled that a slave brought to England could not be forced to leave the realm. The slave could apply for a writ of habeas corpus if forcible removal was attempted. In 1827, Somerset was limited by The Slave, Grace, 166 Eng. Rep. 179 (Adm. 1827). Grace had lived in England and later returned to the West Indies where she sued for freedom. The court held that "Grace had been entitled to her freedom only while in England; when she returned to a slave jurisdiction her status as a slave reattached itself to her." See P. Finkleman, An Imperfect Union 16 (1981).

The impact of these cases on American courts can be found in such cases as Lemmon v. The People, 26 Barb. 270, aff'd, 20 N.Y. 562 (1860) and Mitchell v. Wells, 37 Miss. 235 (1859). For an exceptional analysis of the impact of the institution of slavery on federalism and comity see P. Finkleman, An Imperfect Union (1981). The author points out that the most important legacy of Lemmon, Wells, and Dred Scott is the fourteenth amendment. However, it is the thirteenth amendment that directly prohibits "slavery" or "involuntary servitude".

In 1857, the United States Supreme Court furthered the institution of slavery by holding that no black could be a United States citizen or even a state citizen "within the meaning of the Constitution" and that Congress had no power to prohibit slavery in the territories, and, thus, all legislation embodying such prohibition, including the Missouri Compromise, was unconstitutional. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). It was decisions like Dred Scott, hotly condemned by the North and satisfactorily accepted by the South, that contributed to the configuration of forces and events that produced the Civil War. See generally D. Fehrenbacher, Slavery, Law and Politics (1981).


[The Thirteenth Amendment] declared that all persons in the United States should be free. This measure is intended to give effect to that declaration and secure to all persons within the United States practical freedom. There is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect, unless the persons who are to be affected by them have some means of availing themselves of their benefits. And of what avail will it now be that the Constitution of the United States has declared that slavery shall not exist, if in the late slaveholding States laws are to be enacted and enforced depriving persons of African descent of privileges which are essential to freemen?

It is the intention of this bill to secure those rights.

Id. at 474 (remarks of Sen. Trumbull).
amendment. When Congress enacted section 1 of the Civil Rights Act of 1866, it intended "to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein. . . ." These enumerated rights include the rights "to inherit, purchase, lease, sell, hold and convey real and personal property." For almost a century, both section 1982, the codification of section 1 of the Civil Rights Act of 1866, and the thirteenth amendment lay relatively dormant, unused by civil rights litigants. In particular, the history of the thirteenth amendment indicates that it had never lived up to its historic promise as the "grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government."

This dormancy may have occurred, in part, as a result of the Supreme Court decisions in the Civil Rights Cases, Plessy v. Ferguson, and Hodges v. United States, which progressively contracted

See also J. tenBroek, EQUAL UNDER LAW 174-97 (rev. ed. 1965).
4. U.S. CONST. amend. XIII (1865) 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.

Section 1 of the Civil Rights Act of 1866, codified at 42 U.S.C. § 1982 (1976), was considered as a legislative implementation of section 2 of the thirteenth amendment. See note 2, supra (remarks of Sen. Trumbull). See generally tenBroek, Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment, 39 CALIF. L. REV. 171 (1951) [hereinafter cited as Consummation.]


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

7. Historically, plaintiffs relying on the thirteenth amendment to validate their claims have generally been unsuccessful. See, e.g., Corrigan v. Buckley, 271 U.S. 323 (1926); Hodges v. United States, 203 U.S. 1 (1906); Civil Rights Cases, 109 U.S. 3 (1883); United States v. Harris, 106 U.S. 629 (1883) and discussion in note 12, infra. For almost a century sections 1981 and 1982 lay dormant because they were assumed to have been intended to apply only to state action. See Larson, The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment, 7 HARV. C.R.-C.L. L. REV. 56, 57 (1972); Note, Racially Disproportionate Impact of Facially Neutral Practices—What Approach Under 42 U.S.C. Sections 1981 and 1982?, 1977 DUKE L.J. 1267, 1274 [hereinafter cited as Impact.]

10. 163 U.S. 537 (1896). The Court sustained a Louisiana law of 1890 that required "equal but separate accommodations for white" and "colored" railroad passengers. The majority found
the reach of congressional power under the amendment. Designed for the sweeping purpose of granting the right of freedom, very few litigants had successfully invoked it, except in attacks on peonage.

However, in 1948, in *Hurd v. Hodge*, the Supreme Court breathed new life into the disregarded statute by holding that a Negro citizen who is denied the opportunity to purchase the home he wants "solely because of [his] race and color," has suffered the kind of injury that section 1982 was designed to prevent. In 1968, this holding was reinforced in *Jones v. Alfred H. Mayer Co.* Writing for a majority of seven in *Jones*, Justice Stewart reaffirmed that section 1982 was derived from the Civil Rights Act of 1866 and was designed to bar all racial discrimination, private as well as public, in the sale or rental of property. As such, section 1982 was a valid exercise of the power of Congress to enforce the thirteenth amendment. In sustaining the constitutionality of section 1982 under the thirteenth amendment, the *Jones* decision resurrected the "badge of slavery" concept buried by the court in 1883 in the *Civil Rights Cases*, holding that "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to

the thirteenth amendment inapplicable in this situation. (The *Plessy* separate-but-equal doctrine was overruled by *Brown v. Board of Education*, 347 U.S. 483 (1954)).

12. See *Consummation*, supra note 4, at 171. See also Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment*, 12 *Hous. L. Rev.* 1 (1974); Buchanan, *The Dormant Years of the Thirteenth Amendment*, 12 *Hous. L. Rev.* 593 (1975) [hereinafter cited as *Dormant Years.*] Professor Buchanan authored a series of eight articles comprehensively examining the history and general scope of the thirteenth amendment in 12 *Hous. L. Rev.* 1, 331, 357, 593, 610, 844, 871, 1070 (1975). The amendment is not broad enough, the Supreme Court has held, to protect blacks against being driven from their job by force and terror (*Hodges v. United States*, 203 U.S. 1 (1906)); to prevent color discrimination in the use of public conveyances, hotels and theaters (*The Civil Rights Cases*, 109 U.S. 3 (1883)); to condemn covenants forbidding the transfer of land to persons of black descent (*Corrigan v. Buckley*, 271 U.S. 323 (1926)); to authorize Congress to punish those who conspire for the purpose of depriving any person of the equal protection of the laws (*United States v. Harris*, 106 U.S. 629 (1883).)
13. Under the aegis of the thirteenth amendment, peonage compulsory labor for debt was invalidated as a legal institution in New Mexico by act of Congress in 1867. Statutes of Alabama, Georgia and Florida, which made it a criminal offense to obtain advances of money, under a promise to perform labor were invalidated later. See *Pollock v. Williams*, 322 U.S. 4 (1944); *Taylor v. Georgia*, 315 U.S. 25 (1942); *Bailey v. Alabama*, 219 U.S. 219 (1911). See also *Consummation*, supra note 4, at 171-72.
14. 334 U.S. 24 (1948). The case arose when property owners in the District of Columbia sought to enforce racially restrictive covenants against the Negro purchases of several homes on their block. The Court held that enforcement of those covenants would deny the Negro purchasers "the same right 'as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property.'" Such result is prohibited by § 1982. *Id.* at 34.
15. *Id.*
17. *Id.* at 422-36.
translate that determination into effective legislation." 18 Thus, the Jones Court affirmed the power of Congress to define the substantive scope of the thirteenth amendment and effectively revitalized the thirteenth amendment and section 1982 as successful civil rights weapons. 19 The Court further expanded the use of the badge of slavery analysis in Sullivan v. Little Hunting Park, Inc. 20 and Tillman v. Wheaton-Haven Recreation Ass'n, 21 applying it to racially restrictive covenants and discriminatory policies of private clubs.

The major issue not addressed by these cases was whether conduct, racially neutral on its face, which resulted in racially disproportionate impact, was statutorily prohibited by section 1982 or constitutionally prohibited by the thirteenth amendment. 22 This issue of discriminatory purpose has arisen most often in conjunction with recent cases concerning the equal protection clause of the fourteenth amendment. 23 Since 1976, the Supreme Court has held that proof of discriminatory purpose is necessary to establish a claim under the equal protection clause of the fourteenth amendment. 24

18. Id. at 440.
19. See Dormant Years, supra note 12, at 597. The Court in Jones recognized that the badge-of-slavery concept embraces more than state laws that deprive a class of persons of the legal capacity to function in society; the concept also includes the private acts of class prejudice that render legal capacity an illusion. The Court concluded:

At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.

392 U.S. at 443.
20. 396 U.S. 229 (1969). Sullivan involved a successful claim based on § 1982 where the Court struck down a device functionally comparable to a racially restrictive covenant. The Court noted that "a narrow construction of the language of § 1982 would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded by § 1 of the Civil Rights Act of 1866, 14 Stat. 27, from which § 1982 was derived." Id. at 237, citing Jones, 392 U.S. at 222-37.
22. It should be noted that the problems of identifying unconstitutional purposeful discrimination arise in other contexts as well. See, e.g., Shelton v. Tucker, 364 U.S. 479 (1960) (first amendment); Dean Milk Co. v. Madison, 340 U.S. 349 (1951) (Commerce Clause).
23. Section 1 of the fourteenth amendment provides in part:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.
24. Washington v. Davis, 426 U.S. 229 (1976). The case involved the validity of a qualifying test administered to applicants for positions as police officers in the District of Columbia Metropolitan Police Department. The disproportionate impact of this test which was neutral on its face
The Court in City of Memphis v. Greene\textsuperscript{25} granted certiorari\textsuperscript{26} to determine whether proof of racially discriminatory intent or purpose is necessary in thirteenth amendment or section 1982 cases\textsuperscript{27} (as is now required under the fourteenth amendment\textsuperscript{28}). However, the majority found it unnecessary to reach these issues. Instead, the Court reexamined the record at length and set aside the court of appeals' interpretation of facts, holding that a street closing at the border between a white and a black neighborhood did not involve any impairment to the kind of property interests within the reach of section 1982.\textsuperscript{29}

This case comment will focus on the Supreme Court's opinion in Greene. The comment will place the decision in perspective through a brief review of pertinent discrimination cases as well as a review of the background of the Memphis litigation. The Greene holding will then be presented and analyzed. This comment will question the rationale and viability of the Greene decision, particularly in relation to the dilemma posed when facially neutral conduct has discriminatory impact but lacks intent or purpose (racial animus). Finally, this comment will consider the decision's impact on future civil rights litigation.

**Racially Disproportionate Impact of Facially Neutral Practices: An Overview of Supreme Court Decisions**

During the past twenty years, the Supreme Court has handed down several important decisions concerning the elements of a prima facie case of statutory or constitutional race discrimination.\textsuperscript{30} A yet

\textsuperscript{26} 446 U.S. 934 (1980).
\textsuperscript{29} 451 U.S. at 119-24.
\textsuperscript{30} See Castaneda v. Partida, 430 U.S. 482 (1977) (discriminatory intent proved by a showing that Mexican-Americans constituted only 39 percent of those called for grand jury duty over an 11 year period in a county with a 79 percent Mexican-American population); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (proof of racially discriminatory intent or purpose is required to show a violation of the equal protection clause); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) (section 1981 prohibits racial discrimination against white as well as non-white persons); Runyon v. McCrary, 427 U.S. 160 (1976) (section 1981 prohibits private, commercially operated, non-sectarian schools from denying admission to prospective students because they are black); Washington v. Davis, 426 U.S. 229 (1976) (proof of racially discriminatory intent or purpose is required to show a violation of the equal protection clause as applied through the fifth amendment); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (Title VII of the Civil Rights Act of 1964 forbids the use of neutral practices with racially dispro-
unresolved issue is whether a plaintiff alleging a violation of section 1982 must prove discriminatory intent or, instead, may, in the proper circumstances, rely solely upon a showing of racially disproportionate impact. Since the Court has not directly addressed the issue of intent under section 1982 or thirteenth amendment cases, the Court must proportionate effects unless they are job related); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (section 1982 provides a remedy against purely private acts of race discrimination).

31. See Impact, supra note 7, at 1268 n.3, where the author stated:

Despite the passage of the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 81, section 1982 is still important because it is applicable to transactions involving personal as well as real property and it is capable of reaching those transactions exempted from the reach of Title VIII: the sale or rental of a single family dwelling if effected without the services of a professional realtor of public advertising and if the owner of the dwelling does not own an interest in more than three such dwellings and has not invoked such an exemption within the previous twenty-four month period; the rental of rooms or units in a dwelling, in which the owner resides and in which not more than four families reside independently of each other, 42 U.S.C. § 3603(b) (1976); and the rental of rooms by religious groups and private clubs to their own members. Id. § 3607.

[S]ections 1981 and 1982 have been given a parallel interpretation by the Supreme Court. The Court first indicated that it would do so in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), in which it explicated section 1982. The Court discussed an older decision in which the Supreme Court had held that the predecessor to section 1981 was applicable only to state action. Instead of merely distinguishing that case, the Court expressly overruled it, thus establishing a parallel interpretation for the two sections. See id. at 441 note 78. This initial disposition was solidified by the Court's decision in Runyon v. McCrory, 427 U.S. 160 (1976). See id. at 190 (Stevens, J., concurring) ("it would be most incongruous to give those two sections a fundamentally different construction").

32. See Impact, supra note 7, at 1268 n.4, where it says:

An allegation of racial discrimination may take either of two forms. The first is an allegation of [intentional] disparate treatment—that the defendant has treated the plaintiff less favorably than others because of the plaintiff's race. The second form, disproportionate impact, alleges a less obvious type of racial discrimination. It charges that the defendant has discriminated against the plaintiff by utilizing, in a racially neutral manner, a selection device or criterion that, although racially neutral on its face, nonetheless operates to the detriment of a disproportionate number of minority persons.

33. The Court's modern section 1982 and thirteenth amendment cases have all dealt with intentional discrimination. See, e.g., Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). The Court has not had the occasion to comment on the proper standard in an effect case. Justice Stewart's opinion in Jones did state that section 1982 "must encompass every racially motivated refusal to sell or rent" 392 U.S. at 421-22, but nothing was said about practices with discriminatory effects that were not racially motivated.

In Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), the Court discussed section 1982 with reference to its origin in section 1 of the Civil Rights Act of 1866, and concluded that "the structure of the 1866 Act, as well as its language, points to the conclusion urged by the petitioners in this case—that § 1 was meant to prohibit all racially motivated deprivations of the rights enumerated in the statute. . . ." Id. 426. This is a strong indication of the Court's thinking as to the character of the actions prohibited by the Act. Compare a similar discussion found in Runyon v. McCrory, 427 U.S. 160 (1976), another case involving allegations of disparate treatment. There the Court, while discussing section 1981 by reference to section 1 of the 1866 Act, stated that [i]just as in Jones a Negro's § 1 right to purchase property on equal terms with whites was violated when a private person refused to sell to the prospective purchaser solely because he was a Negro, so also a Negro's § 1 right to "make and enforce contracts" is violated if a private offeror refuses to extend to a Negro, solely because he is a Negro, the same opportunity to enter into contracts as he extends to white offerors. Id. at 170-71. (footnote omitted) (emphasis added). This result seems to be mandated by the
decide whether to adopt the same approach it has taken in equal protection cases or the alternate approach it has taken in Title VII cases.

A plaintiff may establish a prima facie case under Title VII merely by proving that he was damaged by the effect of an employment practice that, although neutral on its face, is shown to have a racially disproportionate impact. On the other hand, to establish a prima facie case under the equal protection clause a plaintiff must produce proof of the defendant's intent to discriminate.

Prior to 1976, the issue of finding discriminatory intent did not arise often, as discriminatory intent was often blatantly clear from the statute or behavior in question. Nor did plaintiffs appear to have to show discriminatory intent by the defendants as a prerequisite to establishing a violation of the equal protection clause. Because this showing was not required, plaintiffs' burden in discrimination cases was not too great. Thus, the fourteenth amendment was invoked, often successfully, not only in school desegregation cases, but also in municipal service, voting, housing, zoning, jury selection, public accom-

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38. Brown v. Board of Education, 347 U.S. 483 (1954). In Brown, the Court overturned the separate-but-equal doctrine espoused in Plessy v. Ferguson, 163 U.S. 537 (1896), holding that segregation of white and black children in state public schools solely on the basis of race and pursuant to state laws permitting such segregation, denies to black children the equal protection of the laws guaranteed by the fourteenth amendment. Further, even though the physical facilities and other tangible factors of white and black schools may be equal, the doctrine of separate-but-equal has no place in the field of public education; separate is inherently unequal.
39. New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958). In Detiege, the Court affirmed per curiam the decision of the fifth circuit (252 F.2d 122 (5th Cir. 1958)) that the refusal of a city to make publicly supported facilities available on a non-segregated basis to black citizens deprived them of equal protection of the law.
40. Gomillion v. Lightfoot, 393 U.S. 385 (1969). See also Voting Rights Act of 1965, 42 U.S.C. § 1971-1973 (1970). In Gomillion, some Alabama black citizens sued for a declaratory judgment that an act of the state legislature changing the boundaries of the city of Tuskegee is unconstitutional and for an injunction against its enforcement. The Court held that since the inevitable effect of the act would be to deprive blacks of their right to vote on account of their race, contrary to the fifteenth amendment, the act was unconstitutional.
41. Hunter v. Erickson, 339 U.S. 385 (1969) (a facially neutral law that burdens minorities is as repugnant for equal protection purposes as a law that discriminates on its face).
42. Buchanan v. Warley, 245 U.S. 60 (1917). The Court held that a city ordinance which forbids blacks to occupy houses in blocks where the greater number of houses are occupied by whites, in practical effect, prevents the sale of lots in such blocks to blacks, thereby violating the fourteenth amendment.
43. Strauder v. West Virginia, 100 U.S. 303 (1880). A West Virginia statute which in effect,
modation and property cases. However, it should be noted that most of these cases dealt with conduct that was obviously racially motivated rather than facially neutral.

The Supreme Court decision in *Washington v. Davis* in 1976, began a new era in civil rights law. Rejecting the contention that state action is unconstitutional solely because it operates to injure more blacks than whites, the Court held that proof of discriminatory purpose is necessary to establish a claim of racial discrimination under the equal protection clause. The Court rejected the Title VII standard announced in *Griggs v. Duke Power Co.*, which prohibited the use of practice that are fair in form, but discriminatory in operation.

singles out and denies to blacks the right and privilege of participating in the administration of law, as jurors, because of their color, is discrimination forbidden by the fourteenth amendment.

44. The Civil Rights Cases, 109 U.S. 3 (1883) (denial of equal accommodations to blacks in an inn, a theater, and a railroad imposes no badge of slavery or involuntary servitude violative of the thirteenth amendment, but, at most, infringes rights which are protected from state aggression by the fourteenth amendment).


46. 426 U.S. 229 (1976). The case involved the validity of a qualifying test administered to applicants for positions as police officers in the District of Columbia Metropolitan Police Department. Davis contended that the use of the test discriminated against blacks in the hiring and promotion of police officers. The Court held that a law or other official act is not unconstitutional solely because it has a racially disproportionate impact. *Id.* at 239. “Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.” *Id.* at 242. The Court held the test was not a “purposeful device” to discriminate against blacks but a test “neutral on its face” which “rationally may be said to serve a purpose the Government is constitutionally empowered to pursue.” *Id.* at 246.

Some contrary indications may be drawn from earlier cases—that proof of racially discriminatory intent is not required to show a violation of the equal protection clause. *Id.* at 242. See, e.g., Wright v. Council of City of Emporia, 407 U.S. 451, 461-62 (1972); Palmer v. Thompson, 403 U.S. 217, 225 (1971). However, the Davis court did not find these cases persuasive on this issue.

47. 426 U.S. at 242. See Schwemm, *From Washington to Arlington Heights and Beyond: Discriminatory Purpose in Equal Protection Litigation*, 1977 U. ILL. L. F. 961 [hereinafter cited as Discriminatory Purpose]. Civil rights leaders recognized that Washington v. Davis was a landmark case and viewed its holding with dismay. One commentator called it “perhaps the single worst decision of the past 80 years,” probably referring to Plessy v. Ferguson, 163 U.S. 537 (1896). McDonald, *Has the Supreme Court Abandoned the Constitution?*, SATURDAY REVIEW, May 28, 1977 at 10. Mr. McDonald was then director of the southern regional office of the American Civil Liberties Union Foundation in Atlanta.

48. 426 U.S. at 239-46.


50. 401 U.S. 424 (1971). In *Griggs*, blacks challenged the power company’s policy requiring that applicants have a high school diploma or pass an intelligence test in order to be considered for employment or transfer to higher paying jobs.

51. *Id.* at 431. The *Griggs* Court examined the statute’s legislative history and concluded that the purpose of Congress was “the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.” *Id.* Accordingly, the Court held 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. . . . *Congress* directed the thrust of the Act to the consequences of employment practices, not simply the motivation. More than that, Con-
Under the *Griggs* statutory standard, a plaintiff alleging disproportionate impact need *not* show that the practice was motivated by discriminatory intent, but an inference of such motive is created. The *Griggs* ruling prompted a wide application of its new evidentiary disproportionate impact theory in neutral factor race discrimination cases brought under a variety of constitutional and statutory provisions. *Davis* dramatically interrupted this trend. The Supreme Court in *Davis* declined to apply the *Griggs* approach because it decided that to do so would raise serious issues of public policy that are traditionally the province of the legislature and would inevitably lead to the invalidation of a whole range of statutes.

Thus, under *Davis*, disproportionate impact is relevant only for the purpose of proving the presence of subjective discriminatory intent.

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52. The *Griggs* Court repeatedly emphasized that Title VII's disproportionate impact standard originated in the language and purpose of the statute. *Id.* at 429-31. *See also Impact, supra note 6.


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

54. In footnote 12 of *Davis*, Justice White, author of the majority opinion, noted the Court's disagreement with some 18 cases dealing with employment discrimination, urban renewal, zoning, public housing, and municipal services that had improperly applied the disproportionate impact standard. 426 U.S. at 244 n.12.

55. 426 U.S. 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).

56. Subjective discriminatory intent is one that does not expressly appear on the face of a statute. However, a statute, otherwise neutral on its face, must not be applied so its effect is to discriminate on the basis of race. *Yick Wo v. Hopkins, 118 U.S. 356* (1886); *Washington v. Davis, 426 U.S. 241* (1976).

57. *Id.* at 242. The Court in *Davis* went on to make clear that in some situations a showing of disproportionate impact will be so suspicious as to constitute proof of intent:

Necessarily, 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. It is also not infrequently true that the discriminatory impact . . . may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds.

*Id.*
Post-Davis cases attempted to establish a standard for proving the presence of subjective discriminatory intent and for according different probative value to the evidence of intent according to the circumstances under which it occurs.\textsuperscript{58} The Court has applied this standard to zoning,\textsuperscript{59} school desegregation,\textsuperscript{60} jury selection,\textsuperscript{61} and employment discrimination\textsuperscript{62} cases.

In recent years, the intent-impact issue has assumed major significance in civil rights cases. The issue of burden of proof\textsuperscript{63} in racial discrimination actions has generated a continuing debate for the Supreme Court and lower courts since Davis.\textsuperscript{64} Lower courts have divided on whether to align the intended protection of the Civil Rights Acts of 1866 and 1870 with the constitutional Davis standard (intent) or with the Title VII-Griggs standard (impact).\textsuperscript{65}

\textsuperscript{58} See note 65 \textit{supra} and accompanying text.


\textsuperscript{60} See Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, (1977), where the Court stated: "The finding that the pupil population in the various Dayton schools is not homogeneous, standing by itself, is not a violation of the Fourteenth Amendment in the absence of a showing that this condition resulted from intentionally segregative actions on the part of the Board." \textit{Id.} at 413, citing, Washington v. Davis, 426 U.S. 229, 239 (1976).

\textsuperscript{61} Castaneda v. Partida, 430 U.S. 482 (1977) (discriminatory intent proved by a showing that Mexican-Americans constituted only 39% of those called for grand jury duty over an 11-year period in a county with a 79% Mexican-American population).

\textsuperscript{62} County of Los Angeles v. Davis, 440 U.S. 625 (1979). See Justice Powell's dissent, seeking to determine "whether § 1981, like the Equal Protection Clause of the Fourteenth Amendment, prohibits only purposefully discriminatory conduct." \textit{Id.} at 647.

\textsuperscript{63} The discriminatory purpose theory promotes the value of equal treatment by conditioning the plaintiff's right to prevail on proof that the defendant's act was prompted by an improper motive. The plaintiff is not favored by a presumption of a generalized injury originating at some distant place and time. The disproportionate impact theory, on the other hand, compensates victims of past societal discrimination by easing the burden of proof. It promotes the value of equal status by allowing the plaintiff to establish a prima facie case of discrimination without reference to the defendant's good or bad intentions. (footnote omitted.)


\textsuperscript{64} \textit{Burden of Proof}, supra note 63 at 1030-31 Unhampered by many of the restrictive substantive and procedural limitations of other civil rights measures, § 1982, which derives from the Reconstruction Civil Rights Act, ch. 31, 14 Stat. 27 (1866), potentially reaches discriminatory conduct not covered by any other statutory or constitutional provision. \textit{Id.} at 1031-32.


\textsuperscript{65} Some courts have adopted the Davis standard. \textit{See, e.g.,} Chance v. Board of Examiners, 79 F.R.D. 122 (S.D.N.Y. 1978) (relief denied because no proof of intent as required by Davis and
NOTES AND COMMENTS

The Court attempted to promulgate much needed guidelines regarding burden of proof and to clarify its position on the fourteenth amendment intent requirement in *Village of Arlington Heights v. Metropolitan Housing Development Corp.* 66

In *Arlington Heights*, the Court reaffirmed its commitment to the discriminatory purpose requirement and offered some guidelines as to how to shoulder the burden of proof in different contexts. "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." 68 The impact of the official action—whether it "bears more heavily on one race than another" 69 may provide an important starting point. 70 However, impact alone is

66. 429 U.S. 252 (1977). The Corporation, a non-profit developer, sued for injunctive and declaratory relief against an allegedly unconstitutional refusal to rezone a piece of property in order to permit construction of a housing development for low and moderate income persons. The Seventh Circuit held that the city's action had a racially discriminatory effect and operated to perpetuate the city's segregated character, violating equal protection, with no compelling justification. 517 F.2d 409, 415 (7th Cir. 1975). See generally, Note, Proving Discriminatory Intent from a Facialy Neutral Decision with a Discriminatory Impact, 36 WASH. & LEE L. REV. 109 (1979) [hereinafter cited as Discriminatory Intent].

67. 429 U.S. 252 (1977), the Court held that Metropolitan failed to carry its burden of proving that a racially discriminatory intent or purpose, required to show a violation of the fourteenth amendment, was a motivating factor in the Village's rezoning decision. 429 U.S. at 264-71. For a probing analysis of the difficulties in ascertaining and proving legislative motive, see Brest, Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive, 1971 SUP. CT. REV. 95, 99-102. See also Ely, Legislative and Administrative Motivation in Constitutional Law, 79 YALE L.J. 1205, 1213-14 (1970).

68. 429 U.S. 252 (1977). The Corporation, a non-profit developer, sued for injunctive and declaratory relief against an allegedly unconstitutional refusal to rezone a piece of property in order to permit construction of a housing development for low and moderate income persons. The Seventh Circuit held that the city's action had a racially discriminatory effect and operated to perpetuate the city's segregated character, violating equal protection, with no compelling justification. 517 F.2d 409, 415 (7th Cir. 1975). See generally, Note, Proving Discriminatory Intent from a Facialy Neutral Decision with a Discriminatory Impact, 36 WASH. & LEE L. REV. 109 (1979) [hereinafter cited as Discriminatory Intent].


70. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. at 266-68. The Court was referring to such "stark" patterns of racial discriminatory purpose, unexplainable on other grounds, as could be found in Gomillion v. Lightfoot, 364 U.S. 339 (1960) (an Alabama law
usually not determinative, and the Court must look to other evidence.\footnote{1}

One evidentiary source the \textit{Arlington Heights} Court explores is the historical background of the decision, particularly if it reveals a series of official actions taken for invidious purposes.\footnote{2} The Court further examines the specific sequence of events leading up to the challenged decision which may reveal the decisionmaker's purposes.\footnote{3} The Court searches for substantive departures from the normal procedural sequence which would afford evidence that improper purpose played a role.\footnote{4} Finally, the Court examines the relevant legislative or administrative history, especially where there are contemporaneous statements by members of the decisionmaking body.\footnote{5} These four factors compose what is now known as the \textit{Arlington Heights} standard of proof for plaintiffs in discrimination cases.

The foregoing summary of the \textit{Arlington Heights} evidentiary test identifies the subjects of proper inquiry for determining whether a racially discriminatory intent exists. Taken together, \textit{Davis} and \textit{Arlington Heights} indicate that the task of proving discriminatory purpose will be difficult in all but the most egregious cases.\footnote{6} The central question involved in claims of covert racial discrimination is whether the focus in such cases should be on the presence of a racially discriminatory purpose on the part of the decisionmaker (as required by \textit{Davis} and \textit{Arlington Heights} in constitutional claims)\footnote{7} or on the disproportionate redefining the city boundaries of Tuskegee was a device to disenfranchise blacks in violation of the fifteenth amendment) and Yick Wo v. Hopkins, 118 U.S. 356 (1886) (blatant discrimination in the administration of a law—a Chinese laundryman was among the 200 Chinese applicants who was refused a permit to operate a laundry).

\footnote{1}{429 U.S. at 266. This evidentiary test and four others can be found at 429 U.S. at 266-68. These tests include, as a relevant starting point, impact. Other factors the Court will examine are legislative or administrative history, the specific sequence of events, and historical background.}

\footnote{2}{429 U.S. at 267. \textit{See}, e.g., Griffin v. School Board, 377 U.S. 218 (1964).}

\footnote{3}{429 U.S. at 267. For example, if the property in issue had been zoned R-5 but was suddenly changed to R-3 when the village learned of the corporations' plans to erect integrated housing an inference of discriminatory motive can be drawn. \textit{See}, e.g., Reitman v. Mulkey, 387 U.S. 369, 373-76 (1967).}

\footnote{4}{429 U.S. at 267. \textit{See}, e.g., Dailey v. City of Lawton, 425 F.2d 1037, 1039-40 (10th Cir. 1970).}

\footnote{5}{\textit{Id.} 429 U.S. at 268. \textit{See}, e.g., Tenney v. Brandhove, 341 U.S. 367 (1951).}

\footnote{6}{\textit{See}, e.g., Castaneda v. Partida, 430 U.S. 482 (1977). The fact that the \textit{Partida} Court voted only five to four to sustain the plaintiff's claim can hardly comfort those faced with the task of proving discriminatory purpose in the future. \textit{See also Discriminatory Purpose, supra note 47, at 1048.}}

\footnote{7}{Recently, in City of Mobile v. Bolden, 446 U.S. 55 (1980), the Court reiterated its position that only if there is purposeful discrimination can there be a violation of the equal protection clause of the fourteenth amendment. \textit{Id.} at 66-67. The Court further held that disproportionate effects alone are insufficient to establish a claim of unconstitutional racial vote dilution; racially discriminatory motivation is a necessary ingredient of a fifteenth amendment violation. \textit{Id.} at 61-}
impact of action taken under a facially neutral law or official decision (as required by Griggs in statutory claims). These two different standards impose vastly different evidentiary burdens on the plaintiff's initial burden of proof.\(^7\)

Greene presented to the Court a situation where the discrimination at issue involved a facially neutral practice—the closing of a public street. This comment will explore the decision in the context of the different evidentiary theories discussed in this section. Greene involved section 1982 and thirteenth amendment claims (as in Jones), but the Court examined these claims in the post-Jones context of Davis and Arlington Heights fourteenth amendment holdings.

**City of Memphis v. Greene**

Factual Background

The litigation arose out of efforts by the residents of Hein Park, a white subdivision located in Memphis, Tennessee, to close West Drive at its northerly end so as to bar all through traffic.\(^9\) Hein Park was

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65. In Bolden, black voters brought a class action suit alleging that the practice of electing the city commissioners at large unfairly diluted the voting strength of blacks in violation of the fourteenth amendment. *But see, in Bolden, Justice Marshall's dissent.* "[P]roof of racially discriminatory *impact should be sufficient to support a claim under the Fifteenth Amendment." *Id.* at 134 (emphasis added). Justice Marshall recognized that "[a]n approach based on motivation creates the risk that officials will be able to adopt policies that are the products of discriminatory intent so long as they sufficiently mask their motives through the use of subtlety and illusion." *Id.* at 135.

The fourteenth amendment states:

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XV.


78. *See Burden of Proof, supra* note 63, at 1039. This commentator notes:

[T]here remains a crucial distinction between the impact and purpose theories in neutral factor cases: under the first a plaintiff establishes a prima facie case by simply showing a racially disproportionate impact; under the second the plaintiff must show something more than mere statistical disparity. The added burden under the purpose theory will vary according to the facts of the case. If the plaintiff establishes extreme disproportionate impact, additional evidence of discrimination may be unnecessary. In other cases, however, the plaintiff may be required to produce evidence relating to the circumstances of the decision, the statements or conduct of the decisionmaker, or the relative weight given various factors in making the decision in order to establish a prima facie case.

*Id.* (footnoted omitted).

79. These and the following facts are reported in Greene v. City of Memphis, 610 F.2d 395, 396-97 (6th Cir. 1979) as found by the district court. *See also Note, Greene v. City of Memphis: Is Intent the Sine Qua Non of Discrimination Claims?*, 35 U. OF MIAMI L. REV. 131 (1980) for an exhaustive examination of the history and pertinent background of this case while it was on appeal before the Supreme Court [hereinafter cited as *Sine Qua Non*].
developed before World War I as an exclusive residential neighborhood for white citizens and these characteristics have been maintained. The northern boundary of Hein Park is Jackson Avenue which carries a significant amount of commercial traffic. West Drive extends the complete length of Hein Park, about one-half mile. Opposite West Drive on the north side of Jackson Avenue is a major thoroughfare, Springdale Street, which serves a sizeable area composed of black citizens who will be “inconvenienced” by the closing of West Drive, since Springdale Street is, in fact, a northward extension of West Drive.

The stated reasons for the closing were to reduce the flow of traffic using Hein Park streets, to increase safety to children who live in Hein Park or use the street to walk to school, and to reduce traffic pollution in the residential area. The closing thus afforded the residents of Hein Park the privacy and safety of living on a dead-end street.

Respondents, certain black individuals and members of a class of black persons in the City of Memphis who own or stand to inherit property immediately to the north of and adjoining Hein Park, attempted to prevent the closing. They claimed that the closing of West Drive deliberately created a barrier between the all-white Hein Park subdivision and the predominantly black residential area to the north, limiting access to their own residential area and impairing their property values. The plaintiffs filed a complaint against the city and various officials contending that the closing violated their rights under the thirteenth and fourteenth amendments, and sought relief under sections 1982 and 1983. The district court dismissed for failure to state a claim. On appeal, the United States Court of Appeals for the Sixth Circuit reversed and remanded, and held that the complaint that the street closing conferred certain benefits on white residents (privacy and quiet of an exclusive dead-end street) was entitled to be judicially resolved.

On remand, the district court ruled for the city because the differential treatment was not so “stark” that the court could infer a discriminatory motive. The case was again brought on appeal to the Sixth

80. The United States District Court for the Western District of Tennessee, Western Division, dismissed the complaint for failure to state a claim and one plaintiff appealed. Greene v. City of Memphis, No. 75-1339 (W.D. Tenn. 1975) (reported at 535 F.2d 976, 977 (6th Cir. 1976)).
81. Greene v. City of Memphis, 535 F.2d 976 (6th Cir. 1976). The case was decided on May 13, 1976.
82. Id. at 980. “We view Greene as having stated claims under 42 U.S.C. § 1982. . . .” Id. at 978. “According to the instant complaint . . . , the closing of West Drive left certain white residents with privacy and quiet of a dead-end street, though black residents, for racial reasons, have been and would be unable to acquire such a dead-end street.” Id. at 980.
83. Sine Qua Non, supra note 79, at 132.
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Circuit. The court reversed and remanded, holding that the closing of West Drive, in effect, erected a physical barrier between an historically all-white residential neighborhood and a black neighborhood and had a disproportionate adverse impact upon certain blacks with regard to noise, traffic, and reduction of property values. In reaching its holding, the court applied the evidentiary tests of Arlington Heights, and found the challenged conduct a "stark" pattern of discrimination and "in a very real sense a badge of slavery violative of the plaintiffs' rights under the Thirteenth Amendment and subject to relief under 42 U.S.C. § 1982." After this decision, the city of Memphis petitioned the Supreme Court for certiorari.

THE SUPREME COURT DECISION

The Majority Opinion: The Sixth Circuit Reversed

When the appeal of City of Memphis v. Greene was presented to the Supreme Court, the legal theories relied on by both petitioner and respondent were basically the same as they had been since 1976. The

84. 610 F.2d 395 (6th Cir. 1979).
85. Id. at 403-405.
86. Id. at 402.

We are convinced that the erection of the physical barrier between a historically all-white residential neighborhood and a predominantly black neighborhood under the particular circumstances found by the court here is precisely the type of "badge" which was the target of the Thirteenth Amendment and of Section 1982. The broad reach of Section 1982 was repeatedly emphasized by Mr. Justice Stewart in Jones, supra, 392 U.S. at 422-37, 88 S.Ct. 2186. As the Supreme Court later observed in Sullivan v. Little Hunting Park, 396 U.S. 229, 237, 90 S.Ct. 400, 404, 24 L.Ed. 2d 386 (1969), "[a] narrow construction of the language of § 1982 would be inconsistent with the broad and sweeping nature of the protection meant to be afforded by [the Act]."

87. 446 U.S. 934 (1980). (Motion of Hein Park Civic Ass'n for leave to file a brief as amicus curiae granted. Motion of respondents for leave to proceed in forma pauperis and certiorari granted.)
88. See 610 F.2d at 397. Respondents' original § 1983 claim based on the fourteenth amendment fell on the district court's conclusion that they had failed to meet their burden of establishing discriminatory intent. This claim was not presented to the Supreme Court. 42 U.S.C. § 1983 (1976) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of
question presented to the Court remained the same: whether a decision by the city of Memphis to close the north end of West Drive violated 42 U.S.C. § 1982 or the thirteenth amendment.89 Justice Stevens, writing for the majority, reversed the Court of Appeals and held that the record did not support the Sixth Circuit decision that the street closing was “invalid”90 because it adversely affected respondents' ability to hold and enjoy their property.91 The Sixth Circuit concluded also that the unique circumstances of the street closing amounted to racial humiliation that rose to the level of a “badge of slavery,” violative of the thirteenth amendment.92 The majority did not agree with this conclusion.

The majority opinion was divided into four parts. Before addressing the legal issues, the Court first devoted over half of its discussion to an exhaustive examination of the relevant facts of the case and the inferences to be drawn from them. Included in this analysis was an extended inquiry into the geography of the area, the history of the city approval, the history of the litigation, and the evidentiary connection between this information and the holdings of the district court and the court of appeals.93 Second, the Court then reviewed recent decisions concerning discriminatory intent.94 Third, the Court dealt with the statutory question: whether the relationship between the street closing and Greene's property interest was violative of section 1982.95 Finally, the Court considered whether the closing of West Drive violated the thirteenth amendment.96

After an inquiry into the geography of the area, the Court concluded that the closing would have some effect on both through traffic and local traffic.97 Through traffic would be diverted to the east or west before entering Hein Park but “the closing will not make the entire

any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other property proceeding for redress.

89. 451 U.S. at 102.
90. Id.
91. 610 F.2d at 404. The court of appeals expressly left open the question to what extent intent is ever an element of the plaintiff's case under section 1982. Id. at 404 n.13.
92. Id.
93. 451 U.S. at 102-19.
94. Id. at --.
95. Id. at 120-24.
96. Id. at 124-29.
97. Id. at 103. West Drive extends the complete length of the subdivision which is about one-half mile. Opposite West Drive on the north side of Jackson Avenue is a major thoroughfare, Springdale Street which serves a large area composed of black citizens. The closing of West Drive at Jackson Avenue will bar through traffic coming from the north to Overton Park and the downtown area of Memphis.
route any longer." 98 Local traffic would experience added distance to the trip from Springdale Avenue to the entrance to Overton Park 99 and would make "access to some homes in Hein Park slightly less convenient." 100

As part of its reexamination of the record, the Court reviewed the city approval of the street closing. 101 It discussed the City Council hearing and resolution authorizing the closing. The Court carefully reported and found persuasive the stated reasons for the closing which were: (1) reduced flow of through traffic using subdivision streets; (2) increased safety to the many children walking to school in the subdivision; and (3) reduced traffic pollution in a residential area. 102

The Court then engaged in an elaborate review of the record and history of the litigation. 103 The majority concluded that the decision of the court of appeals was not supported by the record or the district court findings. 104 Rather, the Court decided that the city's decision to close West Drive was motivated by its interest in protecting the safety and tranquillity of a residential neighborhood. The majority found the procedures fair and not affected by any racial or other impermissible factors. It agreed with the court of appeals that the city had conferred a benefit on certain white property owners, but found no reason to believe the city would refuse to confer a comparable benefit on black property owners if requested to do so. Moreover, the majority found that the closing did not affect the value of property owned by black citizens, but admitted it had caused "some slight inconvenience to

98. Id.
99. Overton Park is a 342-acre city park located near the center of Memphis, south of Springdale and Hein Park. The park contains a zoo, a nine-hole municipal golf course, an outdoor theater, nature trails, a bridle path, and an art academy. Id. at 103 n.2.
100. Id. at 103. The majority noted that the area to the north of Hein Park is predominantly black and that all the homes in Hein Park were owned by whites when the decision to close the street was made. Id.
101. Id. at 103-04.
102. Id. at 104. The Court accepted the proposition advanced by Petitioner that the city's decision to close West Drive was motivated by its interest in protecting the safety and tranquillity of a residential neighborhood.
103. Id. at 105-10. See also Justice White's concurring opinion which criticized this approach. Id. at 130.
104. Id. at 115-17. The majority questioned the court of appeals' conclusion that relief under § 1982 was required by the facts: (1) that the closing would benefit a white neighborhood and adversely affect blacks; (2) that a "barrier was to be erected precisely at the point of separation of these neighborhoods and would . . . have the effect of limiting contact between them"; (3) that the closing was not part of a city-wide plan, but rather, was a unique step to protect one neighborhood from outside influence which the residents considered to be "undesirable"; and (4) that there was evidence of "an economic depreciation in the property values in the predominantly black residential area. . . ." 610 F.2d at 404.
The Court concluded that "this slight inconvenience" did not constitute a significant impact such as to bring it within the reach of section 1982.106

The second tier of the Court's reasoning process concerned the impact that *Davis*107 and *Arlington Heights*108 had on this case as the city had asked the Court to hold Greene's claims under section 1982 and the thirteenth amendment barred by the absence of proof of discriminatory purpose.109 Having noted that those cases held that an absence of proof of discriminatory intent foreclosed any claim that the city's action violated the equal protection clause of the fourteenth amendment, the majority considered Memphis' contention that Greene's claims were likewise barred by the absence of proof of discriminatory purpose. However, rather than confronting the general question whether either section 1982 or the thirteenth amendment requires proof of a specific unlawful purpose, the Court first had to consider the extent to which either provision applied at all to this street closing case.110

The Court briefly reviewed some recent section 1982 cases that concerned the right of black persons to hold and acquire property on an equal basis with white persons and the right of blacks not to have property interests impaired because of their race.111 The Court concluded that the alleged injury did not involve any impairment to the kind of property interests which are within the reach of section 1982.112 It noted that the statute would have supported either a challenge to municipal action benefiting white property owners that would be refused to similarly situated black property owners or, alternatively, the

105. 451 U.S. at 119. The inconvenience was that Springdale residents would have to use a less direct route to and from their homes.
106. Id. at 120-24.
110. Id. at 120.
111. Id. at 120-22.
112. Id. at 124. The Court carefully distinguished the "restriction" in this case from those that would "prevent blacks from exercising the same property rights as whites," "severely restricted access to black homes," or "depreciated the value of property owned by black citizens." Id. at 123.

The absence of such restriction distinguishes this case from the Fifth Circuit's decision in *Jennings v. Patterson*, 488 F.2d 436 [5th Cir.] (1974). In *Jennings*, the defendants placed a barricade across a street on the outskirts of Dadeville, Ala. and prohibited landowners on the other side of the barricade from using the street. All but one of the landowners so restricted were black, and the one white landowner was given private access to the closed street. The street closing had the effect of adding 1 ½ to 2 miles to the trip into town. The court held that the plaintiffs, "because they are black, have been denied the right to hold and enjoy their property on the same basis as white citizens." Id. at 442. Thus *Jennings*, unlike this case, involved a severe restriction on the access to property. Id. at 123-24 n.36.
statute might be violated by official action that depreciated the value of property owned by black citizens.\textsuperscript{113} A further violation might occur if the street closing severely restricted access to black homes because blacks would then be hampered in the use of their property.\textsuperscript{114} However, the majority decided that the record disclosed none of these restrictions. The only injury the Court found was the “requirement that one public street rather than another must be used for certain trips within the city.”\textsuperscript{115}

The Court began its examination of Greene’s thirteenth amendment argument by reiterating its conclusion that the record disclosed no racially discriminatory motive on the part of the city council.\textsuperscript{116} The inquiry as to whether the city’s conduct violated the thirteenth amendment led the Court to conclude that the impact of the closing was a “routine burden of citizenship,” which was not a violation of the thirteenth amendment\textsuperscript{117} since there was no basis for concluding that the “interests favored by the city . . . were contrived or pretextual.”\textsuperscript{118} The majority accepted the city’s contention that any judicial characterization of an isolated street closing would constitute the usurpation of a “law-making power far beyond the imagination of the amendment’s authors.”\textsuperscript{119} To regard the consequence of a street closing on a particular neighborhood as a kind of stigma so severe as to violate the amendment would trivialize its great purpose.\textsuperscript{120} Thus, since the majority

\textsuperscript{113} Id. at 123. See, e.g., Tillman v. Wheaton-Haven Recreation Ass’n, 410 U.S. 431 (1973) (section 1982 covers a preference to purchase a nontransferable swim club membership); Hurd v. Hodge, 334 U.S. 24 (1948) (the Court refused to permit enforcement of private covenants imposing racial restrictions on the sale of property); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 421-22 (1968) (section 1982 encompasses every racially motivated refusal to sell or rent); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) (the term “lease” in section 1982 includes an assignable membership share in recreational facilities).

\textsuperscript{114} 451 U.S. at 123. The Court noted the absence of severely restricted access and distinguished this case from Jennings v. Patterson, 488 F.2d 436 (5th Cir. 1974). See text and accompanying note 112 supra.

\textsuperscript{115} 451 U.S. at 124.

\textsuperscript{116} Id. at 126 & n.41. See also the Court’s comments relative to discriminatory motive at 451 U.S. at 107, 114-16 & nn.22-27.

\textsuperscript{117} Id. at 129. The Court reasoned that the closing’s disparate impact on black citizens could not be fairly characterized as a badge or incident of slavery, but as an inconvenience which was a function of where they live and drive—not a function of their race. The majority termed this inconvenience a “burden” of citizenship. Id. at 128-29.

\textsuperscript{118} Id. at 127. The majority found that the record disclosed no racially discriminatory motive on the part of the city council. Id. at 128.

\textsuperscript{119} Id. at 124 quoting Palmer v. Thompson, 403 U.S. 217, 227 (1971). In Palmer, the Court rejected the claim that a city’s decision to close public swimming pools rather than desegregate them violated the thirteenth amendment. The Court noted that § 2 of the Amendment gave Congress the power to eradicate “badges of slavery,” and that Congress had not prohibited the challenged conduct. Id. at 124 n.37.

\textsuperscript{120} 451 U.S. at 128.
found neither significant property impairment under section 1982 nor conduct amounting to a badge of slavery under the thirteenth amendment, it reversed the judgment of the court of appeals.

The Concurring Opinion: Limitation of the Majority Opinion

Justice White, who submitted a concurring opinion, was the only member of the Court to examine fully the issue on which certiorari had been granted. He concurred in the holding of the majority but believed that the majority had not answered the question posed by the parties: whether a violation of section 1982 could be established without proof of discriminatory intent. Justice White stated that this question was impliedly decided in the affirmative by the Sixth Circuit and that the petition for certiorari sought review of that precise point.

After an extensive analysis of the legislative history of the Civil Rights Act of 1866, Justice White decided that purposeful discrimination was "quite clearly the focus" of the legislative proscription; a violation of section 1982 requires some showing of racial animus. Thus, according to Justice White, a nonintentional adverse impact upon black citizens is not a sufficient basis for section 1982 relief.

Having concluded that no racial animus existed, Justice White concurred in the judgment of reversal, but would have remanded for further proceedings in accord with his opinion. Since Justice White concluded that the court of appeals judgment was based on section 1982, he found the issue of the reach of the thirteenth amendment not

121. Id. at 130. Justice White stated:

We granted review to answer the question presented in the petition for a writ of certiorari. The parties in their briefs proceeded on the same assumption. However, instead of addressing the question which was explicitly presented by the findings and holdings below, raised by the petitioners, granted by this Court and briefed by the parties, the Court inexplicably assumes the role of factfinder, peruses the cold record, rehashes the evidence, and sua sponte purports to resolve questions that the parties have neither briefed nor argued.

Id. Justice White pointed to the Court's Rule 21.1 (a) which states that "[o]nly the questions set forth in the petition or fairly included therein will be considered by the Court." Id.

122. Id. Justice White further noted that since the Sixth Circuit's judgment was based on section 1982, the reach of the thirteenth amendment was not properly before the court. Id. at 130 n.2.

123. Id. "[N]othing in the legislative history of this act suggests that Congress was concerned with facially neutral measures which happened to have an incidental impact on former slaves." Id. at 134.

124. Id. at 135.

125. Id. Justice White was in favor of remand since the court of appeals proceeded on the basis that a violation of § 1982 does not require some showing of racial animus or an intent to discriminate on the basis of race, reversing the district court's judgment without disturbing the district court's conclusion that no discriminatory purpose had been found. Id. at 129.
properly before the Court. Therefore, unlike the majority, Justice White never addressed respondents' thirteenth amendment claim.

The Dissenting Opinion: More Than A Simple Street Closing

Justice Marshall, joined by Justices Brennan and Blackmun, dissented from the majority opinion on two bases: the record and the legislative history and intent of section 1 of the Civil Rights Act of 1866. Justice Marshall recognized that the key to the majority's conclusion was its view of the facts. Therefore, he reexamined and reviewed the relevant evidentiary facts in some detail and became convinced that the court of appeals had been "entirely justified in each of its conclusions."

Justice Marshall rejected the majority's notion that the case involved nothing more than a dispute over a city's race-neutral decision to place a barrier across a road. Rather, he pointed out that more was at stake than mere "inconvenience"; the "inconvenience" itself sent a "plain and powerful symbolic message" to black residents north of Hein Park—"stay out of the subdivision." In addition, a proper reading of the record demonstrated precisely the kind of evidence of discriminatory intent the Court had deemed probative in *Arlington Heights*. The dissent noted that although the majority treated West

126. Id. at 135-47.
127. Id. at 147-55.
128. Id. at 138. See note 104 supra and accompanying text.
129. Id. at 138.
130. Id. at 139. Black residents testified at trial that this is what they thought the city was telling them by closing West Drive. Dr. Marvin Feit, a professor of psychiatry at the University of Tennessee, predicted that the barrier between West Drive and Springdale Street would reinforce feelings about the city's "favoritism" toward whites and would "serve as a monument to racial hostility." Id. at 139.
131. 429 U.S. 252, 267-68 (1977). See text accompanying notes 67-71 supra. See also the trial testimony of Sarah Terry, an opponent of the closing, interpreted by the dissent to imply that "undesirable" traffic referred to those Negro drivers who actually used the street. 451 U.S. at 141-42. Moreover, the testimony of city planning officials strongly suggested that the city, by deviating from its usual procedures in deciding to close West Drive, violated one guideline of *Arlington Heights*—departures from the normal procedural sequence affording evidence that improper purposes are playing a role. 429 U.S. at 266-68. As Justice Marshall noted:

City officials asserted at trial that there is no requirement that the opinions of affected property owners be solicited before a street is closed, and the District Court found that there had been no substantial departure from usual practices. But the city's own application forms state that they must be signed by "[a]ll owners abutting the thoroughfare to be closed." At trial, city officials took the position that this language only refers to individuals owning property abutting at the point of the closing. If that is accurate, then on the city's theory, any two property owners living across a street from one another could seek to close it and the city would have no obligation to consult any other residents at all before approving the closing. Put gently, such testimony is contrary to common sense and not worthy of great deference.
Drive as just another closing, it was, according to the city official in charge of closings, the only time the city had ever closed a street for traffic control purposes, and was undertaken without a comprehensive city-wide planning effort by the city.132 This fact and the fact that Memphis had had a very real history of racial segregation133 represented precisely the kind of evidence Arlington Heights134 had deemed relevant to an inquiry into motivation.135

The dissent found that substantial harm to respondents' property rights was demonstrated by the record.136 Thus, this injury fell within the literal language of section 1982 and relevant cases, since the closing will burden respondents' ability to enjoy their property and depress its value.137 Moreover, according to the dissent, the legislative history of the Civil Rights Act of 1866 indicated the broad scope of its intended purpose of eliminating discrimination of the type presented in this situation.138 Justice Marshall concluded that the closing of West Drive was forbidden on these facts by section 1982.139

132. Id. at 143 (reporting the trial testimony of Paul Goldstein, Tr. 297-298, and comments of the trial judge, Tr. at 313, 321-22).
133. See Watson v. City of Memphis, 373 U.S. 526 (1963). In Watson, black residents sued the city for declaratory and injunctive relief directing immediate desegregation of public parks and other publicly owned or operated recreational facilities from which blacks were still excluded. 303 F.2d 863 (6th Cir. 1962). The Supreme Court reversed the court of appeals and held that the continued denial of the use of city facilities to petitioners solely because of their race violated their constitutional rights. 373 U.S. at 539.
134. It should be noted that Justice Marshall concurred in the Arlington Heights Court's definition of the proper inquiry in determining whether racially discriminatory intent exists. 429 U.S. at 271. However, dissenting in part, he favored remand to the court of appeals to reassess the significance of the evidence developed in the district court in light of the standards set forth. Id. at 272. Justice Marshall, joining in Justice Brennan's dissent in Washington v. Davis, 426 U.S. at 229, deplored Davis which he felt, had "the potential of significantly weakening statutory safeguards against discrimination in employment." Id. at 259.
135. 451 U.S. at 144. Additionally, the dissent viewed the combined testimony of Dr. Feit and real-estate agent Moore as sufficient to demonstrate that the closing of West Drive would cause genuine harm to the property rights of Negro residents north of Hein Park. Id. at 146 n.12.
136. Id. at 145. "The closing will both burden respondents' ability to enjoy their property and also depress its value. . . ." Id. at 148.
137. Id. See, e.g., Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431, 437 (1973); Wright v. Salisbury Club, Ltd., 632 F.2d 309, 314-16 (4th Cir. 1980) (a violation of § 1982 can be made out when the challenged action may have an adverse impact on property values in the future). See also, Palmer v. Thompson, 403 U.S. 216 (1971), in which the Court stated, "a city's possible motivations to ensure safety and save money cannot validate an otherwise impermissible state action." Id. at 226.
138. 451 U.S. at 149-50. See Jones v. Alfred H. Mayer Co., 392 U.S. 409, 433 (1968) ("[t]hat the bill [had] so sweeping an effect . . . was disputed by none"). Id. at 433.
139. 451 U.S. at 154 n.18. Justice Marshall disagreed with the majority's discussion of the constitutional claim. He posited that since the closing violated § 1982 it was a fortiori a violation of the thirteenth amendment as well. He concluded that the city's action caused harm that reached the magnitude of a "badge or incident" of slavery, at least as those terms were understood by the Reconstruction Congress, since that Congress included so many of those who had a hand in drafting the thirteenth amendment. Id. at 154 n.18.
In light of his disposition of the statutory question, Justice Marshall noted that ordinarily he would find it unnecessary to consider the merits of the thirteenth amendment claim.\textsuperscript{140} However, in an extended footnote, he responded to the majority's discussion of the constitutional claim.\textsuperscript{141} In contrast to the majority, Justice Marshall would insist that the government carry a heavy burden of justification before the Court should sustain "conduct as egregious as erection of a barrier to prevent predominantly Negro traffic from entering a historically all-white neighborhood."\textsuperscript{142} Justice Marshall concluded that the city had not discharged that burden in this case.\textsuperscript{143}

\textbf{ANALYSIS}

\textit{Interpretation of the Evidence}

The majority, concurring, and dissenting opinions agreed with the district court's holding that the closure of West Drive in Memphis would have some impact upon certain black residents, but disagreed as to the nature and extent of that impact. The majority and Justice White concluded that the impact—"slight inconvenience"\textsuperscript{144}—alone was not sufficient to establish a section 1982 violation. Further, the majority did not believe this impact so disproportionate as to lead to a finding of discriminatory intent.\textsuperscript{145} However, Justice Marshall correctly stated that, even if racial animus \textit{was} required by the statute, it was sufficient if the evidence raised an inference of intent and the government failed to rebut it with a sufficiently strong explanation.\textsuperscript{146}

In drawing inferences from the evidence, the majority purported to apply the \textit{Arlington Heights} evidentiary standard\textsuperscript{147} to discern racially-discriminatory intent,\textsuperscript{148} but ignored or misinterpreted some very compelling evidence that would have shown discriminatory intent. The historical background indicated that Memphis had a history of racial segregation that had previously led to intercession by the Court.\textsuperscript{149}

\textsuperscript{140} \textit{Id.}.
\textsuperscript{141} \textit{Id.}
\textsuperscript{142} \textit{Id.}
\textsuperscript{143} \textit{Id.}
\textsuperscript{144} \textit{Id.} at 119. The majority interpreted the record to show that the inconvenience of using another street was "minimal." \textit{Id.} at 110.
\textsuperscript{145} \textit{Id.} at 114 or 116.
\textsuperscript{146} \textit{Id.} at 148 n.14.
\textsuperscript{147} 429 U.S. at 266-68. \textit{See} text accompanying notes 67-75 \textit{supra}.
\textsuperscript{148} \textit{See} references to racially discriminatory motive, 451 U.S. at 106 n.9, 107, 114, 116 & n.27, 126.
\textsuperscript{149} \textit{See} Justice Marshall's dissent. 451 U.S. at 143-44. \textit{See also} text accompanying note 133 \textit{supra}. 451 U.S. at 143-44. \textit{See also} text accompanying note 133 \textit{supra}.
Furthermore, the record indicated that the closing was sought at the behest of white residents of Hein Park, and was the only time the city had ever closed a street for traffic control purposes.

This special sequence of events was clearly suspect according to the evidentiary standards enunciated in *Arlington Heights*. There, Justice Powell, writing for the majority, listed three broad subjects for proper inquiry to determine whether discriminatory purpose was one of the motivating factors in the challenged decision. Justice Powell observed, as did Justice White in *Davis*, that racial impact might be an important starting point. Absent extreme racial impact, in most other situations, the historical background and legislative history of the state action requires investigation. The historical background and sequence of events leading up to the Memphis closing certainly raised an inference of discriminatory purpose under an *Arlington Heights* analysis.

*Arlington Heights* stated that "[d]epartures from the normal procedural sequence . . . might afford evidence that improper purposes are playing a role." The testimony of city planning officials strongly suggested that Memphis deviated from its usual procedures in deciding to close West Drive. The city's departure from its usual procedures presented evidence of such "improper purposes." Thus, the evidence furnished, at minimum, a strong inference of discriminatory intent, which the majority refused to recognize.

150. 451 U.S. at 103.
151. *Id.* at 143.
152. 429 U.S. at 266-68.
153. *Id.*
154. *Id.* at 267. It is interesting to note that the plaintiff in *Arlington Heights* has finally achieved relief, even though it lost its case in the Supreme Court. On December 4, 1980, the Court of Appeals for the Seventh Circuit held that the consent decree requiring the village to annex and rezone a parcel of land for multiple family housing effectuated the Fair Housing Act and judicial policy favoring settlements. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 616 F.2d 1006 (7th Cir. 1980). The consent decree terminated the seven-year Arlington Heights zoning dispute.
155. 451 U.S. at 142-43. Justice Marshall noted:

In particular, despite an unambiguous requirement that applications for street closing be signed by all owners of property abutting on the thoroughfare to be closed, the city here permitted this application to go through without the signature or the consent of Sarah Terry. Perhaps more important, the city gave no notice to the Negro property owners living north of Hein Park that the Planning Commission was considering an application to close West Drive. The Planning Commission held its hearing without participation by any of the affected Negro residents and it declined to let them examine the file on the West Drive closing. It gave no notice that the City Council would be considering the issue. When respondents found out about it, they sought to state their case. But the Council gave opponents of the proposal only 15 minutes, even though some members objected that that was not enough time.

*Id.*
NOTES AND COMMENTS

The Statutory Question

I. Injury

The majority abandoned its prior broad construction of the statutory language of section 1982; in the last fourteen years, judicial recognition of the types of discrimination covered by the statute and the persons protected by it has expanded.156 There has also been a corresponding increase in the use of the statute as a legal tool to prohibit the infringement of property rights by racial discrimination.157 This has been the legacy of the landmark decision in Jones.

The Court admitted it had broadly construed the language of section 1982 to effectuate the remedial purposes of the statute, to protect not merely the enforceability of property rights acquired by black citizens, but also their rights to acquire and use property on an equal basis with white citizens.158 The Court declined broad construction in this

156. See, e.g., Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Hurd v. Hodge, 334 U.S. 24 (1948) and text accompanying notes 14-21 supra. See also District of Columbia v. Carter, 409 U.S. 418, 422 (1973) ("[L]ike the Amendment upon which it is based, § 1982 is not a 'mere prohibition of State laws establishing or upholding' racial discrimination in the sale or rental of property but, rather, an 'absolute' bar to all such discrimination, private as well as public, federal as well as state," citing Jones, 392 U.S. at 413, 437) (emphasis in original).

Lower federal courts have also afforded section 1982 a broad construction. See, e.g., McDonald v. Verble, 622 F.2d 1227, 1234 (6th Cir. 1980) ("Recent cases make clear that the [Civil Rights Act] statutes prohibit all forms of discrimination, sophisticated as well as simpleminded, and thus disparity of treatment between whites and blacks . . . must receive short shrift from the courts"); Phiffer v. Proud Parrot Motor Hotel, Inc., 648 F.2d 548, 551 (9th Cir. 1980) ("Racial motivation is not an element of the § 1982 prima facie case; only a racial impact need be shown."); Jennings v. Patterson, 488 F.2d 436, 441-42 (5th Cir. 1974) (where all persons except one who were deprived of use of a public street by erection of a barricade by white landowners were black, erection of barrier was actionable under sections 1981 and 1982 of the Civil Rights Act guaranteeing all persons the same civil rights as those enjoyed by white citizens) (Jennings was distinguished in Greene, 451 U.S. at 123 n.36.)

157. See, e.g., Woods-Drake v. Lundy, 667 F.2d 1198 (5th Cir. 1982) (landlord liable under section 1982 and Fair Housing Act, 42 U.S.C. § 3601 et seq., for evicting tenants because they had entertained black guests in their apartment); Evans v. Tubbe, 657 F.2d 661 (5th Cir. 1981) (plaintiff alleged a cognizable claim, to wit, that a racially motivated refusal to allow her access to her property violated section 1982).

158. 451 U.S. at 120.

[In Hurd v. Hodge, 334 U.S. 24, the Court refused to permit enforcement of private covenants imposing racial restrictions on the sale of property even though the legal rights of blacks to purchase or to sell other property were unimpaired. In Jones . . ., we held that § 1982 "must encompass every racially motivated refusal to sell or rent." 392 U.S., at 421-422. In Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, we interpreted the term "lease" in § 1982 to include an assignable membership share in recreational facilities. In Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431, we extended that holding to cover a preference to purchase a nontransferable swim club membership. Id. at 120-22.

Lower federal courts have also required plaintiffs alleging a violation of § 1982 to demonstrate that their property interests have been impaired. See, e.g., Wright v. Salisbury Club, Ltd., 632 F.2d 309 (4th Cir. 1980) (right to join a country club was a property interest attached to a subdivision home); Moore v. Townsend, 525 F.2d 482 (7th Cir. 1975) (discriminatory refusal to
case, since it interpreted the evidence as having shown no sufficient impairment to respondents' property interests. However, there was some evidence, credited by the district court, and accepted by the Sixth Circuit, of an economic depreciation in the property values in the predominantly black residential area with a corresponding increase in the property values in Hein Park. Rejecting this evidence, the majority refused to consider the inconvenience suffered by drivers north of Hein Park, commuting to and from their homes, an impairment of property rights. Obviously, if a white person buys property in Hein Park, he will have direct access to downtown Memphis, Overton Park and the public school. If a black person buys property across the street, in Springdale, he will not have the same direct access and cannot enjoy the same right to hold and enjoy his property as a white citizen because the barricade inhibits his ingress to and egress from his property. The majority's refusal to recognize this is especially shocking considering the absence of any evidence in the record contradicting the testimony of respondents' witnesses that property values would fall, indicative of an adverse impact.

The evidentiary findings of the District Court and the record in this case fully support the Court of Appeals' conclusion that black property owners are likely to suffer economic harm as a result of the construction of the barrier. In attempting to demonstrate to the trial court that the closing of West Drive would adversely affect their property, respondents first introduced the testimony of Harrell C. Moore, a real estate agent with seventeen years experience in the field. Moore began by predicting that after West Drive was closed, Hein Park would become "more or less a Utopia within the city of Memphis," families who had left the inner city for the suburbs would probably return in order to live there, and the property values in Hein Park "would be enhanced greatly." Moore was then asked what effect the closing would have on the property values in the Springdale area. He responded: "From an economic standpoint there would not be a lessening of value in those properties in the Springdale area, but from a psychological standpoint, it would have a tendency to have a demoralizing effect." At this point, counsel for petitioners interposed an objec-

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159. See Greene v. City of Memphis, 610 F.2d at 404.
160. 451 U.S. at 146 n. 12 (Marshall, J., dissenting).
tion, but Moore was eventually permitted to answer the question, and he testified as follows:

In my opinion, with the 17 years experience in the real estate industry, psychologically it would have a deterring, depressing effect on those individuals who might live north of the Hein Park area. . . . As a result of such, their moralistic values on their properties could tend to be such that the upkeep would not be nearly so great and it could have a detrimental effect on the property values in the future.  

Further, respondents’ other witness, Dr. Feit, testified that, based on his experience as Director of Planning for Allegheny County, Pa., the shift in traffic patterns as a result of the closing of West Drive would lower the property values for owners living north of Hein Park. The combined testimony of these witnesses should have been sufficient to demonstrate that the street closing would cause genuine harm to respondent’s property rights. The majority conceded that “the statute might be violated by official action that depreciated the value of property owned by black citizens.” The violation clearly occurred in this case, but the majority found no injury, partly because it gave insufficient weight to expert testimony.

II. Intent

The majority left unanswered the question whether a section 1982 claim is barred by absence of proof of discriminatory purpose. The Court never reached this issue, as it found no sufficient adverse impact on respondents’ property rights.

However, in his concurrence, Justice White directly addressed the question since he interpreted the Sixth Circuit decision as implicitly holding that a section 1982 violation could be established without proof of discriminatory intent. He rejected this view based upon his understanding of the legislative history of the section. Justice White’s belief that section 1982 requires proof of purposeful discrimination has been cited with approval.

However, the plain language of the statute does not suggest an intent requirement; it does not condition a section 1982 violation on the motivation of any person or persons. Although the legislative history

161. Id. at 145-46.
162. Id. at 146.
163. Id. at 123 (emphasis added).
164. See text accompanying notes 123-24 supra.
165. See, e.g., Croker v. Boeing Co., 662 F.2d 975, 986 (3d Cir. 1981). But see (Gibbons, J., dissenting) 662 F.2d at 1002-03.
suggests that Congress meant to eradicate both state laws that by their terms oppressed former slaves and those laws that were enforced with that goal in mind, nevertheless, the broad statutory language suggests that this is not all Congress meant to do.\textsuperscript{166}

Given the absence of a congressional declaration of intent to extend the protection of the Civil Rights Act of 1866 only to effects of purposeful discrimination, it seems unlikely that Congress intended to afford no protection against impairment of property interests caused by the nonintentional conduct. Additionally, a comparison with other similar statutory remedies for racial discrimination, such as section 1983\textsuperscript{167} and Title VII,\textsuperscript{168} which permit an impact standard rather than an intent standard, lends further weight to the interpretation that section 1982 protects against nonintentional as well as intentional discrimination.

The Constitutional Question

The majority held that the city’s closing of West Drive, though it had a disproportionate impact on black citizens, “could not . . . be fairly characterized as a badge or incident of slavery” violative of the thirteenth amendment\textsuperscript{169} based upon its same view of the facts of the alleged statutory violation. The Court assumed that the impact was merely a “routine burden”\textsuperscript{170} of citizenship, but neglected to address the issue of why this burden must fall on black citizens alone. Considering the Greene record, there was a strong basis for finding a constitutional violation; that the closing was a racial humiliation amounting to a badge of slavery. The Sixth Circuit and Justices Marshall, Brennan and Blackmun found such a constitutional violation. The court of appeals noted that the community to be benefited by the closing was and had been historically white; the territory to be burdened by the closing was predominantly black. The barrier was to be erected precisely be-

\textsuperscript{166} 451 U.S. at 148, n.14 (Marshall, J., dissenting).
\textsuperscript{168} See text accompanying notes 49-53 and 65 supra. But see American Tobacco Co. v. Patterson, 102 S. Ct. 1534 (1982) (seniority systems that unintentionally discriminate are exempt). The effect of this 5-4 ruling is to make it more difficult to challenge seniority systems as biased. Employees who claim discrimination in seniority systems must prove intentional discrimination in order to succeed.
\textsuperscript{169} 451 U.S. at 126. Cf. The first Justice Harlan’s statement in Hodges that “by its own force, that Amendment destroyed slavery and all its incidents and badges, and established freedom.” Hodges v. United States, 203 U.S. 1, 27 (1906) (Harlan, J., dissenting).
\textsuperscript{170} 451 U.S. at 129.
tween these areas, limiting contact between them. The Court concluded that the closing was a "unique step to protect one neighborhood from outside influences which the residents considered to be 'undesirable'." This result under the unique circumstances can only be viewed as "one more of the many humiliations," amounting to a badge of slavery "which society has historically visited upon blacks." It is true that not every racially discriminatory act constitutes a badge of slavery forbidden by the thirteenth amendment. But the Court recognized long ago that the badges and incidents of slavery—its burdens and disabilities—including restraints upon those fundamental rights which are the very essence of civil freedom. The Greene Court departed significantly from both the letter and spirit of the 1968 Jones decision. Jones represented judicial acceptance of the broad role intended for the thirteenth amendment by its original supporters. When the thirteenth amendment was being debated, supporters, as well as opponents, acknowledged that it would have the effect of striking down racial discrimination in a wide variety of areas. The Greene majority, unlike the Sixth Circuit, refused to equate the burden of the street closing on black citizens with the kind of racial discrimination forbidden by the amendment. But a "badge of slavery" is no less a badge if it is subtle rather than flagrant. Some badges remain today.

172. Id.
173. Id. at 402. See also The Civil Rights Cases, 109 U.S. 3, 24-25 (1883). Cf. Runyon v. McCrary, 427 U.S. 160, 211 (1976) (White, J., dissenting) ("racially motivated refusal to hire a Negro or white babysitter or to admit a Negro or a white to a private association cannot be called a badge of slavery. . .").
175. See remarks of Sen. Trumbull, note 3 supra. See also Buchanan, The Supreme Court and the Thirteenth Amendment in the Modern Era, 12 Hous. L. Rev. 844 (1975).
176. See, e.g., CONG. GLOBE, 38th Cong. 1st Sess., 1465, 2944, 2962, 2979, 2982-83, 2987.
177. Some badges of slavery remain today. While the institution has been outlawed, it has remained in the minds and hearts of many white men. Cases which have come to this Court depict a spectacle of slavery unwilling to die. We have seen contrivances by States designed to thwart Negro voting, e.g., Lane v. Wilson, 307 U.S. 268. Negroes have been excluded over and again from juries solely on account of their race, e.g., Strauder v. West Virginia, 100 U.S. 303, or have been forced to sit in segregated seats in courtrooms, Johnson v. Virginia, 373 U.S. 61. They have been made to attend segregated and inferior schools, e.g., Brown v. Board of Education, 347 U.S. 483, or been denied entrance to colleges or graduate schools because of their color, e.g., Pennsylvania v. Board of Trusts, 353 U.S. 230; Sweatt v. Painter, 339 U.S. 629. Negroes have been prosecuted for marrying whites, e.g., Loving v. Virginia, 388 U.S. 1. . . They have been forced to live in
As Justice Marshall and the court of appeals observed, the closing of West Drive was "one more of the many humiliations which society has historically visited upon blacks." It is interesting to note that even though the majority did not find a sufficient impairment of property rights to state a successful claim under section 1982, the Court nevertheless addressed the constitutional question. Since the Court did not find that the harm to blacks was serious enough to constitute a badge of slavery, it was not necessary to render a decision on the question whether a violation of the thirteenth amendment can be established absent a showing of racially discriminatory intent.

In fact, the Court tried to sidestep this issue but began its examination of respondents’ thirteenth amendment argument by reiterating its conclusion that the record disclosed no racially discriminatory motive on the part of the city council. The inference that can be drawn from this statement is that had the city council acted with discriminatory intent, the Court would have considered this a violation of the amendment. The Court seems to be saying, though somewhat indirectly in dicta, that a violation of the amendment can occur only when discriminatory purpose is present, thereby aligning the thirteenth amendment standard of proof with that of the fourteenth amendment.

However, even if, as the Court seems to imply by its constant references to the city's motivation, proof of improper racial motivation is a requirement of a thirteenth as well as a fourteenth amendment claim, the Court should have found such improper purpose. Had it conducted the Arlington Heights-mandated “sensitive inquiry into such circumstantial and direct evidence of intent as may be available,” the Court might well have discerned a “clear pattern, unexplainable on segregated residential districts, Buchanan v. Warley, 245 U.S. 60, and residents of white neighborhoods have denied them entrance, e.g., Shelley v. Kraemer, 334 U.S. 1.


178. 451 U.S. at 154, n.18. "[O]fficial action causing harm of the magnitude suffered here plainly qualifies as a 'badge or incident' of slavery, at least as those terms were understood by the Reconstruction Congress." Id.

179. 610 F.2d at 404. This “racial humiliation not only rises to the level of a badge of slavery but also affects the right of blacks to hold property in the same manner as other citizens. . . .” Id.

180. Id.

181. 451 U.S. at 126. The Court found no basis for concluding that the interests favored by the city in its decision were “contrived or pretextual.” Id. at 127.

182. In fact, respondents requested the Court not to render a decision on the constitutional issue of intent fearing, perhaps, that the Court would apply its fourteenth amendment intent requirement to the thirteenth amendment, thereby increasing the respondents’ burden of proof. See Brief of Respondent, Greene at 33. The complete set of briefs are on file at the Chicago Bar Association.

183. See 451 U.S. at 107, 114-16 & nn.22-27, 126.
grounds other than race” emerging from the effect of the city’s action. As the Sixth Circuit noted, “the pattern of discrimination here was indeed ‘stark’ and ... a badge of slavery” violative of Greene’s rights under the thirteenth amendment.

Significance of the Decision

The Davis and Arlington Heights decisions increased the burden of proof for plaintiffs stating claims under the fourteenth amendment. These cases established the proposition that plaintiffs must prove that a governmental decision maker acted with intent or purpose to discriminate before facially neutral conduct violates the equal protection clause. Subsequently, one commentator predicted that plaintiffs may find an insurmountable burden awaiting them because of the inherent difficulties surrounding the proof of specific discriminatory intent.

The Court in Greene impliedly extended the discriminatory intent requirement to prove a violation of the thirteenth amendment by refusing to broadly construe its intended protection against “conduct as egregious as erection of a barrier to prevent predominantly-Negro traffic from entering a historically all-white neighborhood.” The Court also refused to recognize the street closing as an impairment to the kind of property interest within the reach of section 1982. Faced with these restrictive interpretations, future plaintiffs may well wonder whether either the thirteenth amendment or section 1982 affords them sufficient protection from “the many humiliations which society has historically visited upon blacks.”

If the goal of these laws was to eliminate the effects of subtle instances of discrimination caused by facially neutral procedures, as well as intended discrimination, then this Court has done the respondents an injustice. This result cannot be tolerated in a society committed to racial equality. Greene will have a restrictive impact on civil rights litigants seeking judicial resolution of discriminatory conduct. By its decision, the Court indicated that it wants to restrict yet another avenue of access to judicial review for civil rights violations. The Greene Court

188. See Discriminatory Intent, supra note 66, at 128.
189. 451 U.S. at 154 n.18 (Marshall, J., dissenting).
190. Greene v. The City of Memphis, 610 F.2d 395, 404 (6th Cir. 1979).
sends a powerful message to these plaintiffs and defendants: subtle forms of discrimination will pass judicial muster.\textsuperscript{191}

\textbf{Conclusion}

The purpose of the Civil Rights Act of 1866 was to insure the abolition of slavery. The Act intended to prohibit all racial discrimination violative of the letter and spirit of the Act’s goal. Between 1948 and 1976 the Supreme Court construed the Act broadly attempting to effectuate the purpose of the Act.

The trio of \textit{Davis}, \textit{Arlington Heights} and \textit{Greene}, taken together, represent a shift away from broad construction of the Act. The dead-end street in Memphis will have a deadening effect on judicial resolution of racial discrimination. After \textit{Greene}, plaintiffs will have great difficulty obtaining relief from conduct that damages and stigmatizes a racially identifiable group of citizens. Official action that has disparate racial impact will not be considered unlawful, as long as its racial animus is well-concealed and masked behind “legitimate” interests. The sanctioning by the Court of the closing of West Drive may very well signal to white communities all over the country that municipal zoning power is available to physically exclude “undesirable elements,” definable in racial terms, thereby creating a virtually all white oasis.\textsuperscript{192}

Thus, the \textit{Greene} Court has retreated from the promise the \textit{Jones} Court made, that the thirteenth amendment was enacted “to eradicate the last vestiges and incidents of a society half slave and half free.”\textsuperscript{193} The dismay and frustration stemming from this broken promise raises serious questions about race relations in our country. The implications of judicial disregard of, if not acquiescence in, discriminatory conduct are critical. As Justice Marshall noted in a recent Court decision, if the Court “refuses to honor our long-recognized principle that the Constitution ‘nullifies sophisticated as well as simple-minded modes of dis-

\textsuperscript{191} Civil rights litigants may be more successful if their cases do not reach the Supreme Court. All of the circuit courts of appeal in \textit{Davis}, \textit{Arlington Heights}, and \textit{Greene} held for plaintiffs, finding discriminatory impact sufficient to constitute a violation of their civil rights. \textit{See also} Wainwright v. Allen, 461 F. Supp. 293, 297 (D.N.D. 1978) (it is not necessary in a racial discrimination case to make a showing that the action was racially motivated).


Perhaps relying on the Court’s decision in \textit{Greene}, the wealthy Florida town of Golden Beach has closed all but one road leading to the rest of Dade County. “Determined to remain a tropical oasis of privacy and safety. ...” the residents intend to “keep out criminals, curious tourists from nearby hotels, joggers, and any Haitian refugees who might land at the northeastern Dade beach in their flight from poverty.” \textit{See} Chi. Tribune, Oct. 27, 1981 at 1. col. 1.

\textsuperscript{193} 392 U.S. at 441 n.78, \textit{quoting}, The Civil Rights Cases, 109 U.S. 3, 22 (1883).
criminal it cannot expect the victims of discrimination to respect political channels of seeking redress."194

Geri J. Yonover