The Purposes of Title VII

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THE PURPOSES OF TITLE VII

CHUCK HENSON*

It is one of the Negro's great contributions to American society that his drive for equal opportunity is giving impetus to a social revolution that, measured by the number of people helped, will be far more beneficial to whites than to Negroes.1

INTRODUCTION

Some things have an obvious and enduring purpose. The purpose of a hammer is to drive nails. The purpose of a saw is to cut wood. The purpose of nails is to fasten, for example, the freshly cut wood by being driven by a hammer. For other things, like Title VII of the Civil Rights Act of 1964 ("Act" or "1964 Act"), purpose seems mutable or hidden. For example, finishing the sentence today: "The purpose of Title VII is . . ." presents a problem. It has presented the same problem since 1964. What Title VII does is not obvious gauged against the widely announced problem it was meant to solve: Black unemployment and underemployment. The obscurity of its purpose is troubling particularly if you are Black because Title VII has had no apparent effect on Black joblessness.2 Whether Blacks are equal citizens otherwise is widely questioned.3 What was Title VII meant to achieve for Black Americans? Beyond the symbolic act of stating the equality principle as the core of federal

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1. MICHAEL I. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 212-13 (1966).

2. Referring to the proposed Title VII of the Civil Rights Act, key legislators recognized that voting rights, school desegregation, and the desegregation of public accommodations had little meaning in the absence of jobs:

   The right to vote, however, does not have much meaning on an empty stomach. The impetus to achieve excellence in education is lacking if gainful employment is closed to the graduate. The opportunity to enter a restaurant or hotel is a shallow victory where one's pockets are empty. The principle of equal treatment under law can have little meaning if in practice its benefits are denied the citizen. H.R. REP. NO. 88-914, pt. 2, at 2513 (1963). Unemployment, employment by occupation, and wage statistics showed nonwhite unemployment at more than twice the rate of white unemployment. See id.

   In 1979, the continuing employment disparity led the Supreme Court to describe the purpose of Title VII as opening to blacks previously foreclosed employment opportunities as a foundation to the Court's decision to permit short term private affirmative action in United Steelworkers of Am. v. Weber, 443 U.S. 193, 194 (1979). The Weber Court specifically noted that the unemployment rates had not changed since Title VII became law in 1964: "The problem that Congress addressed in 1964 remains with us. In 1962, the nonwhite unemployment rate was 124% higher than the white rate." Id. at 204 n.4. "In 1978, the black unemployment rate was 129% higher." Id. Historically, black unemployment rates have continued to be twice as high as white unemployment rates. See Data Retrieval: Labor Force Statistics (CPS), BUREAU OF LAB. STAT., http://www.bls.gov/webapps/legacy/cpsatab2.htm (last visited Mar. 17, 2019) (check box for “unemployment rate” under “not seasonally adjusted” column for “White” and “Black of African American” subcategories; then select “Retrieve data”).

employment discrimination law, a reasonable answer to the question seems to be: Nothing. Nothing was done to cure the impact of race-based exclusion from educational and job opportunity because that cure required discrimination in favor of Blacks. The equality principle cannot both prohibit discrimination against Blacks and allow discrimination in favor of Blacks.

Early reflections on Title VII's purposes suggest that some expected it to achieve change on a scale commensurate with their beliefs about the significance of the Civil Rights Era and its centerpiece, the Civil Rights Act of 1964. Immediately after the Act's passage, it became clear that Title VII could not sustain the weight of expectations that the Civil Rights Era encouraged. Defeated expectations led to scholarly expressions of outrage and disappointment at Title VII's limitations. These expectations beg the question: What was the purpose of the 1964 Act? Exploring the reasons for the Act informs answers about what its seventh title was meant to achieve at the time. A primary cause of The Civil Rights Act of 1964 was the negative influence of the "Negro problem" on America's foreign policy goals. Although discrimination touched every part of life in every part of this country, it was only visible to domestic and international audiences because of how southern White people practiced discrimination. America could not, without great irony, sell itself in the early 1960s as the ideal of a free and democratic society while it tolerated, because of federalism, open apartheid south of the Mason-Dixon line. For largely foreign policy reasons, in 1963 it became urgent to create a symbol to show the world that the United States would live the creed it espoused: "[M]en are created equal" including Black Americans.

As a symbol, the 1964 Act served its foreign policy purpose. It is much easier to state (and there is strong support in the historical record) that a purpose of the Civil Rights Act of 1964 was to be an icon of American beliefs in the ideological combat for the hearts and minds of the non-European, newly emerging, non-white world that, at the time, occupied much of the attention of the cold warriors. The purpose of Title VII was the same as the 1964 Act, a tool in achieving America's foreign policy objectives. Historians write that the Act successfully served its purpose. It created an international belief that America was committed to the equality of all people, including its Black citizens. Having the Act was the success.

The Act, however, was also an expression of domestic policy. Like hammers, most of which are also designed to remove nails, the Act was also designed as a symbol to American citizens. The symbolism derives in part from finally achieving a federal law that breached that part of federalism that accommodated legalized inequality. Accomplishing the passage of the Civil Rights Act of 1964 was a big deal. The public policy of equality reached access to education, public accommodations, voting, and employment. According to the politicians the title related to employment—Title VII—was the most important part of the 1964 Act because none of the other rights it contained meant much

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4. I do not assert that American foreign policy goals were the sole cause of the 1964 Act. There was an exponential escalation in pressure for civil rights accompanied by an escalation in violence in the south and northern cities. See Nick Bryant, The Bystander: John F. Kennedy and the Struggle for Black Equality 1–3 (2006). Blacks were not only subject to violence at the hands of whites, but the early 60s saw for the first time Blacks beginning to respond to violence with violence. See id. I only assert that foreign policy was an essential cause of the 1964 Act.

5. Federalism was the excuse politicians gave to emerging African nations for why America had to tolerate a de jure racially segregated system in the south. See Mary L. Dudziak, Cold War Civil Rights: Race and the Image of American Democracy 215 (2000).

6. See id. at 235.

7. Id. at 210–11, 240.

8. Id. at 212–14.
without an income to give Blacks an opportunity to enjoy them. First class economic citizenship was the path that led to first class citizenship for Blacks.

The 1964 Act and Title VII, however, have always been contested symbols in this country. For some, passage of the law signified the achievement of equality. In the South most obviously, others saw the Act wrongly taking away their rights to achieve an unwanted equality for someone else. Ironically, equality seemed to be a zero-sum concept. Some Americans believed that granting Blacks equality meant that Whites lost equality. In some measure, belief in the positive or negative powers of equality also indicates expectations about a level of social transformation. The Act and Title VII deal with equality on this level by primarily addressing conduct and prohibiting illegal conduct defined as "discrimination." Equality was also a trap. It required everyone to be treated the same way. There could be no valid discrimination in favor of Blacks to overcome a history of separateness—an inequality in every sphere of American life that prepared people for successfully competing in the labor market. Title VII, for instance, was meant to provide equality through equal access to employment by commanding gatekeepers to ignore race as a job qualification. Equality required that outcome and nothing more.

Friends and foes of civil rights vetted the equal treatment aspect of equality openly. The discussion surrounded mainly what equality would mean for innocent White people. Would Blacks receive jobs because of their Blackness and Whites lose their jobs regardless of their longevity or skills? Equality of treatment of White workers and businesses so dominated the discussion that there was no open conversation about the responsibility of White people generally or the accountability of the nation for slavery and its aftermath, Jim Crow. Moreover, Black civil rights leadership purposefully did not demand a law that might, as a domestic Marshall Plan specifically for Blacks, suit a purpose consistent with solving the immediate problems.

Domestically, because of equality's limitations, some "militant" Blacks and "liberal" scholars and jurists found the equality that Title VII embodied wanting. As Professor Derrick Bell would write in 1977, "if the country was really committed to eradicating the social and economic burdens borne by the victims of employment discrimination, it would have fashioned a far more efficacious means of accomplishing this result." By limiting its work to equal access, Title VII did not solve the immediate problem of giving Blacks jobs to fix the crisis of Black underemployment and unemployment. For these thinkers, discrimination under the Act needed to be different in scope than the simplistic idea that discrimination in job access and job success would come to a screeching halt on Title VII's effective date: July 2, 1965. The equality principle, which defined discrimination under the Act, did nothing to account for the historical effects of discrimination: the tragic under-preparedness of Blacks to compete for jobs in the modern employment marketplace. It also ignored the present impact of this basic problem on Blacks with jobs, but without training or access to training based on a history of segregation. In the first case, equal opportunity to compete helped no Blacks. In the second, Blacks were doomed to remain segregated and underemployed; a sacrifice on the altar of the equality principle for the handful of Blacks with the requisite job preparedness to compete on an equal footing with Whites after July 2, 1965.

The scholars, commentators, and jurists who were unsatisfied with this version of equality contested the equality purpose of Title VII. For this group Title VII did not live up to expectations because it did not solve the immediate problem or provide a solution that would have an effect in the immediate generation. Equality of access inadequately expressed the antidote to the reality of discrimination. The "Negro problem" needed a resolution based in equitable outcomes regardless of Title VII's legislative history or the political compromises contained in its words. Title VII should do more. In determining what that "more" was, scholars created a new concept of discrimination which some district court judges and some circuit courts adopted with gusto in the run-up to *Griggs v. Duke Power Co.* This group created the original "basic assumption" to make Title VII a vehicle for a form of equality that acknowledged how race discrimination worked. It assumed a base level of discrimination continued to exist regardless of present intent. It also assumed that if the zero-sum game of equality had a cost, the most innocent, the Black Americans, would not pay that cost. There was little fear of cost because these thinkers believed that their conceptualization of discrimination avoided any conflict with the equality principle. According to the original "basic assumption," the history of racial discrimination was so pervasive that all White employers and unions were guilty of racism. All Black employees or applicants were innocent victims. Every adverse employment decision required, therefore, that the employer or union demonstrate through objective facts the absence of any taint of historical racism in a present adverse employment decision. This is the conceptualization of discrimination that the Court appeared to ratify in *Griggs.*

Through *Griggs* the Court gave the impression of planting a purpose in Title VII: "[T]o achieve equality of employment opportunities and remove barriers which have operated in the past in favor of an identifiable group of white employees over other employees." To fulfill that outcome based purpose, no employment policies or tests, regardless of neutrality or intent, could withstand Title VII "if they operate to 'freeze' the status quo of prior discriminatory employment practices." There was at the time no designation of this new conceptualization of discrimination as "disparate impact" and no contrast drawn between disparate impact and disparate treatment. Accordingly, after *Griggs,* one of the primary shapers of the new conceptualization of discrimination, the Court of Appeals for Eighth Circuit, used its understanding of *Griggs* in rooting out discrimination in the yet undefined disparate treatment space. The Eighth Circuit applied the original basic assumption to the case of Percy Green against the McDonnell Douglas Corporation.

14. See id. at 1–2 ("The Supreme Court [in *Griggs*] enunciated several broad principles which are fundamental to the evolution of Title VII law, the most significant being a new concept of discrimination: . . . 'Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.'" (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) [emphasis added]).
15. See id. at 6.
17. Id.
In 1973, for the first time, the Supreme Court segregated what we now call disparate impact from disparate treatment in *McDonnell Douglas Corp. v. Green*. The Court rejected the Eighth Circuit's use of the new conceptualization of discrimination in disparate treatment cases. In doing so, the Court responded to a threat against the equality principle which, arguably, Griggs avoided, by reasserting the equality principle as the limit of discrimination in all other cases. The Court revised the Eighth Circuit's formulation of the "basic assumption" with a new version that eliminated the requirement that employers disprove their racism. The "basic assumption 2.0 is the notorious *McDonnell Douglas* burden shifting analysis. Scholars today recognize that *McDonnell Douglas* was not the mere cautionary tale it appeared to be in the mid-1970s. Rather, modern scholars contest *McDonnell Douglas* as representing a deviation from and denial of Title VII's purpose.

This Article explores Title VII's contested purposes. Revealing Title VII's purposes requires connecting *Griggs* to *McDonnell Douglas* as a complete chronicle of the conflict between the equality principle and Black unemployment and under employment. I believe that the lingering and potent belief in Title VII stems from the success of *Griggs* in temporarily endowing Title VII with powers beyond the equality principle. This idealized version of Title VII remains to this day as a statement of what Title VII was meant to achieve despite what the Court did via *McDonnell Douglas* to set parameters around *Griggs* consistent with the equality principle and to formally restate the equality principle as Title VII's only purpose.

Starting with issue of purposes, the first two sections of this Article explore the limits of Title VII's purposes by contrasting the problem of Black unemployment with the choice the 88th Congress made to pursue inequality of opportunity rather than jobs for Black people. I argue that Title VII's purpose was forged from values of policy makers that were not focused exclusively or even primarily on solving the problem of Black unemployment. These policy makers were driven by American foreign policy goals, the urgency of doing something, and domestic political concerns. The equality principle, with its limits on completely equal treatment, allowed policy makers to fulfill their goals. In crafting the Act and Title VII, they conceptualized a simplistic form of discrimination and protected their constituents from Title VII's impact. The resulting law could do nothing about immediately employing large groups of Black Americans because it outlawed the compensatory elements needed to accomplish that goal.

The third section of this Article turns to why and how scholars and judges reconceptualized discrimination. Here, I argue that Title VII's obvious weaknesses created disappointment and disbelief. I will focus on certain primary weaknesses: Title VII's focus on only the "worst" forms of discrimination; Title VII's safe harbor for existing management and union prerogatives; and the fact that Title VII only applied to future discrimination. These primary weaknesses created a vacuum of unfulfilled expectations that Title VII would deal with the current problems of Black unemployment and underemployment and fix the problem of discriminatory hiring in present and the future. To fill this vacuum, scholars and judges reviewed Title VII and concluded that the 88th Congress must not have intended to do so little. These same scholars and

19. But see Jones, supra note 13, at 9 (*McDonnell Douglas* was merely a cautionary tale that "the normal sanctions associated with serious employee misconduct will not be subject to the strict job relatedness rule of [*Griggs*]").
20. Other weaknesses include the weakness of the EEOC and burdening the complaining party with the expense of litigating discrimination.
judges determined, therefore, to give Title VII the purpose of eliminating more than the "worst" forms of discrimination by dealing with the reality of racism in the United States. They reconceptualized discrimination to capture discrimination in a space the equality principle did not cover. They theorized an absence of conflict between the equality principle and remedying the present impacts of historical discrimination at the junction of segregated unions and segregated employment. In the process they eliminated the safe harbors and time constraints Title VII contained and created the original "basic assumption" to empower Title VII: the explanation for any adverse employment action is race discrimination unless the employer proves otherwise with substantial objective evidence of job-relatedness.

In the fourth section of this Article I argue that the Eighth Circuit, as one of the key proponents and developers of the expanded definition of discrimination that led to Griggs, took Griggs as a direction to apply the original basic assumption to all employment discrimination cases. When the Eighth Circuit decided McDonnell Douglas, it did just that. The Court then took the opportunity with McDonnell Douglas to contest the purpose of Title VII given to it by the Eighth Circuit. Griggs was not a global repurposing of Title VII. By the mid-1970s the judiciary busily shrank Griggs to only certain types of jobs and certain types of tests. Meanwhile, as a reassertion and confirmation of the equality principle, McDonnell Douglas grew in prominence and set basic assumption 2.0 as the limit of the kind of discrimination Title VII prohibits: equality of access.

In the fifth and final section of this Article I consider the possibility of a further reconceptualization of discrimination. I urge the abandonment of McDonnell Douglas. It inappropriately displaces juries from deciding whether Black Americans are suffering from employment discrimination and relies on a fiction about how people make decisions about the qualities of other people out of date with modern science on how unconscious bias drives decision-making.

I. THE FOREIGN POLICY PURPOSE OF TITLE VII

"Purpose" means "something set up as an object or end to be attained."21 Purpose must also suppose the identification of the end or ends to be attained in order to make sense of purpose as a mechanism to reach a goal or goals. To understand the purpose or purposes of Title VII we must explore the issues politicians and legislators had in mind in the 1960s and the means by which politicians and legislators dealt with those issues. Two issues immediately spring to mind: winning the "Cold War" and the "Negro problem," also known as the struggle for equality for Black Americans. The Civil Rights Act of 1964 arrived at the intersection of these issues. The purpose of the 1964 Act was the result of how policy makers prioritized and balanced the relationship between defining the United States as the epitome of a free society in its competition against the Soviet and Chinese communists and how a colorblind America could manifest without a remedy for the present effects of historical discrimination against Blacks.

In the early 1960s, the "Negro problem"22 for Black Americans was the de jure (in the South) and de facto (everywhere else) exclusion from political and

22. The "Negro problem" was shorthand for the problem of race discrimination and the deprivation of economic, civil, and political rights for Black Americans.
economic opportunity. For White politicians, the “Negro problem” was one of public relations. People in the United States and around the world could turn on a television and watch Whites burning, bombing, and beating Black Americans because they insisted on the end of legal segregation in this country. The “Negro problem” was bad for the United States’ international interests at a time when those interests focused on selling American Freedom to Africa, Asia, and South America. The “Negro problem” gave America’s Cold War enemies the perfect weapon to undermine American foreign policy: live action video of the “freedom” of Black Americans.

Ironically, President Kennedy’s heavy interest in foreign policy is exactly what made him focus, in the end, on civil rights for Black Americans. Although Blacks had been seeking full citizenship in this country before and since its founding, Kennedy became sufficiently interested in civil rights when images of Blacks protesting for their rights and being attacked by White law enforcement in Birmingham, Alabama were televised around the world. It took Eugene “Bull” Connor fulfilling his promise to “keep the niggers in their place” with police dogs, fire hoses and cattle prods in April 1963 to get civil rights for Black Americans firmly on Kennedy’s radar. And that happened because African nations that Kennedy was trying to keep from communism saw the broadcasts and warned Kennedy that “the ears and eyes of the world are concentrated on events in Alabama.” From one perspective, the problem to be solved was the source of the bad press: Blacks demonstrating for civil rights.

President Kennedy’s June 11, 1963 proposal for sweeping civil rights legislation was set up largely to solve the problem of Black protest and its impact on American foreign policy. When Kennedy finally took the moral high ground on June 11, he challenged the nation to deal with what the media portrayed as a purely sectional issue knowing that only a bipartisan coalition could pass any proposed civil rights legislation over the anticipated filibuster of Southern Democrats. Although Blacks had been seeking full citizenship in this country before and since its founding, Kennedy became sufficiently interested in civil rights when images of Blacks protesting for their rights and being attacked by White law enforcement in Birmingham, Alabama were televised around the world. It took Eugene “Bull” Connor fulfilling his promise to “keep the niggers in their place” with police dogs, fire hoses and cattle prods in April 1963 to get civil rights for Black Americans firmly on Kennedy’s radar. And that happened because African nations that Kennedy was trying to keep from communism saw the broadcasts and warned Kennedy that “the ears and eyes of the world are concentrated on events in Alabama.” From one perspective, the problem to be solved was the source of the bad press: Blacks demonstrating for civil rights.

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Kennedy’s proposed civil rights act did not address Black unemployment or underemployment at all.35 This failure to focus on the national problem of job discrimination may be explained by what could and could not be seen by television cameras. American apartheid in the South was the international problem because it was being transmitted around the world. The geopolitical problem was dealing with the obvious racial violence in the South and not the obvious national problem of Black unemployment.34 Kennedy’s address to Congress on civil rights on June 19, 1963, fulfilled the promise he made on June 11 to send Congress omnibus civil rights legislation.35 Between June 11 and 19, the administration’s early drafts of the Civil Rights Act of 1963 did not include any federal fair employment practices titles.36 The version of the administration’s bill that was submitted in the House as H.R. 7152 on June 20, 1963 was the first version that mentioned an Equal Employment Opportunity Commission in its seventh title.37 The sole aim of that version of Title VII was the prevention of discrimination by government contractors and subcontractors.38

Because the administration was focused most on what could be seen and broadcasted, the Civil Rights Act of 1963 as proposed focused on the obvious. Dealing with the obvious, there was no need to consider the nature of equality and what equality might mean when applied to the zero-sum game of employment. Moreover, there was no need to define discrimination or even conceptualize it. Even absent a fair employment practices title, the Civil Rights Act of 1963 as proposed had its intended symbolic impact with Kennedy’s international audience.39 The foreign policy victory was won by the fact of a proposal for a Civil Rights Act regardless of its content or functionality.40

II. Conceptualizing Employment Discrimination

Title VII’s purpose was not ending Black unemployment and underemployment. In 1963 and 1964 policy makers were aware of the disparities in unemployment rates between Black and White Americans.41 Those statistics provided some impulse for the continued efforts to pass federal fair employment practices legislation.42 Nevertheless, if first class economic citizenship had been Title VII’s goal, the Title could have taken an entirely different “more efficacious” shape.43 Congress chose a less efficacious means because of the
goal was "equality" and "equality" had logical limitations. Equality meant no special treatment for anyone. Congress was left to conceptualize discrimination as a means of assuring that from the operative date of Title VII forward no one received special treatment.

An alternative policy choice existed: recognize that Blacks were innocent in the discrimination that put them and kept them at the bottom of the economic ladder. The Court's decision in Brown v. Board of Education established a signpost pointing in this direction. If separate but equal was inherently unequal because the financial allocation was unequal and led to unequal educational and social results for Blacks that they were not going to overcome in a segregated society, an argument could have been made that the same principle applied to the problem of Black unemployment and underemployment. Although the fix in Brown was the reallocation of economic resources to Blacks via school integration, the principle remained: equality for Blacks required special treatment. Congress could fix the problem by giving Blacks jobs and tolerate any discrimination against Whites and others until Black economic participation mirrored the proportions of White economic participation.44

Politicians did not make this choice for several reasons. First, Kennedy's announcement of a civil rights policy grounded itself in the concept of simple equality for all. Second, Black civil rights leaders did not ask for some form of economic redistribution that some of them saw as a solution because of the unsavory quality of asking for special treatment. Third, once Kennedy put the foreign policy goal of creating a symbol of freedom and equality into Congress's hands, the domestic policy interests of the individual legislators dominated the project of producing the symbol the administration asked for.

As a matter of domestic policy on the "Negro problem" there was no precedent in America for treating Blacks as equal to Whites. Historically, the demand for equal treatment was met with failure and, among Whites, resentment of what anything approaching equal for Blacks might mean to the value of Whiteness.45 The idea of equality included the idea of there being a limited amount of equality.46 To grant Blacks equality looked like discrimination to Whites. These dangers of "equality" formed the backbone of the campaign of "massive resistance" that followed in the wake of Brown to retain what Whites viewed as equality.47 When Kennedy became President the thought of equality for Black Americans was already a challenge and his inaugural address made impossible a domestic policy of something more than equality for Blacks. Kennedy said nothing about the lack of equality for Blacks.48 Kennedy told Americans: "[A]sk not what your country can do for you—ask what you can do for your country."49 When Kennedy ultimately addressed the nation about civil rights for Blacks on June 11, 1963, he appealed on behalf of equality knowing what the challenge granting Blacks equality represented.50

44. Belatedly in 1979, and with a specific claim that the 88th Congress intended Title VII to give Blacks jobs, this is what the Court ultimately authorized in United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979)—private affirmative action that discriminated against whites in favor of Blacks because of a history of discrimination.


46. See id.

47. What Whites viewed as equality is summarized in the "Southern Manifesto" as a constitutional right to maintain segregation; a freedom to continue to exclude Blacks from opportunities open to Whites. See Carol Anderson, White Rage 80–81 (2016).


49. Id.

50. See Kennedy, supra note 35; Graham, supra note 10, at 74–75.
For similar reasons black leaders never asked the administration for the "far more efficacious means" of correcting the problem of Black unemployment and underemployment. Historically, all Blacks ever asked for was equal treatment. Martin Luther King's "I have a dream" speech, for example, eloquently defines equality as a rejection of special treatment for Blacks. For a moment in the early 1960s, however, so-called militant Blacks in the North demanded and achieved small successes where White employers agreed to racially preferential hiring. The gravitational pull of the historical demand for equality, however, required that Blacks, at least the Black civil rights leadership, give no countenance to preferential treatment as reparations for hundreds of years of inequality. Blacks were trapped by their own demands for equality.

During hearings in summer 1963 friends and foes of civil rights questioned witnesses, including the Attorney General Robert Kennedy, about discrimination in favor of Blacks. Whether friend or foe, the questions highlighted the problem of remedying historical wrongs against Blacks by creating a law that discriminated against innocent Whites. Racial quotas were the focal point of the questions. On the issue of whether civil rights law should remedy employment imbalances by hiring to quota or to give Blacks special consideration, the answer had to be and was: "No." The logical force of "equality" in many respects required the 88th Congress to exclude a generation of Black workers from Title VII's coverage by leaving them without a remedy for the discrimination they suffered before July 2, 1965. This result was part of how the policy goal of equality informed the initial conceptualization of discrimination.

A. Conceptualizing Discrimination by Not Defining Discrimination

Title VII does not define "discrimination." It defines prohibited practices as "unlawful employment practices." It made the primary unlawful employment practice: "[T]o fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." This is the equality principle. Implicitly, its statement recognizes equality as a zero-sum concept. Discrimination against a person because of race captured the idea that discrimination in favor of some-
one else occurred at the same time. Congress specifically defined certain employment practices as lawful. These included what I discuss below as the “safe-harbors” of Section 703(h): the continuation of existing seniority systems, an employer’s right to use professionally developed general intelligence tests, and the continued existence of racially imbalanced workforces. Congress also made Title VII entirely prospective. Unlawful employment practices could only happen after July 2, 1965. This represents the conceptualization of discrimination, not the definition of discrimination.

Policymakers were aware of definitions for discrimination. Testimony in support of Title VII’s predecessor, the Fair Employment Practices Act of 1963, defined discrimination in this way:

Employment discrimination against Negroes is defined as any behavior on the part of an employer toward a Negro employee or potential employee, which reflects a negative evaluation of that person’s race to the extent that the employer either refuses to utilize that person or underutilizes him, and/or underpays him.

A simple definition is sufficient. Let us refer to employment discrimination as any nonobjective behavior on the part of an employer toward an employee or potential employee, which reflects some intuitive negative evaluation (prejudice) of the employee’s race to the extent that the employer, when confronted with a manpower need, will either not use the employee, underutilize him, and/or undercompensate him.

Given congressional awareness of state fair employment practices laws, it seems reasonable to conclude that policymakers also knew that Missouri had defined “discrimination” in its law. Missouri’s Fair Employment Practices law, the Missouri Human Rights Act (“MHRA”), became state law in 1961. It defined “discrimination” in employment as “any unfair treatment based on race, color, religion, national origin, ancestry, sex, age as it relates to employment.” With potential definitions at hand, the choice against defining “discrimination” in Title VII must have been purposeful. Given the focus on equality, definitions of discrimination based on “any unfair treatment” or an analysis of “non-objective behavior” opened doors to the kinds of discrimination in favor of Blacks the equality principle prohibited, including looking into the past and tracing the source of any claimed non-objective treatment to the present. Moreover, in the minds of policymakers, achieving the goal of equality did not require Title VII to capture all discrimination or trace the discrimination it condemned to its historical source.

B. Only The “Worst” Forms of Discrimination

When the House reported out its version of Title VII to what would become the Civil Rights Act of 1964, it described Title VII as “prohibit[ing] and
provid[ing] the means of terminating the most serious types of discrimination.” Members of the House also stated that Title VII “can and will commit our Nation to the elimination of many of the worst manifestations of racial prejudice.” The “most serious types of discrimination” and “many of the worst manifestations of racial prejudice” relate most directly to the sectional nature of the problem the administration was solving. Those phrases described in short hand what had been happening in the South. The message of Title VII was therefore also the message of the 1964 Act in support of America’s foreign policy goals. The United States was claiming a national identity, for consumption by the global community, of world leadership arching toward greater racial justice. It was doing so by fixing the problems in the South where, as everyone knew, the “worst” forms of discrimination lived.

Just as the southern stereotype of racial hatred informed the meaning of the “worst” kinds of action, it defined the intention behind the action. The most profound discrimination that Americans and the world saw was an intentional action to do harm because of race. The link between action and intention strongly limits the forms of discrimination that Title VII could recognize. The discrimination would have to be significant, purposeful, and obvious. When the word “intentional” made its way into the text of Section 706(g) of Title VII to modify the right to relief for employment discrimination, this was its arguable meaning. If the discrimination was insignificant, hidden, or inadvertent it failed the worst-form-of-discrimination test.

C. Safe Harbors for Historical Discrimination

Although media of the period convincingly portrayed the South as the home of the “worst” forms of discrimination, refusing jobs to qualified Blacks and relegating Blacks to the worst jobs with the lowest pay were practiced across the country by employers and by and within unions. It was no secret that “whites only” signs figuratively hung above jobs and union membership South and North just as they literally hung above drinking fountains and bathrooms in the segregated South. The problem for legislators was developing a law that prohibited employment discrimination without discriminating against White employees or diminishing the rights of White employers in the North.

The compromise legislation that became Title VII managed the problem by creating safe harbors for all White employers, unions, and White employees. The safe harbor provisions were the price paid for the essential support of key northern Republicans to protect their constituencies. Nothing these groups already had would be taken away. Title VII would not become effective until

69. Id. at 2488.
70. See BORSTELMANN, supra note 24, at 137.
71. Henson, supra note 33, at 93–96. At the time, the legislators responsible for adding “intentional” to the statute thought little of it. It merely clarified what everyone understood. 110 CONG. REC. 12,723, 12,724 (1964). Mr. Richard K. Berg, an early scholar of Title VII’s legislative history, did not give any consideration to the meaning of the word “discrimination” in isolation. See Richard K. Berg, Equal Employment Opportunity Under the Civil Rights Act of 1964, 31 BROOK. L. REV. 62 (1964). He discusses discrimination in conjunction with the word “intentionally” to explain why “intentionally” was a superfluous addition to Title VII. According to Berg: “Discrimination is by its nature intentional. It involves both an action and a reason for the action. To discriminate ‘unintentionally’ on grounds of race, color, religion, sex, or national origin appears a contradiction in terms.” Id. at 71. In contrast, Mr. Berg dismisses, as too remote, the possibility that a subconscious intent to discriminate, that is submerged in the use of pejorative language, could fall within Title VII’s protections. Id. at 71 n.14.
72. 110 CONG. REC. 12,723, 12,724 (1964) (remarks of Senator Humphrey, one of H.R. 7152’s key proponents) (there was no liability for “inadvertent or accidental discriminations”).
73. See GRAHAM, supra note 10, at 75.
one year after it became law: July 2, 1965. Only intentional discrimination after that date would result in liability. Little if any of the past would be relevant in determining whether intentional discrimination occurred after July 2, 1965.\textsuperscript{75}

Creation of the safe harbors began in the House. H.R. 7152, the bill that would become the Civil Rights Act of 1964, was sent to the Senate with the promise that the EEOC, Title VII's watchdog, would work on a short leash:

It must also be stressed that the Commission must confine its activities to correcting abuse, not promoting equality with mathematical certainty. In this regard, nothing in this Title permits a person to demand employment. Of greater importance, the Commission will only jeopardize its continued existence if it seeks to impose forced racial balance upon employers and labor unions. Similarly, management prerogatives, and union freedoms are to be left undisturbed to the greatest extent possible. Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices.\textsuperscript{76}

This statement represents the consensus viewpoint of the House.\textsuperscript{77} The Senate followed the House's lead by dealing with the issues of management right to use tests to make employment decisions and by giving unions and their membership explicit protection.

The Senate created safe harbors by defining what were not unlawful employment practices. Senators added Section 703(h) to Title VII and excepted differential treatment related to \textit{bona fide} seniority systems and the use of professionally developed ability tests from Title VII's coverage.\textsuperscript{78} According to Section 703(h), different benefits available to employees arising from existing \textit{bona fide} seniority systems are not unlawful employment practices covered by Title VII "provided that such differences are not the result of an intention to discriminate . . . ."\textsuperscript{79} Shortly after passage of the Act, one commentator remarked that "Congress went out of its way to protect established seniority rights from the bite of Title VII's provisions, even though these rights may have been acquired as a result of prior discrimination."\textsuperscript{80} Senators Case and Clark, advocating for Title VII, assured their colleagues that established seniority rights could not be touched by Title VII because "[i]ts effect is prospective and not retrospective."\textsuperscript{81} According to these senators:

\ldots if a business has been discriminating in the past and as a result has an all-White working force, when the Title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed, permitted—to fire Whites in order to hire Negroes, or to prefer Negroes for future vacancies, or once Negroes are hired, to give them special seniority rights at the expense of White workers hired earlier.\textsuperscript{82}

The safe harbor for \textit{bona fide} seniority systems met the purpose of the northern politicians to "blunt the impact of the bill on the North and to lower

\textsuperscript{75} See Berg, supra note 71, at 77 (discussing whether it was even rational for employers to be concerned about achieving racial balance in their work forces because of Title VII and observing that "the employer's practices prior to the effective date of the Title and the composition of his work force on that date should be of only limited relevance, perhaps suggesting a disposition to discriminate, but not sufficient to destroy the ordinary presumption that he is complying with the law").

\textsuperscript{76} H.R. REP. No. 88-914, at 2516 (1963) (emphasis added).

\textsuperscript{77} See id. at 449; Berg, supra note 71, at 74.

\textsuperscript{78} See id. at 88-914; Berg, supra note 71, at 74.


\textsuperscript{81} Id. at 839 n.55 (quoting 110 CONG. REC. 7213 (1964)).

\textsuperscript{82} See id.
the perceived costs of the Act to Republican constituents."83 Racial imbalance in any work force received similar protections in Section 703(j).84 At the time no one thought these “clarifications” effected a functional change to Title VII.85

The seniority system exemption and the prohibition of quotas have an obvious and direct connection to the accepted concept of equality. These additions to Title VII focus on individuals who, for political reasons, must be held harmless in making equality of employment opportunity the law: White workers.86 Less conspicuous in the legislative history is the freedom granted to employers in determining the composition of their workforces. The Senate amplified this freedom within Title VII by specifically protecting the use of intelligence tests.

The trigger for senators to protect testing in Title VII came from an Illinois state fair employment practices case which came down as the Senate was debating Title VII.87 In Myart v. Motorola, Inc.,88 Myart alleged that Motorola did not hire him because he was black.89 One of Motorola’s defenses was it did not hire Myart because he failed Motorola’s Test No. 10, a general intelligence test.90 Motorola did not produce Myart’s actual test or the Motorola employee who administered Myart’s test at the hearing.91 Myart testified that he had passed Test No. 10. Motorola produced the test’s author,92 who testified that it was the shortest test he knew of to test verbal comprehension and ability to understand instructions.93 The hearing officer, finding for Myart, enjoined Motorola from using Test No. 10. According to the hearing officer, Test No. 10 was obsolete and had the effect of disadvantaging minority applicants regardless of intent.94 [Test No. 10’s] norm was derived from standardization on advantaged groups. Studies in inequalities and environmental factors since the publication of test No. 10 [in 1949] have been made with careful equating of such background factors . . . . [T]his test does not lend itself to equal opportunity to qualify for the hitherto culturally deprived and the disadvantaged groups.95

In addition to ordering Motorola to cease and desist from using Test No. 10, the hearing officer ordered that, should the company replace the test, any replacement “shall reflect and equate inequalities and environmental factors

84. Berg, supra note 71, at 76.
85. See id. at 73 (the additions of protections for bona fide seniority systems and testing do not “involve[ ] a substantive change in the [T]itle.”); id. at 76 (“Section 703 (j) is another clarifying provision effecting no substantive change.”).
86. Winter, supra note 80, at 840–42 (criticizing Congress for failing to attack unions and seniority systems because of unions’ history of racism and the fact that seniority systems are not neutral as to race). “It is the dead hand of racial prejudice governing present relationships and is of value to no one except its direct beneficiaries.” Id. at 842.
87. See Berg, supra note 71, at 74.
89. Id. at 5662.
90. See id. at 5663.
91. See id.
92. “Dr. Shurrager developed a series of test for [Motorola, including Test No. 10,] including tests of four different kinds of special relations and ability; and he regularly supplies these tests to [Motorola] for a fee . . . .” Id.
93. Id. at 5664.
94. Id.
95. Id.
among the disadvantaged and culturally deprived groups." The hearing officer also ordered Motorola to employ Myart.

The Senate made sure that the Myart result, a remedy for the present effects of historical discrimination, could not happen under Title VII. The Senate leadership accepted an amendment by Senator Tower to Title VII, and the following language ultimately appeared in Section 703(h): "nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test is not designed, intended or used to discriminate . . . ." The Tower amendment going largely unremarked can be explained by the notion that if Title VII guaranteed anything, it only guaranteed the equal opportunity to compete, regardless of history. Thus, this exchange between Senator Dirksen, who had filed objections, and Senator Clark, one of the leading Democrats tasked with the passage of the omnibus civil rights legislation:

Objection: Under the bill, employers will no longer be able to hire or promote on the basis of merit and performance.

Answer: Nothing in the bill will interfere with merit hiring or merit promotion. The bill simply eliminates consideration of color from the decision to hire or promote.

The employer's ability to test was an unobjectionable part of existing management prerogatives, which "expressly protects the employer's right to insist that any prospective applicant, Negro or white, must meet the applicable job qualifications." Because compensation for past discrimination was not part of the 1964 Act's purpose, it also made sense for Title VII to reject racial quotas as a measure of the presence or absence of discrimination. The Senate's addition of Section 703(j), prohibiting the use of quotas, reflected, again, the consensus view of equality and limited the potential liability to employers with racially imbalanced work forces.

96. Id.
97. Id. Myart's compensatory demand was for employment, with back-pay, and seniority from the date of his application. Id. at 5662. See as a declaration that facially neutral tests cannot be used to reject "disadvantaged and culturally deprived groups" unless the tests account for "inequalities and environmental factors," the hearing officer's decision in Myart and the Court's decision in Griggs v. Duke Power Co. are effectively identical. Imbedded in the hearing officer's pronouncements of cultural deprivation and inequalities lay the Griggs Court's reasoning that the educational, and therefore occupational, disparities caused by segregation could not be allowed to be frozen in time by a facially neutral test that did not really test a person's ability to do a job, but instead tested the person himself. Fully aware of, Myart, Congress could have signaled its intent to allow for the Griggs result by either remaining silent or by enacting a section that prohibited testing on any other basis than an applicant or employee's ability to perform a specific job.

98. See Berg, supra note 71, at 74.
100. Compare Berg, supra note 71, at 74 (seeing the Tower amendment as largely irrelevant, and "[s]ince the amendment did not effect a change in the previous meaning of the [T]title, no negative implication may be drawn from the reference to a 'professionally developed ability test'"), with Vaas, supra note 63, at 449 (perceiving what the logic of Myart portended: "The amendment is limited to an employer's use of such tests. Does this leave the door open for the EEOC or for a court to hold that use of such a test by an employment agency . . . is an unfair employment practice if it results in "de facto discrimination," and the user knows or should have known that this would be the result?").
102. Berg, supra note 71, at 74-75 ("Since the amendment did not effect a change in the previous meaning of the [T]itle, no negative implication may be drawn from the reference to a 'professionally developed ability test.' The issue in any case where the use of any ability test is questioned is not whether the test is professionally developed . . . but whether it is used in good faith or with intent to discriminate.").
103. Berg, supra note 71, at 74 (quoting 110 CONG. REc. 7,026 (1964)).
104. See 78 Stat. at 257.
Each of these carve-outs from the spectrum of unlawful employment practices accurately reflected the national consensus and national insecurity about the meaning of the equality principle. Equal meant equality of opportunity to compete in a race for economic advantage set to begin on July 2, 1965. No advantage gained by Whites before the 1964 Act would be taken away. What Whites might lose, however, was what the legislators bargained over and sought to protect: existing jobs, economic benefits and expectations that resulted from Blacks being excluded from the employment marketplace. Oddly, legislators spent no time debating how Blacks might best compete given a history of de jure and de facto policies meant to exclude Blacks from even preparing to compete. These policy choices became focal points for commentators and scholars in the years immediately after the Act’s passage. Yet no scholar in the period between 1964 and 1973, the year the Court decided *McDonnell Douglas*, connected the specific safe harbors of Section 703(h), seniority system protection, and the right to use tests, to the specific legislative compromise captured in the House Report: existing “management prerogatives and union freedoms are to be left undisturbed to the greatest extent possible.” Rather than “clarifying redundancies,” the Section 703 safe harbors were cornerstones that could not be shifted without disturbing the 88th Congress’s overarching vision of limiting Title VII liability to violations of the equality principle.

### III. RECONCEPTUALIZING DISCRIMINATION

Immediately after its passage scholars and commentators went to work analyzing Title VII. With varying degrees of approbation, anger, disappointment, and concern, they revealed their expectations about what Title VII was supposed to do in contrast with the scheme the 88th Congress produced. Although some appreciated Title VII because of its existence, all agreed that it was too obviously a piece of compromise legislation with a dim future. Several saw that conceptualizing discrimination in Title VII around the equality principle set up a fatal conflict with any purpose the Title may have had beyond symbolism. One of the era’s major scholars of employment discrimination, Professor Michael I. Sovern, wrote that Title VII was only a small beginning to “[b]ringing the Negro to full economic citizenship.” It was a beginning that, in 1966, would not cover ninety-two percent of employers or sixty percent of employees by the time its mandate grew from employers of one-hundred or more to employers of twenty-five or more. Moreover, the equality principle would only garner jobs for qualified Blacks in an increasingly technological, white-collar workspace from which most Blacks would be “permanently disqualified” because of a history of inferior education.

For those reasons, the search for a purpose beyond symbolism for Title VII became focused on spaces where the equality principle would not be challenged, and some jobs still existed which Blacks might, more or less, immedi-

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107. See id. at 65. Commenting on Title VII’s grace periods of covering employers with one-hundred or more employees on July 2, 1965 and only reaching employers of twenty-five or more employees on July 2, 1968, Sovern pointed out the likelihood of dashed expectations for Blacks: The unheralded delays are obviously pregnant with embittering surprises for Negro job applicants who think that American business and labor are supposed to be treating them fairly now. It will be difficult to explain to a Negro turned away in the spring of 1967, by a business large enough to require [seventy-four] employees, why the Civil Rights Act of 1964 cannot help him yet.
108. Id. at 5.
ately fill despite the crippling effects of their substandard education. The search for a purpose which met these criteria led scholars directly to unions and the Section 703(h) safe harbor for seniority systems. Exploring Title VII's internal tensions, however, scholars and commentators exposed all of Section 703(h)'s safe harbors as valid subjects for an in-depth review of the scope of the equality principle. In so doing, they laid the groundwork for a reconceptualization of discrimination where Title VII might capture the present effects of historical discrimination in all employment decisions.

A. Finding Title VII's Purposes

Some scholars and commentators saw the existence of Title VII as a symbol of where the country stood on invidious racial discrimination as an achievement. One early historian celebrated Title VII for its educational value: "As an expression of congressional and national concern over the problem of discrimination in employment, Title VII [was] indeed unprecedented." According to another scholar, however, "[t]he educative impact of anti-discrimination programs is not, therefore, unidirectional. What they teach in the way of tolerance is matched by their ability to mislead as to the causes and remedies for Negro poverty." Another concluded that Congress's work "brought to fruition the labors and aspirations of civil rights proponents everywhere, [and] made possible that which has never before been possible in America and will leave a lasting mark on the structure of American society." At least one of these scholars, however, noted that Title VII's enforcement procedures "[bore] only too visibly the marks of compromise, and seem . . . to contain serious deficiencies." Private lawsuits were unlikely to do much because defendants would have the upper hand in resources and information and individual plaintiffs would find the litigation too burdensome under the best circumstances. Title VII's effectiveness largely depended on the climate of opinion regarding racial discrimination in society. Even Franklin D. Roosevelt, Jr., the first Chairman of the newly minted EEOC, by calling to business and unions to go beyond the letter of the law, admitted that Title VII did not "right ancient wrongs" or "undo the damage done by 250 years of slavery and 100 years of segregation.

Other scholars analyzed Title VII through a philosophical lens: what was the law's proper role in equal employment opportunity? Some concluded that laws like Title VII had a role to play but questioned what that role should be in relation to the equality principle. Others thought Title VII unwise because it seemed to set unmeetable expectations about resolving the economic issues for Blacks because of its basis in the equality principle. There was disagreement about the application of the equality principle to some, all, or none of the issues Title VII touched. Several of these commentators, however, agreed on

110. Winter, supra note 80, at 855.
111. Vaas, supra note 63, at 457.
112. Berg, supra note 71, at 96.
113. See id. at 96–97.
114. See id.
116. See Charles T. Schmidt, Jr., Title VII: Coverage and Comments, 7 B.C. INDUS. & COM. L. REV. 459, 471–72 (1966) ("Although I am pessimistic about the overall effects of Title VII . . . this in no way suggests that I view racial discrimination in the world of work as not being subject to effective legislation, nor am I reluctant to suggest additional legislation."); see also Frank Cloud Cooksey, The Role of Law in Equal Employment Opportunity, 7 B.C. INDUS. & COM. L. REV. 417, 417 (1966) ("[T]he law may be used as an effective tool in eliminating some unreasonable discrimination in the area of hiring and other employment practices.").
117. See Winter, supra note 80, at 821.
facts relating to the lack of job preparedness Blacks suffered in the 1960s which do not reveal themselves in Title VII's legislative history or in any part of the Title. In sum, these observers saw that Title VII's value was symbolic. It did nothing to solve the problem of Black joblessness. It did nothing to solve the problem of Black job-preparedness. Title VII's only purpose appeared to be imbedding the equality principle in federal law, with the serious side effect of prohibiting any form of targeted benefits for Blacks.

According to one outraged commentator, Title VII was a complete failure because it embraced the equality principle. He saw Title VII as a measure to correct ideas about discrimination largely through conciliation and a hope that employers and unions would go beyond the letter of the law. But, he believed that there was no time to wait for America to change its racial attitudes and that compliance with the letter of the law was unlikely. Moreover, Title VII was deeply flawed in its focus on the equality principle. It was flawed because it did not deal with the problem of Black joblessness and economic hardship by giving only Blacks special treatment. Title VII should have either required hiring to quotas or compelled industry and unions to “assume the employment training responsibility of the Negro.”

Another commentator found Title VII flawed for purposes of ending “unreasonable” employment discrimination in a timely manner because of the inherent problems with evidence and its sluggish process. He suggested that Title VII, as it stood, could be useful in eliminating “the more overt types of discrimination” but it would need revision and enforcement to “be a catalyst in the process of reducing the more covert discriminatory practices.” On the other hand, this commentator recognized a primary problem Title VII was never meant to fix: job preparedness. To him “it appear[ed] axiomatic that the

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118. See SOVERN, supra note 106, at 5.
119. See Winter, supra note 80, at 855 (“We are relatively unpracticed at using law as a moral symbol rather than as a coercive device.”). Winter concluded that Title VII was a failure as a coercive device and as a symbol because of its conflicting goals, fixing Black economic deprivation and the equality principle. But see SOVERN, supra note 106, at 101 (“In the meantime, Title VII, for all its limitations, is far more than a symbol, at least in states that have not yet enacted fair employment practices legislation.”). Title VII is an irreversible beginning that will get better as Black political influence increases and resistance to equal employment opportunity diminishes. See id.
120. See Schmidt, supra note 116, at 459 (“In my eyes, this Title is wholly inadequate to meet even the minimum demands of the Negro, being ill-conceived in scope, coverage, administration, and enforcement.”).
121. See id.
122. See id. at 461–62. Franklin D. Roosevelt, Jr., the first Chairman of the EEOC agreed with this assessment of Title VII. Roosevelt, supra note 115, at 413–14 (“Our appeal is that business go beyond the letter of the law in order to carry out the spirit of the law.”)
123. See Schmidt, supra note 116, at 460 (“The Negro in America has been mediating and conciliating for over 150 years. He has little faith in the process, nor should he!”); see also Roosevelt, supra note 115, at 414 (“There will be no social peace unless we right ancient wrongs. That requires us to undo the damage done by 250 years of slavery and 100 years of segregation.”).
124. See Schmidt, supra note 116, at 459–60 (“The problem in civil rights is the Negro—the problem in job discrimination is the Negro—the problem in unemployment is the Negro—the problem in skilled craft unions is the Negro—the problem in apprenticeship and training is the Negro... However, Title VII does not exclusively focus upon the Negro. In fact, some have even expressed this lack of focus as being one of the outstanding virtues of the Title. They argue that by requiring merit employment and non-restrictive membership provisions along very broad lines... that we may ‘package’ the American ideal of equal opportunity into one convenient container. To me, this is equivalent to treating a cancer with aspirin because you also happen to have a headache, a sore toe, and a hangnail!”).
125. See id. at 472.
126. Id.
128. Id. at 420.
first obstacle to be overcome by Negroes in their search for equal employment opportunity is the achievement of the education and training necessary to perform the increasingly demanding tasks of a technologically sophisticated society."

Given the equality principle, however, there could be no argument for "favored treatment" to excuse the lack of qualification for a given job.129

Others doubted anti-discrimination law generally, Title VII in particular, because of its fatally simplistic view of discrimination and the tension between equal treatment and solving Black economic suffering. The overly simplistic view of discrimination based on eliminating the decision-making of a racist employer supported the existence of legislation that was "vague, both in principle and in practice" and could not be properly critiqued "without seeming a racist."131 A more complex discussion of what form of discrimination was limiting Black economic opportunity included consumer bias against Blacks, co-worker bias, the absence of Blacks in the labor pool, the absence of qualified Blacks, and the absence of apparently qualified Blacks.132 Title VII's hyper focus on racially motivated employers overstated the impact of that type of discrimination and set irrational expectations about the Title's ability to influence the economic picture for Black Americans.133 Title VII as constructed was based on the treatment of individuals. Individual cases of discrimination were not going to put "substantial numbers of Negroes to work."134 The only method of putting substantial numbers of Blacks in jobs, thereby meeting the expectations Title VII created, would be quotas and preferential hiring whether adopted voluntarily to avoid claims of discrimination or imposed judicially.135

This scholar also specifically criticized the Act for purposefully missing the opportunity to address well known and more readily tractable union discrimination.136 Most problematic was Title VII's protection of seniority systems. Section 703(h) was a mistake based on an overly simplistic view of seniority systems and political fear of "antagonizing those beneficiaries [of seniority systems] and of disrupting relationships."137 The mistaken view was that seniority systems were race neutral when they actually were racially driven by a documented history of racial discrimination.138 Unions, not capitalists, were the problem since "the principal economic beneficiaries of discrimination against Negro workers are white [unionized] workers . . . ."139 Rather than create a law that might allow the white unions and management to merge separately maintained seniority lists by simply putting the Black list at the bottom,140 Title VII would have been a good place to suspend the equality principle and grant Blacks special treatment.141 In conclusion, without preferential treatment for Blacks,

129. Id. at 418.
130. See id. at 419 ("The Civil Rights Act of 1964 explicitly rejected a course of preferential treatment.").
131. Winter, supra note 80, at 824.
132. See id. at 822-24.
133. See id. at 826.
134. Id. at 834-35.
135. See id.
136. See id. at 838-44.
137. Id. at 842.
138. See id. at 841 ("I suspect that if one were to attempt to catalogue the industries from which Negroes are most systematically excluded, they would be those in which unions do control hiring. Since many of these have traditionally served as the pipeline for ethnic group betterment, the labor movement must be held responsible for some of the most pernicious bottlenecks preventing Negro advancement.").
139. Id. at 840.
140. See id. at 841 ("I don't mean to suggest that Title VII necessarily permits the parties to join previously separate seniority lists by putting the Negro list at the bottom. That is not clear. It is clear, however, that Congress went out of its way to render this a permissible interpretation.").
141. See id. at 842-43.
Title VII would not have a positive economic impact for Blacks and preferential treatment could not be engaged in because of the many negative impacts including backlash and yielding the moral principle of the civil rights movement.\textsuperscript{142}

One scholar focused exclusively on the equality principle and its conflict with special treatment for Blacks.\textsuperscript{143} After rehearsing the arguments in favor of violating the equality principle, he concluded that special treatment was untenable as a solution to Black joblessness.\textsuperscript{144} In particular, this observer argued that preferences for Blacks underestimated the group that needed preferences: Gunnar Myrdal’s “underclass.”\textsuperscript{145} All Americans without an adequate share of society’s benefits, “the self-perpetuating group at the bottom level of our society who have lost the ability and the hope of moving up” only one third of which were Black, comprised the underclass.\textsuperscript{146} By preferring Blacks, the majority of the underclass paid the price without having benefitted from the exclusion of Blacks from American economic life.\textsuperscript{147} Inserting the equality principle into the law was already problematic. The members of the underclass who would be “most affected by job preference for the Negro would be the second generation Americans and poor whites who have most bitterly resented his march toward equality.”\textsuperscript{148} They would not well tolerate changing places with Blacks.\textsuperscript{149} For this scholar, Title VII’s best purpose was symbolic, although he does not mention the title by name. The educative force on “public opinion as to the morality of discrimination” was “more important than the actual enforcement mechanisms of the law.”\textsuperscript{150} Similar to the conflicting goals of equal treatment and curing Blacks’ economic deprivation, the goal of convincing America of the immorality of discrimination stood in conflict with any preferential treatment for Blacks.\textsuperscript{151}

This scholar also discussed what was not, in his mind, preferential treatment for Blacks.\textsuperscript{152} As with other scholars, he focused on unions and Black exclusion from the information pipeline about job openings and training opportunities.\textsuperscript{153} On the relationship between unions and Black unemployment: “Over the years the Negro has been the victim of deliberate racial discrimination which has drastically limited his numbers in most positions and in

\textsuperscript{142} Id. at 854–55. See also Sovereign, supra note 106, at 211–12 (condemning “compensatory discrimination” as engaging in group “stereotypy” rejection of which “rests most fittingly on the very principle that has enlightened the long fight over civil rights—the individual is entitled to be judged on his own merits”).


\textsuperscript{144} See id. at 387.

\textsuperscript{145} See id. at 374.

\textsuperscript{146} See id.

\textsuperscript{147} See id. at 375.

\textsuperscript{148} Id.

\textsuperscript{149} See id. at 375–76.

\textsuperscript{150} Id. at 379.

\textsuperscript{151} See id. at 380.

\textsuperscript{152} See id. at 368 (“Before discussing the first of our questions—the extent to which the government could compel private employers to give preference to Negroes—it is appropriate to delineate one area in which the questions of preference are more apparent than real.”). But see Winter, supra note 80, at 844 (dealing with unions on issues like seniority and outreach through coercive law “involves preferential treatment of a kind, but there is little harm in that when imposed on such a monopolistic system”).

\textsuperscript{153} Kaplan, supra note 145, at 368; see also Winter, supra note 80, at 843–44 (“Where unions have control over job assignments through hiring halls and apprenticeship programs, moreover, there seems to be no reason to permit them to apply whatever subjective standards they desire. . . . Moreover, I see no objection to requiring holders of this power aggressively to seek out applicants from previously excluded groups with a view toward demonstrating that opportunities are now available to qualified applicants.”).
most industries."

Unions may continue to discriminate against Blacks by admitting members on grounds directly linked to historical discrimination like familial ties or the personal endorsement of existing members without a present reference to race. He argued that there should be a remedy for historical discrimination in the present, "[w]herever the factor which prevents the admission of the Negro to a union is caused in some sense by that union's previous discrimination, it is certainly neither difficult nor unfair to insist on the use of some other method which does not incorporate a prior discrimination." Nor would it be preferential treatment to remedy the related system of job access based on insider information where employers who trust word of mouth referrals from an entirely or predominately white workforce to fill vacancies perpetuates historical discrimination. Nevertheless, according to the critic who addressed the issue of enforcing any such remedy, "[t]he possibility of imposing such controls under [Title VII] is not great" because of the Title's requirement of a "specific intent to discriminate on racial grounds."

Title VII as written could only successfully serve a symbolic purpose. America had formally embraced the equality principle in federal law. Because of the equality principle, Title VII could not meet the expectations the Civil Rights Act of 1964 created about an immediate resolution of the economic imperilment of Blacks. That remedy led down the road of race-based preferences; a road blocked by the equality principle. Even if Title VII allowed for preferences based on race, it could not succeed in remedying the economic plight of Black Americans because the title did not contemplate the problem of Black job-preparedness without which Blacks would not succeed in the jobs they were given. On the other hand, unions and seniority systems presented fertile ground for remediation because the equality principle arguably was not in conflict with eliminating the present effects of their historical discrimination. The questions remained: How could such a remedy be created and, if created, how would it be proved?

B. Finding a Remedy for the Present Effects of Historical Discrimination

Primary architects of the arguments that Title VII could, despite its language and apparent intent, reach into the past and adjust for the present effects of historical discrimination were Professor Michael I. Sovern and an unknown Harvard Law School student. Another primary architect was Professor Alfred W. Blumrosen who was publishing ideas similar to the ones discussed in this section between 1967 and 1969 and assembled his ideas in the 1971 book Black Employment and the Law. I do not highlight Professor Blumrosen because the seminal cases creating remedies for the present effects of historical discrimination beginning with Quartes focus on Professor Sovern and the Harvard Law Review Note.

Similar to Professor Sovern, Blumrosen captured the racist history of unions and described in detail how that history was discrimination that was being perpetuated in the present. See BLUMROSEN, BLACK EMPLOYMENT AND THE LAW (1971). He posed the question in relation to Title VII: "In other words, has [a system where Blacks lose their seniority when they move to white departments] discriminated during the post July 2, 1965, period, or did the discrimination cease when the formal barriers to promotion were lifted?" See id. at 170. According to Blumrosen, the discrimination continued in the present. See id. at 170–71. Professor Blumrosen wrote in some detail about the arguments for and against the idea that Title VII covered the present effects of historical discrimination in union seniority systems. See id. at 172–90. One of the key arguments that Title VII did not cover the present effects of historical discrimination was that it could not be applied retroactively. According to Blum-
tion to the issue of how discrimination could be proved. The unknown Harvard student explained specifically how seniority should be dealt with without violating the equality principle.

Professor Sovern described his ideas about the union discrimination problem in a 1962 article in the Columbia Law Review titled *The National Labor Relations Act and Racial Discrimination.* He later amplified these ideas in a 1966 book, *Legal Restraints on Racial Discrimination,* to account for Title VII; the arrival of which he did not foresee. In 1962 he did not believe that Congress would "enact a comprehensive program in the near future" to deal with Black unemployment and underemployment. Aside from the National Labor Relations Act ("NLRA"), federal law in the area of employment discrimination was a "collection of makeshifts." And dealing with discrimination against Blacks by unions made sense because of the power of labor unions "to maintain or end discrimination." Unions had a history of refusing Blacks membership, relegating them to segregated locals, and most importantly, they used their "power to confine Negroes to the lowest job classifications of some enterprises and to exclude them from others altogether."

Professor Sovern explored how the NLRA could stop these practices particularly under Sections 8(b)(2) (prohibiting unions from trying to make employers discriminate on the basis of union membership) and 8(b)(3) (prohibiting employers from encouraging or discouraging union membership) and the duty of fair representation. He created a catalogue of the numerous methods unions used to discriminate against Blacks including denial of membership because of race and denial of employment because they were not union members. His contribution in sketching out the numerous ways these exclusions operated as the dead hand of prior discrimination without appearing to be race based is shown in the cases that later explored arguments that unions and employers changed their policies and were complying with Title VII after July 2, 1965.

Arguing that Sections 8(b)(2) and 8(b)(3) should apply to race discrimination, Sovern observed that the road to employment, employment security, and

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161. See *Sovern,* supra note 106.
162. Professor Sovern's *Legal Restraints* represents his effort to catalogue the varieties of laws and agencies, including the newly enacted Title VII and the newly created EEOC, focused on the issue of employment discrimination at the time. Chapter 4 of *Legal Restraints* "Congress at Last: The Civil Rights Act of 1964" contains his discussion of Title VII particularly its flaws. Chapter 6, "The National Labor Relations and Railway Labor Acts" is substantially Professor Sovern’s *NLRA* article. Professor Sovern accepts the premise of the equality principle, noting that its inclusion in Section 703(j) is a redundancy meant to reassure and dispel misunderstanding because "nothing in the Act would have supported an interpretation" allowing preferential treatment for Blacks. *Id.* at 70.
164. *Id.*
165. *Id.* at 565.
166. *Id.*
167. See *id.* at 566.
168. See *id.* at 567-69.
169. See *id.* at 571-72.
economic wellbeing led through the union and the union hiring hall.\textsuperscript{170} Prior discrimination could be a potent deterrent for Blacks attempting to join lily-white unions or approaching their hiring halls.\textsuperscript{171} So deterred, it would be hard to find complaining parties to bring cases to test the level of continuing race discrimination.\textsuperscript{172} Turning to the discrimination where a white union represented Black and white workers to the detriment of Black workers, Professor Sovern proposed a basic assumption that a union that excludes Blacks does not represent their interests.\textsuperscript{173} Therefore, in response to claims of discrimination, the "burden of proving justification should be on the union . . . ."\textsuperscript{174} A claimant's prima facie case to force the burden of proof to the union would consist of being Black and proving the union excluded Blacks from membership in the past.\textsuperscript{175} Sovern, in effect, provided the solution to the problem of proving discriminatory intent: always assume present discrimination based on a history of discrimination and make the discriminator prove "that they have done the unlikely when their actions are challenged."\textsuperscript{176}

In 1966, Professor Sovern published \textit{Legal Restraints on Racial Discrimination}.\textsuperscript{177} The book expanded the discussion he began in his \textit{NLRA} article to reconcile all laws relating to employment discrimination. His commentary about the safe-harbors largely repeated the assurances of the policy makers that the actions specifically excluded from the definition of discrimination were reassuring redundancies.\textsuperscript{178} Most significant to this discussion, he posed the problem of employment discrimination against Blacks as one of "[b]ringing the Negro to full economic citizenship."\textsuperscript{179} Although he accepted the equality principle, he acknowledged that because of inferior education, equal employment opportunity on the basis of "merit alone" would not change anything.\textsuperscript{180} Despite highlighting the proposition that "merit alone" could not move the needle to full economic citizenship, Professor Sovern did not abandon the equality principle. He framed it in a way that eliminated any argument that included notoriously race linked secondary characteristics. He wrote: "To violate Title VII, one must treat differently because of race itself and not merely because of an applicant's lack of a qualification which he was prevented from acquiring because of his race."\textsuperscript{181} Professor Sovern, however, noted two issues about the safe harbors in Section 703(h): that courts could ignore the present effects of prior discrimination in seniority systems; and the preservation of the right to test using ability tests requiring a high degree of literacy when the job

\textsuperscript{170.} See \textit{id.}
\textsuperscript{171.} See \textit{id.}
\textsuperscript{172.} See \textit{id.} at 572.
\textsuperscript{173.} See \textit{id.} at 582.
\textsuperscript{174.} \textit{Id.}
\textsuperscript{175.} \textit{Id.} Professor Sovern made identical arguments under the duty of fair representation. He proposed that Blacks could challenge union recognition for purposes of collective bargaining. He argued that "[a] union's refusal to admit Negroes is highly probative evidence that it will be unwilling or unable to represent them fairly." \textit{Id.} at 600. The "refusal to admit Negroes" included denial of membership and segregation of Blacks into "a colored local." \textit{Id.} Therefore, "once a union has been shown to exclude Negroes from membership, fair representation seems so improbable that the union should have the burden of adducing evidence that it will represent Negroes in the bargaining unit fairly." \textit{Id.}
\textsuperscript{176.} \textit{Id.} at 632. \textit{Cf.} BLUMROSEN, supra note 159, at 172-76 (arguing that because Title VII is a body of "statutory tort law" intent is not evil motive, but an awareness of the consequence of actions. Thus, the absence of continuing intent to discriminate does not immunize an employer or a union from Title VII liability if they continue to grant seniority system benefits that perpetuate past harms).
\textsuperscript{177.} See SOVERN, supra note 106.
\textsuperscript{178.} See \textit{id.} at 70.
\textsuperscript{179.} \textit{Id.} at 5.
\textsuperscript{180.} \textit{Id.}
\textsuperscript{181.} \textit{Id.} at 71.
has no such requirement would disadvantage Blacks. On the latter issue, Professor Sovern noted that Title VII's permission to use such tests should not disable the EEOC from persuading employers "to use tests better suited to [the performance of the job in question] and less likely to heap an additional disadvantage on the Negro product of a segregated school system."182

Following Professor Sovern, an unnamed Harvard Law School student wrote a Note titled *Title VII, Seniority Discrimination, and the Incumbent Negro*, which focused on the specific problem of how Title VII should deal with the expectations of white workers that their seniority rights, established under discriminatory seniority systems, will remain in force.183 The Note's Author, like prior commentators, held the view that dealing with the problem of seniority did not challenge the equality principle. Arguing that Blacks' seniority should entitle them to assume their "rightful place" in line for jobs that would open in the future:

*Title VII should not be seen as [preferential treatment] since they do not accelerate the advancement of Negroes simply because of their race; rather, they prefer them only if they are senior employees who have been denied advancement which, absent discrimination, their length of service would have secured for them.*184

She or he did not accept the proposition that the 88th Congress had created a safe harbor for all seniority systems. Despite Congress having "[gone] out of its way"185 to protect all seniority systems and benefits prior to July 2, 1965, the Note's Author simply found it incredible that Title VII "provid[ed] a blanket exemption for all differences in treatment resulting from seniority arrangements set up [before that date]."186 The Note's Author reasoned that Title VII's legislative history did not cover the issue of incumbent, as opposed to new, Black employees. Congress's failure to create a record on this issue, coupled with the Title's purpose as "a response to congressional concern over the depressed economic status of the Negro in American society,"187 meant that a bona fide seniority system protected by Section 703(h) could not cause Title VII to "exclude from its protection the generation of Negroes who have worked under discriminatory systems."188 A bona fide seniority system excludes such discriminatory impacts because those impacts are the result of the discriminatory intent that went into creating them.189 On balance, the Author of the Note concluded that white workers would retain most of the benefits of past discrimination, their current jobs and their economic gains.190 A "rightful

182. *Id.* at 73.

183. *See Note, Title VII, Seniority Discrimination, and the Incumbent Negro, 80 Harv. L. Rev. 1260* (1967) [hereinafter *The Note*] (identifying the writer as "the Author of the Note" or "the Note's Author"). Although there is no specific reference to the issue Professor Sovern raised about the meaning of Section 703(h), Sovern's concern that Congress's failure to discuss "the problem of the Negro who was hired years ago but not permitted to acquire seniority like a white employee" because of race discrimination, likely influenced the Note's Author. *SOVERN, supra note 106,* at 72. Because of congressional silence, Professor Sovern foresaw that "when new systems are created to replace [systems based on overt discrimination], Section 703(h) may well induce courts to ignore what went before and permit continued Negro subordination for years to come." *Id.* at 73.


185. Winter, *supra note 80,* at 841 n.62.

186. *The Note, supra note 183,* at 1272.

187. *Id.* at 1262.

188. *Id.* at 1273.

189. *See id.* Blumrosen cites the Note with approval. *See BLUMROSEN, supra note 159,* at 169–211 (asserting that Title VII prohibits the present effects of past discrimination in seniority systems).

190. *The Note, supra note 183,* at 1273.
place" solution would only deprive them of seniority expectations of questionably legitimacy derived from non-bona fide systems.\footnote{191}

Implementing a "rightful place" solution would not be problematic. It would have very limited impact because a Black worker would still have to meet existing job qualifications.\footnote{192} On that note, the Author of the Note described certain tactics that she or he hoped that courts would recognize as tactics of discrimination. For example, courts should suspect an employer's post Title VII introduction of "new and more stringent ability requirements at the same time they are compelled to open formerly 'white' jobs to incumbent Negroes."\footnote{193} Moreover,

[I]f the diploma requirement and other standards not closely related to the ability to perform a specific job had not previously been imposed on whites entering the skilled line, and if they exclude[ ] a large number of Negro incumbents, they would appear, at least prima facie, to operate as a continuation of discrimination. Such added requirements should be rejected unless the employer can rebut this presumption by showing that they have some reasonable basis in the present or future skill requirements of his work force.\footnote{194}

With something bordering on the prescient, Professor Sovern and the Author of the Note hypothesized the facts and found compelling arguments for broadening Title VII's purpose. Focus on union seniority systems and the impact on incumbent Black workers after July 2, 1965 capitalized on the arguments by Title VII critics that such systems should never have been protected under Section 703(h). Moreover, the present discriminatory impacts of union seniority systems either fell completely outside of the equality principle or only slightly within it. In either event, the union seniority system, particularly in the openly segregated south became the initial target for a successful reconceptualization of discrimination to begin.

C. Discrimination Reconceptualized

As predicted by commentators and scholars, Congress's conceptualization of discrimination was tested in the courts. This judicial evaluation of the Act was happening almost simultaneously in different jurisdictions and at different levels of the federal court system. Conflicting decisions on identical issues were not rare. Indeed, the coincidence of cases seemed to prevent judges from being completely aware of contemporary opinions and arguments from other jurisdictions. In some instances, judges accepted the legislative record and statutory language at face value. The fact that Title VII seemed to do so little was not grounds for questioning or probing legislative intent. The equality principle was necessarily restrictive. The 88th Congress's failure to document the incumbency issue described in the Note did not outweigh the clarity with which legislators documented the equality principle, the Title's prospective only application and the legislative compromise to maintain existing union and management liberties, short of the grossest forms of discrimination. Other judges weighed the force of Title VII's language and legislative history against their ideas about the Title's purpose. These judges ultimately used the arguments of the scholars to reconceptualize discrimination. These judges undermined the safe harbors the 88th Congress created and declared that Title VII proscribed

\footnotetext{191. Id.; see also Blumrosen, supra note 159, at 185–87 (stating that whiteness as a benefit, for instance in circumstances where union membership and therefore employment is based in whole or part on familial relationships, is not a valid expectation or a benefit that Congress would protect).}

\footnotetext{192. The Note, supra note 183, at 1275.}

\footnotetext{193. Id.}

\footnotetext{194. Id. at 1276.}
the present effects of past discrimination. At a minimum, Title VII's prospec-
tive nature, its intent requirement, and its protections for bona fide seniority
systems were not to become impediments to creating remedies that, arguably,
crossed the line drawn by the equality principle and, for a time, undid the 88th
Congress's policy choices to limit Title VII's reach through a narrow conceptu-
alization of discrimination.

As we shall see, during the process of reconceptualizing discrimination
courts used ideas which scholars developed in the specific context of exploring
the boundaries of Section 703(h)'s safe harbors to reach all systems and all
policies relating to the hiring and advancement of Black employees. The
courts, particularly the Eighth Circuit, moved from the proposition that union
membership and seniority systems were corrupted by racism to the proposition
that historical racism likely continued to corrupt all employment decisions after
Title VII became operative. On that basis, reconceptualized discrimination
grew to include the basic assumption that Blacks were innocent victims of his-
torical discrimination resonating in the present and employers and unions were
continuing to discriminate. Because discrimination was so ingrained, its nonex-
istence was a fact employers and unions would have to prove to avoid liability.

1. The Beginning: Quarles v. Phillip Morris, Inc. and Judge Butzner

The legal adoption of reconceptualized discrimination started with Judge
Butzner's opinion in Quarles v. Phillip Morris, Inc.195 in 1968. The case was tai-
lor-made for the application of the ideas the scholars generated after passage of
the 1964 Act. It contained the essential ingredients of a formally segregated
unionized workforce: lines of seniority that limited Blacks to the hardest and
lowest paying work and the application of seniority rules after July 2, 1965
that stripped Blacks of their employment seniority if they transferred to have better
paying "white" jobs.196 The facts of the Quarles case so closely mirrored the
hypothetical scenarios argued by the Note's Author, that Judge Butzner of the
Fourth Circuit, sitting by designation on the Quarles trial, openly and freely
adopted the Note's arguments and its "rightful place" solution.197

Quarles was a class action brought by incumbent Black employees under
Title VII. The plaintiffs raised four issues: (1) Phillip Morris continued discrim-
inatory hiring practices after the Title became effective; (2) the company dis-
criminated against Blacks in the employment and promotion of supervisors; (3)
Phillip Morris paid Blacks less than white employees for the same work; and (4)
Phillip Morris discriminated against incumbent Blacks, those hired before January
1, 1966, with respect to transfer, advancement and seniority.198 The Quarles
plaintiffs lost on the first three issues.199 According to Judge Butzner: "The
final issue is whether the restrictive departmental transfer and seniority provi-
sions of the collective bargaining agreement are intentional, unlawful employ-
ment practices because they are superimposed on a departmental structure that
was organized on a racially segregated basis."200 The facts showed that Blacks
hired into Black jobs only retained their employment seniority by progressing

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196. Id. at 509-14.
197. See id. at 510 ("A perceptive analysis of the problem and its solution, upon which the court
has freely drawn, may be found in Note, Title VII, Seniority Discrimination, and the Incumbent Negro, 80
Harv. L. Rev. 1260 (1967).”).
198. See id. at 507.
199. See id. (stating that on the issue of unequal pay Judge Butzner, denying class-wide relief,
awarded relief to two individuals).
200. Id. at 510.
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in or transferring to other Black jobs. Once Blacks were allowed to bid to transfer to white jobs, progression in which was governed by departmental seniority, Black's lost all seniority and seniority protections. Judge Butzner framed his decision around the following question: “Are present consequences of past discrimination covered by the act?” With heavy reliance on the Note, he answered that the 1964 Act covered the present effects of historical discrimination.

Judge Butzner was not convinced by the defendants’ arguments that Title VII excluded from coverage the present effects of past discrimination. Despite the mustering of the extensive legislative history to the contrary, Judge Butzner concluded that the plain language of the statute did not exclude “present discrimination that originated in seniority systems devised before the date of the act.” Judge Butzner was not convinced by the defendants’ arguments that Title VII excluded from coverage the present effects of past discrimination. Despite the mustering of the extensive legislative history to the contrary, Judge Butzner concluded that the plain language of the statute did not exclude “present discrimination that originated in seniority systems devised before the date of the act.” To Judge Butzner, the absence of such language, in the context of the 1964 Act as a whole, meant that “Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act.” Tracing the arguments of the Note’s Author, Judge Butzner rejected a reading of legislative history where a protected bona fide seniority system merely had to exist before July 2, 1965 to escape the Title’s proscription against discrimination. Instead, he held that “a departmental seniority system that has its genesis in racial discrimination is not a bona fide seniority system.”

Judge Butzner also specifically addressed the issue of discriminatory intent related to the discriminatory effects of departmental seniority. According to the judge, discriminatory intent traveled to the present with the discriminatory effect. It was undisputed that Phillip Morris and the union had discrimi-

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201. See id. at 512.
202. See id. at 513 (“On the other hand, organization of the departments on a racially segregated basis has prevented Negroes from advancing on their merits to jobs open only to white persons. Employment without regard to race since January 1966 and the relaxation of departmental transfers has only partially eliminated this disadvantage.”).
203. Id. at 510.
204. See id.
205. Id. at 515.
206. Id. at 516.
207. Id. at 517.
208. See id. at 517 (“Obviously one characteristic of a bona fide seniority system must be lack of discrimination.”). Judge Butzner also noted the simplistic nature of Congress’s discussion of seniority systems. See id. The record reflected a nearly exclusive focus on employment seniority rather than on departmental seniority which scholars identified as the primary problem for existing workers. See id. The legislative history on the Section 703(h) seniority system safe harbor was therefore irrelevant to a discussion of the impact of departmental seniority. “None of the excerpts upon which the company and the union rely suggests that as a result of past discrimination a Negro is to have employment opportunities inferior to those of a white person with less employment seniority.” Id. at 516.
209. Id. at 517. But cf. The Note, supra note 183, at 1272–73 (“A 'bona fide' seniority system appears to be one which can be explained or justified on nonracial grounds. Some seniority systems which are in fact designed to discriminate against Negroes may be justifiable on neutral grounds and would be lawful absent this discriminatory intent. However, even though a discriminatory system of this type might be termed 'bona fide,' certain 'differences' in treatment authorized by the system will 'result' from the discriminatory intention which entered into its establishment. These differences must, therefore, fall outside the scope of [Section 703(h)'s] protection.” (footnote omitted) (emphasis added)).
210. Judge Butzner did nothing with the apparent conflict between his findings that Philip Morris and the union were not discriminating after January 1, 1966 which is the basis for his rulings against the plaintiffs on their claims of discriminatory hiring, promotion, and pay.
211. This idea mirrored Professor Blumrosen’s argument that intent was a tort concept based on knowledge of consequences rather than current evil motive. BLUMROSEN, supra note 159, at 173. Intent under Title VII “involves awareness that the acts of the defendant would inflict harm on the
nated extensively in the past. That discriminatory intent remained in the present because the differences established by that intent between Black employment opportunity and white employment opportunity "are maintained now."

The judge paid special attention to the equality principle. His discussion focused on Title VII's prohibitions of preferences and the fact that all outcomes were ultimately to be tested by the ability to do the job. He adopted the "rightful place" remedy the Note outlined because it avoided scrapping a business-justified departmental structure and limited preference to the undeniably race neutral basis of overall employment seniority. White workers' expectations based on departmental seniority were not "vested, indefeasible rights." They were subject to legal and contractual modification. Moreover, as every scholar and Judge Butzner noted, taking away the Section 703(h) safe harbor only granted the right to show that a Black employee could qualify for and do the job on her own merit. It did not guarantee that the unqualified would get or keep any jobs.

2. The Middle: Griggs v. Duke Power Company and Judge Gordon

Judge Butzner issued his Quarles opinion on January 4, 1968. In another jurisdiction governed by the Fourth Circuit Court of Appeals, a case similar to Quarles, Griggs v. Duke Power Co., would be decided by Judge Gordon in the Middle District of North Carolina on September 30, 1968 with the opposite result. Unlike Quarles, Griggs was not a union seniority system case. That factual disparity would have consequences for the reconceptualization of discrimination because unlike Quarles, Griggs would be appealed all the way to the Supreme Court where the discussion of systems beyond those that established seniority rights by collective bargaining would open the door to a challenge of the present discriminatory effects of any policy or practice that had its roots in the era before the 1964 Act. Also, unlike Quarles, Griggs included the problem of setting job qualifications through testing and educational requirements that allowed additional reconceptualizing of discrimination on that Section 703(h) safe harbor the Quarles decision did not reach.

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plaintiff. This awareness provides the element of 'blameworthiness' which distinguishes the intentional from the negligent infliction of harm in modern tort law." Id. See Quarles, 279 F. Supp. at 517. See id. at 518 (citing Whitfield v. United Steelworkers of Am., Local No. 2708, 263 F.2d 546 (5th Cir. 1959)). According to Judge Butzner, Whitfield tolerates the effects of historical discrimination where those effects disable Blacks from taking positions because of lack of ability to do the work. "The fact that white employees received their skill and training in a discriminatory progression line denied to the Negroes did not outweigh the fact that the Negroes were unskilled and untrained." Id. at 519. Id. at 520. See id. at 520–21 (stating that the process Judge Butzner designed to make employment seniority the test for opportunity to transfer and advance and avoid layoffs specifically approved screening for qualification regardless of seniority). 219. 292 F. Supp. 243, 248 (M.D.N.C. 1968), aff'd in part, rev'd in part, 420 F.2d 1225 (4th Cir. 1970), rev'd, 401 U.S. 424 (1971). Because Griggs included both seniority systems and job qualification standards in the context of the present impact of historical discrimination on a group of incumbent Blacks, the reconceptualization of discrimination it reached at the Supreme Court represents a mid-point, not a conclusion. The reconceptualization of discrimination reached its conclusion in a line of contemporaneous cases in the Eighth Circuit, which took advantage, like Quarles, of the theoretical frameworks of scholars that advanced the ideas that came to fruition in the Court's Griggs decision. The Eighth Circuit applied its theories of discrimination to groups of incumbent Blacks and to individuals of color who employers refused to promote and new Black applicants who employers rejected.
In the meantime, despite the differences between *Quarles* and *Griggs*, they contained similar ingredients: job lines at the Dan River power plant where the claims of discrimination arose were historically segregated, Blacks had the worst, lowest paying jobs in the labor department, and better quality and better paying work in other departments only became open to them after Title VII became law.\(^\text{221}\) Akin to Judge Butzner, Judge Gordon specifically found that although Duke Power Company claimed that there was no policy to segregate Blacks into menial lower paying jobs and to deny Blacks access to better jobs with better pay, the company had practiced racial discrimination prior to July 2, 1965 when it was legal to do so.\(^\text{222}\) The absence of a bargained for seniority system was filled by Duke Power Company's establishment of employment qualifications that Blacks could not readily meet because of notorious educational deficiencies, that whites never had to meet at all. This was the kind of non-compliance Professor Sovern and the Note's Author warned against. This was the present impact of historical discrimination about which the *Griggs* plaintiffs complained. Judge Gordon framed the plaintiffs' case this way:

> The plaintiffs reason that in subsequently applying the high school education requirement on a departmental basis only, the initial discrimination was carried over and continues to the present. This result, they say, is demonstrated by the fact that white employees without a high school education are eligible for job openings in the more lucrative departments while Negro employees with the same or similar educational qualifications are restricted to job classifications in the lower paying labor department.

Under plaintiffs' theory, the departmental structure of defendant's work force is tainted by prior discriminatory practices and therefore cannot serve as a basis for applying educational or general intelligence standards as prerequisites to promotion. Plaintiffs contend that the present system continues the past discrimination and violates the Act.\(^\text{223}\)

Judge Gordon's analysis of the evidence discloses that he perceived the conflict between the plaintiffs' theories and the employer's traditional prerogatives of what was necessary for the success of his or her business. Judge Gordon noted that there was no contention and no evidence that the departmental system at the Dan River plant was irrational or unjustified.\(^\text{224}\) Judge Butzner had reached a similar conclusion in deciding not to interfere with Phillip Morris' departmental system in *Quarles*.\(^\text{225}\) Judge Gordon's conclusion about the results of Duke Power's exercise of its business judgment, however, reflected a different perception of his role in reconceptualizing discrimination. According to Judge Gordon:

> If the relief requested by plaintiffs is granted, the defendant will be denied the right to improve the general quality of its work force or in the alternative will be required to abandon its departmental system of classification and freeze every employee without a high school education in his present job without hope of advancement.\(^\text{226}\)

In focusing on the impact on the defendant and the other employees, Judge Gordon highlighted two key underpinnings of Title VII. The 88th Congress did not design Title VII to circumvent rational business operations.\(^\text{227}\) Nor did Congress intend the equality principle to drive any remedy for Blacks

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\(^\text{221}\) See *Griggs*, 292 F. Supp. at 247.

\(^\text{222}\) Id.

\(^\text{223}\) Id.

\(^\text{224}\) See id. at 248.

\(^\text{225}\) See id. at 249.

\(^\text{226}\) Id. at 248.

\(^\text{227}\) See Vaas, supra note 63.
that punished White people. His focus was on the conflict between traditional management prerogatives to set job requirements and the impact of those job requirements on incumbent employees of all races. Judge Gordon resolved that conflict in favor of the employer as Congress arguably intended.

Judge Gordon concluded his analysis of the plaintiffs' attack on the departmental seniority structure at Dan River by considering the reality of whether any system that segregated in the past could survive a Title VII challenge based on the plaintiffs' theories. Logically, all systems that discriminated in the past would be illegal under Title VII because under all such systems, the prior victims of discrimination would, as at Dan River, "labor under the inequities resulting from the past discriminatory promotional policies of [any employer.]"

Being aware of the legislative history of Title VII and the specific bargains that protected seniority systems by making the Title's application prospective only, Judge Gordon concluded that Congress could not have intended the consequences of the plaintiffs' theories.

Judge Gordon specifically disagreed with Judge Butzner on whether Title VII covered the present consequences of past discrimination. Judge Butzner held the view that "Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act." In contrast, according to Judge Gordon:

In providing for prospective application only, Congress faced the cold hard fact of past discrimination and the resulting inequities. Congress also realized the practical impossibility of eradicating all the consequences of past discrimination. The 1964 Act has as its purpose the abolition of the policies of discrimination which produced the inequities.

It is obvious that where discrimination existed in the past, the effects of it will be carried over into the present.

Judge Gordon's position does not seem irrational. He simply did not share Judge Butzner's doubts. Judge Butzner reached his conclusion by doubting the 88th Congress' intention to protect existing seniority systems by labeling them all bona fide so long as they stopped discrimination on and after July 2, 1965. And like the writer of the Note that shaped his ideas, Judge Butzner overlaid his personal perspective of what Title VII's purpose should have been on the specific Congressional mandate, reading "prospective only" out of the legislative history and out of the law. Judge Gordon accepted the legislative history and the reality of the political context which birthed the Civil Rights Act of 1964. The 88th Congress mandated forward-looking equality of opportunity, not an equitable result. Congress repeatedly rejected the equitable result idea because it undermined the equality principle. As Judge Gordon pointed out, the 88th Congress could not have intended a remedy where whites would be made to suffer harm (in this case "freezing" out of job advancement because of lack of education) because Blacks suffered the identical harm in the past. Moreover, there was no evidence that Congress intended to change the level of the playing field for White workers who took jobs and gained seniority in reliance on the deal that existed before the nation declared employment discrimination illegal.

228. See id.
230. Id. at 248.
231. See id. at 249.
232. See id. ("If the decision in Quarles may be interpreted to hold that present consequences of past discrimination are covered by the Act, this Court holds otherwise.").
The lack of congressional debate on this question should not have been read as a signal to courts to fill the apparent policy void. Legislative intent clearly directed that Title VII did not provide for any preferential treatment for Blacks. And that is exactly what moving Blacks into their rightful place would look like to displaced White workers. If, as in many instances, the simplest explanation is the correct one, Judge Gordon correctly described congressional intent: after July 2, 1965 a generation of Black workers would continue to suffer the present impact of past discrimination in exchange for benefits that might accrue to succeeding generations of Black workers. There was no need for debate in Congress of such an obvious premise: that Title VII could not have become law unless it tolerated significant continuing effects of historical discrimination.

On the issue of job testing, an employer's ability to use job tests became a major hurdle for Title VII proponents in Congress. "Job testing" became a totem for whether employers would continue to have their traditional autonomy to run their businesses. According to Judge Gordon, Title VII "does not deny an employer the right to determine the qualities, skills, and abilities required of his employees." Judge Gordon's expansive view of the validity of testing requirements fits well with a view of Title VII as an expression of congressional intent to maintain existing management prerogatives as broadly as possible. Thus, if a test was professionally developed, as it was in Griggs, its use could not be challenged based on whether the test always and only measured the ability to perform specific work. The only restriction on the use of tests in Title VII is the requirement that tests be professionally developed and neither designed nor used for intentional race discrimination. Here, Judge Gordon's beliefs about the very limited impact the 88th Congress intended Title VII to have on an employer's ability to design job requirements drove his conclusion that the professionally developed general intelligence test Duke Power Company used was immune from attack under Title VII. Judge Gordon believed Duke Power Company's evidence that it had a business purpose for knowing whether job applicants "[had] the general intelligence and overall mechanical comprehension of the average high school graduate." Since the test being used was professionally developed and related to that business purpose Judge Gordon found for the defendant.

The Fourth Circuit, relying on Quarles and a small handful of other cases from southern jurisdictions unanimously disapproved of Judge Gordon's decision on the use of Title VII to remedy past harms. Acknowledging that "the Act was intended to have prospective application only," the Fourth Circuit declared that "relief may be granted to remedy present and continuing effects of past discrimination." The Fourth Circuit spent no time analyzing the issue and therefore did nothing to resolve the concerns Judge Gordon raised about Title VII's vastly expanded reach into every covered employer who practiced

235. See id. at 249-50.  
236. See id.  
237. Id. at 250.  
238. See id. ("Nowhere does the Act require that employers may utilize only those tests which accurately measure the ability and skills required of a particular job or group of jobs."). On the other hand, Professor Sovern urged courts to be circumspect of tests which did not limit themselves to the worker's ability to do the work.  
239. See id.  
240. Id. ("A test which measures the level of general intelligence, but is unrelated to the job to be performed is just as reasonably a prerequisite to hiring or promotion as is a high school diploma. In fact, a general intelligence test is probably more accurate and uniform in application than is the high school education requirement.").  
241. Id.  
243. Id.
racial discrimination in employment prior to July 2, 1965. At the Dan River Steam Station, six Black employees met the criteria for relief from the present effects of past discrimination.\textsuperscript{244} Given the small number of current Black employees at the Dan River Steam Station, six, to whom the Fourth Circuit granted relief, there may have been no need to look at the bigger picture. The Fourth Circuit only required Duke Power to waive its educational and testing requirements as to those six and to give them "nondiscriminatory consideration for advancement to other departments if and when job openings occur."\textsuperscript{245} The Fourth Circuit then interrupted the normal functioning of the departmental seniority system in a very limited way by requiring that these six plaintiffs have their employment seniority determine their priority for future advancement.\textsuperscript{246}

As to the issue of job relatedness for testing, the Fourth Circuit ruled for Duke Power Company.\textsuperscript{247} The Fourth Circuit held the same perspective as Judge Gordon had on the company's legitimate business reasons for the educational and testing requirements. The Fourth Circuit couched the issue as "whether Duke had a valid business purpose in adopting such requirements or whether the company merely used the requirements to discriminate."\textsuperscript{248} The Fourth Circuit relied on admissions in the appellant brief that they were not challenging an employer's right to set the qualifications for jobs by using tests.\textsuperscript{249} The appellants, however, defined "business necessity" to limit employers to tests that measures a worker's ability to do a specific job.\textsuperscript{250} Reviewing the legislative history, the Fourth Circuit rejected the appellants' restricted view of "business necessity."

At no place in the Act or in its legislative history does there appear a requirement that employers may utilize only those tests which measure the ability and skill required by a specific job or group of jobs. In fact, the legislative history would seem to indicate clearly that Congress was actually trying to guard against such a result. An amendment requiring a "direct relation" between the test and a "particular position" was proposed in May 1968, but was defeated.\textsuperscript{251} One member of the panel rejected this argument. Relying on the same set of cases that supported Title VII's application to the present and continuing effects of past discrimination, Judge Sobeloff penned his dissent on the job relatedness requirement.\textsuperscript{252} Judge Sobeloff's dissent is notable for many reasons, but it is most notable for its rejection of Duke Power Company's good faith.\textsuperscript{253} For Judge Sobeloff, a history of discriminatory hiring practices at Dan River meant that the court should not accept Duke Power Company's declarations that: first it knew what its business required and, second that a high school degree or equivalent general intelligence as demonstrated by passing a general intelligence test met its business needs. If its business required a high school education, the White employees at Dan River should not have been grandfathered out of the educational and testing requirement. Grandfathering

\textsuperscript{244} See id. ("Those six Negro employee-plaintiffs without a high school education or its equivalent who were discriminatorily hired only into the Labor Department prior to Duke's institution of the educational requirement in 1955 were simply locked into the Labor Department by the adoption of this requirement.").
\textsuperscript{245} Id. at 1231.
\textsuperscript{246} See id. at 1236.
\textsuperscript{247} See id. at 1235.
\textsuperscript{248} Id. at 1232.
\textsuperscript{249} See id.
\textsuperscript{250} Id. at 1234.
\textsuperscript{251} Id. at 1235 (footnote omitted).
\textsuperscript{252} See id. at 1239 (Sobeloff, J., dissenting).
\textsuperscript{253} See id. at 1245–46.
delegitimized Duke Power's business justification and strongly called up the specter of race discrimination. In Judge Sobeloff's view:

[I]t cannot be ignored that while this practice does not constitute forthright racial discrimination, the policy disfavoring the outside employees has primary impact on blacks. This effect is possible only because a history of overt bias caused the departments to become so imbalanced in the first place. The result is that in 1969, four years after the passage of Title VII, Dan River looks substantially like it did before 1965. The Labor Department is all black; the rest is virtually lily-white.\footnote{254}

Judge Butzner and Judge Sobeloff's views ultimately prevailed at the Supreme Court. Chief Justice Burger, writing for a unanimous Court, declared that "[u]nder the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."\footnote{255} The Court adopted the narrow definition of "business necessity," at least as applied to the use of tests. In future, Title VII would require tests to be related to the specific employment and the employer would have "the burden of showing that any given requirement must have a manifest relationship to the employment in question."\footnote{256} Moreover, the employer's intent was irrelevant.\footnote{257}

3. The Conclusion: Discrimination Reconceptualized and the Eighth Circuit 1969-1972

After the passage of the Civil Rights Act of 1964 and before its decision in \textit{Green v. McDonnell Douglas}, the Eighth Circuit was reconceptualizing discrimination in ways that went well beyond the specific confines of Title VII before the Court decided \textit{Griggs} in 1971. Eighth Circuit jurisprudence foreshadowed \textit{Griggs} expansion of the definition of employment discrimination to cover the present effects of historical harms. Beginning in 1969 the Eighth Circuit began affirming that Title VII could and should correct the continuing harm of historical discrimination in the present. This, of course, is the logical foundation for the Court's conclusion in \textit{Griggs}. In developing its view of employment discrimination, however, the Eighth Circuit went beyond creating a pre-\textit{Griggs} disparate impact framework for analyzing employment discrimination claims. The Eighth Circuit also defined an original version of "the basic assumption" for all types of employment discrimination claims.

In two pre-\textit{Griggs} decisions, \textit{United States v. Sheet Metal Workers Int'l Ass'n, Local Union No. 36}\footnote{258} and \textit{Parham v. Southwest Bell Telephone Co.}\footnote{259} the Eighth Circuit rejected the idea that Title VII was limited to harms arising only after the statute's operative date. These cases also contain the building blocks of the original "basic assumption" about proving employment discrimination after Title VII's effective date: an assumption of discrimination and an assumption of harm.

\footnotetext{254}{Id. at 1247.} \footnotetext{255}{Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).} \footnotetext{256}{Id. at 432 (emphasis added).} \footnotetext{257}{See id.} \footnotetext{258}{416 F.2d 123 (8th Cir. 1969).} \footnotetext{259}{433 F.2d 421 (8th Cir. 1970).}

United States v. Sheet Metal Workers Int'l Ass'n, a pattern and practice case brought by the Attorney General, litigated the question of discrimination in the context of historically segregated unions. Sheet Metal Workers dealt with the problem of all white union membership in the St. Louis, Missouri metropolitan area. The unions in question, Local No. 36 and Local No. 1, were exclusively white prior to 1966. These locals also controlled access to almost all the sheet metal and electrical work in the St. Louis Metropolitan area. As specifically authorized by the 88th Congress, the Department of Justice filed a pattern and practice discrimination case complaining that "nepotism is a policy and practice of both unions, that the unions have failed to inform Negroes of the opportunities to become members of the unions, and they have failed to organize employers who employ Negroes."261

The case was tried before Judge Meredith, the same judge who would preside over the trial of Green v. McDonnell Douglas Corp. Identical to Judge Gordon, the Griggs trial judge, Judge Meredith started from the proposition that there could be no liability under Title VII for conduct occurring before its effective date, July 2, 1965, or after the date the government filed suit, February 4, 1966. According to Judge Meredith's summary of the evidence, the government failed entirely to demonstrate that nepotism limited union membership to whites, or that there were any other significant race related failures, including the use of union seniority for access to employment through referrals or hiring halls, by the locals after July 2, 1965. Judge Meredith's analysis showed that Black membership in the locals was not the result of a pattern and practice of discrimination, but of an unwillingness of Blacks to take advantage of the equal opportunity to join the locals after July 1965. The facts showed that the locals accepted and placed those Blacks who applied for membership and showed up to take the given tests. Moreover, no one filed a complaint or charge of discrimination against either of the locals with any federal, state, or local body charged with responsibility for enforcing laws prohibiting racial discrimination.

According to Judge Meredith the government's case also failed to show a Title VII violation based on a discriminatory denial of union seniority and related benefits. As to Local 36 there was no evidence that any Black person signed up for work prior to January 1, 1968. As to Local 1, the electrical union, Judge Meredith described the groups and their composition. Membership in Group I, for example, garnered the most preferential treatment because its membership was restricted by experience and seniority in the union. All preferential treatment, regardless of group number, depended on membership in the union. Without union membership, there was no

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260. The St. Louis Arch project, February 12, 1963—October 28, 1965, employed significant numbers of union sheet metal workers. Percy Green protested the fact that the Arch project employed almost no Blacks by climbing the Arch as an act of civil disobedience on July 14, 1964.
262. See id. at 720–21.
263. See id. at 722–23.
264. See id. at 725–26.
265. See id. at 723.
266. See id.
267. See id. at 726–27.
268. See id. at 727.
269. See id.
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accumulation of union seniority. Moreover, the union by collective bargaining became the “sole and exclusive source of referrals of applicants for employment[ ]” of electricians in the St. Louis metropolitan area. The evidence, according to Judge Meredith, showed no discrimination.

In response to the government’s argument that “in view of the past practices of these unions, [the seniority based] distinctions effectively discriminate against Negroes,” Judge Meredith explored the legislative history of Title VII regarding union seniority. He concluded, as would Judge Gordon in Griggs, that Title VII was entirely prospective. The only evidence of discrimination that Judge Meredith saw was that before the effective date of Title VII both locals excluded Blacks from membership. In summary:

The Civil Rights Act of 1964 was not intended to penalize unions or others for their sins prior to the effective date of the Act. It is prospective only. Neither was it passed to destroy seniority rights in unions or in business. The Act specifically forbids a union or a business from giving preferential treatment to Negroes to correct an existing imbalance of whites.

There being no evidence of discrimination after July 2, 1965, Judge Meredith found no Title VII violation.

It is noteworthy that Judge Gordon and Judge Meredith reached identical conclusions independent of each other. Judge Meredith’s Sheet Metal Workers decision came down on March 7, 1968. Judge Gordon decided Griggs almost eight months later on September 30, 1968. Judge Gordon made no reference to the supportive Sheet Metal Workers opinion. Nor did he discuss Judge Heebe’s March 26, 1968 opinion in United States by Clark v. United Papermakers & Paperworkers which adopted Judge Butzner’s reasoning from Quarles. By the time Judge Gordon decided Griggs, federal district court judges were evenly split on the question whether Title VII covered the present and continuing effects of past discrimination. One of the takeaways from this split is that it was reasonable to conclude restricting Title VII to a prospective application only, where a generation of incumbent Black workers would suffer the continuing effects of historical discrimination was exactly what the 88th Congress contemplated and intended. The Eighth Circuit’s Sheet Metal Workers decision, however, adopted the Quarles principles four months before the Fourth Circuit decided the Griggs plaintiffs’ appeal from Judge Gordon’s decision.

The Eighth Circuit’s approach in Sheet Metal Workers derived from the government’s change in tactics. Before Judge Meredith, the government based its case on nepotism that continued after July 2, 1965 at both Locals. There was little evidence to support the government’s claim that nepotism was camouflaging continued intentional exclusion of Blacks from union membership.

Before the Eighth Circuit, the government argued that it did not have to prove

270. See id. at 726 (citation omitted).
271. See id. at 727.
272. Id.
273. See id. at 728.
274. See id. at 730.
275. See id.
276. See id.
277. See id. at 719.
279. See id.
282. See id. at 722–23.
injury to any Blacks to establish a pattern and practice case. The government also argued that Title VII required race neutral employment practices and "an obligation to correct or revise practices which would perpetuate racial discrimination." The Eighth Circuit held that it was "unnecessary" for the government to prove that the Locals have refused membership or work referral to Negroes since the effective date of the Act.

The Eighth Circuit then gave a detailed history of the Locals' discrimination and the continued absence of any Blacks in the Locals. This history focused on how historical discrimination limited Blacks from joining the Locals and continued to limit Black employment opportunities because racism artificially delayed their union membership. The Eighth Circuit determined that the employment referral systems approved by Judge Meredith were discriminatory "because the plans carry forward the effects of former discriminatory practices." Given the unique facts of Sheet Metal Workers, the Eighth Circuit found specific legislative history to support holding the Locals liable under Title VII. According to the Clark and Case Memorandum, although there was no intent to reach incumbent White seniority generally, even where that "incumbent work force was restricted to whites" and "where waiting lists for employment or training are prior to the effective date of the Title, maintained on a discriminatory basis, the use of such lists after the Title takes effect may be held an unlawful subterfuge to accomplish discrimination." With this reference and references to Quarles and the Note, the Eighth Circuit modified the access to and qualification requirements for both Local's referral systems to eliminate those requirements that Blacks could not meet which kept them out of the highest group with the greatest likelihood of gaining referred employment. The Eighth Circuit then explained that the modifications were not quotas or preferential treatment, "nor do we deprive any non-Negro craftsman of bona fide seniority rights." The unique facts of Sheet Metal Workers, a case where employers were not defendants, allowed the Eighth Circuit to expand the numbers in the preferred groups without explicitly displacing anyone's priority to the next job.

In holding that Title VII covered the present and continuing effects of historical discrimination, the Eighth Circuit relied on the core group of cases, including Quarles, that expanded the definition of actionable discriminatory conduct. The Eighth Circuit's Sheet Metal Workers decision, however, went well beyond all supportive precedent by not requiring the existence of a plaintiff that suffered injury in the present. The Eighth Circuit acknowledged this

283. See United States v. Sheet Metal Workers Int'l Ass'n, Local Union No. 36, 416 F.2d 123, 127 (8th Cir. 1969).
284. Id.
285. Id.
286. See id. at 127-31.
287. Id. at 131.
288. Id. at 134 n.20 (citing 110 CONG. REC. 6992 (1964)).
289. See id. at 133.
290. Id. (footnote omitted).
291. The absence of the employers, however, and the appearance of merely making the pie larger are misleading. For example, fair or unfair, a sudden increase in the size of Group 1, the group with the highest likelihood of referred employment, means a decrease in the chances that opportunities will open for members of Group 2 with ever decreasing opportunities for members of the bottom two tiers in the system. Moreover, the relevant employers were present in the sense that the Eighth Circuit recognized that collective bargaining agreements between the Locals and any employers would need modification if the Locals maintained the referral systems as modified by the court. See id. at 132 n.16.
292. See id. at 132 n.15.
distinction and lack of evidence that someone had been harmed.\textsuperscript{293} The Eighth Circuit did not believe that such evidence was necessary.\textsuperscript{294} The Eighth Circuit relied on reality rather than legal precedent to explain why there was no injured plaintiff and why the absence of that key ingredient should not prevent Title VII from doing its work. Reality, according to the Eighth Circuit, showed that the Locals were so notoriously racist that it was unreasonable to expect Black workers to subject themselves to the racism and then wait a year for the potential of gaining enough seniority to have a chance at full employment.\textsuperscript{295} Here is where the Eighth Circuit invents a concept that would become known as "the basic assumption" underpinning how employment discrimination occurred in an environment where signs advertising jobs "for Whites only" could no longer be seen. Logically, if everyone agrees that there has been racism, that the objects of racial hatred and exclusion are aware of their profound undesirability and the haters agree that they intentionally excluded Blacks in the past for racial reasons only, then we can assume that the hatred of and desire to exclude Blacks did not suddenly disappear on July 2, 1965 and we can assume that Blacks did not wake up wide-eyed under a cabbage leaf as the sun rose that day either. The basic assumption, then, has two parts. Intentional racial discrimination continued after July 2, 1965.\textsuperscript{296} Blacks continued to be victims of that discrimination regardless of whether they took the formal step of being re-victimized to accrue a visible injury after July 2, 1965.

There is little recognition of the explosive nature of the Eighth Circuit's conception of "the basic assumption" as a two-part process of presumed intentional discrimination and presumed injury. For example, in his Fourth Circuit Griggs dissent which came down four months after \textit{Sheet Metal Workers}, Judge Sobeloff wrote about the first part of "the basic assumption":

> The pattern of racial discrimination in employment parallels that which we have witnessed in other areas. Overt bias, when prohibited, has oftentimes been supplanted by more cunning devices designed to impart the appearance of neutrality, but to operate with the same invidious effect as before.\textsuperscript{297}

Judge Sobeloff, however, does not write anything about the existence or impact of the presumed injury part of "the basic assumption." Once can explain this omission with the fact that the Fourth Circuit did not have to assume an injured plaintiff to review the merits of the case because Griggs included plaintiffs with claims of injuries sustained after July 2, 1965.

The Eighth Circuit also addressed the admissions requirements the Locals imposed and unlike Judge Meredith, found some of them in violation of Title VII. On the specific issue of testing necessary for admission to Local 36 as a journeyman sheet metal worker, Local 36 violated Title VII by using an unduly subjective testing procedure. One man administers the test which has no time limits and no established passing score. The examiner does not forward the test sheets or scores with his decision on qualification. The examiner simply tells the union that an applicant is, or is not, qualified.\textsuperscript{298} The Eighth Circuit held that because the standard-less testing procedures left no way to measure

\textsuperscript{293} See id. at 132.
\textsuperscript{294} See id.
\textsuperscript{295} See id.
\textsuperscript{296} The Eighth Circuit approved Judge Meredith's finding of discrimination by the Locals before 1964 but went on to infer that the exclusionary policies continued after July 2, 1965 based on a comparison of membership in the Locals (entirely White) and the diversity of the available pool of workers. See id. at 127, 127 n.7.
\textsuperscript{298} See Steel Workers, 416 F.2d at 135.
the judgement of the examiner for discriminatory intent, “it is essential that journeymen’s examinations be objective in nature, that they be designed to test the ability of the applicant to do that work usually required of a journeyman and that they be given and graded in such a manner as to permit review.” Judge Sobeloff quotes this language from *Sheet Metal Workers* in his *Griggs* dissent. As mentioned earlier, this language becomes the centerpiece of the Supreme Court's creation of the job-relatedness requirement. Moreover, this is the starting point for the Eighth Circuit's development of a jurisprudence of doubt not only about the impact of testing procedures but also about the motivation and intention behind the use of all procedures that adversely impacted Black employment. The exploration of employer motivations continued in *Parham v. Southwestern Bell Telephone Co.*


The Eighth Circuit followed *Sheet Metal Workers* with a second pre-*Griggs* decision in *Parham v. Southwestern Bell Telephone Co.* *Parham* differed from *Sheet Metal Workers* in some respects. It included an allegedly injured plaintiff, Mr. Parham, and it was brought as a straight forward case of disparate treatment. Mr. Parham also brought the case as a class action on behalf of all current and prospective Black employees of Southwestern Bell. The Eighth Circuit took advantage of the class action posture of the case to review the phone company's conduct through the *Sheet Metal Worker's* pattern and practice lens.

Mr. Parham's disparate treatment class action shared three essential elements with *Sheet Metal Workers*. First, the case arose in the south, Little Rock, Arkansas. Second, the employer had a long history of racial discrimination. Prior to 1964, the phone company did not employ blacks in any skilled job. As of September 1964, the phone company employed 2,736 people. Of these, there were fifty-one Black employees largely of long tenure. Of these, forty-six were janitors or laborers. The remaining five Black employees were coin collectors or stockmen. The hiring system, based on word of mouth referrals, after July 2, 1965 would maintain segregated employment and limited job opportunity for Blacks. Third, the Black people were innocent.

The district court overlooked these indicia culpability. Rather, the district court took the “prospective only” view of Title VII. In this case, the phone company had taken a proactive stance by issuing a statement of non-discrimination as early as April 1964. Moreover, the phone company's statistical evi-

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299. *Id.* at 136. The Eighth Circuit highlighted that “[w]e are concerned rather with the system, the nature of the examination, its objectivity and its susceptibility to review.” *Id.*

300. *See* *Griggs*, 420 F.2d at 1241.


302. *See* 433 F.3d 421 (8th Cir. 1970).

303. *See id.* at 422.

304. *See id.* at 424.

305. *See id.*

306. *See id.*

307. *See id.*

308. *See id.*

309. *See id.* at 427 n.5.

310. This is the perspective Judge Gordon took in the *Griggs* trial and Judge Meredith took in the *Sheet Metal Workers* trial.

311. *See Parham*, 433 F.2d at 424.
dence showed that things were changing. By June 1968, Southwestern Bell employed 144 Black workers and Black workers had begun to penetrate the skilled jobs with only thirty-six remaining as janitors, laborers, coin collectors or stockmen.\textsuperscript{312} From the trial judge’s perspective, Southwestern Bell, absolved of its pre-Title VII racism, had acted in good faith and was making good progress.\textsuperscript{313} The trial judge found these facts persuasive even though the judge found that the phone company continued its historical practice of filling vacancies by word of mouth and even though that method would maintain racial segregation.\textsuperscript{314} As to Mr. Parham’s individual claim, his reference checks showed that he had a problem retaining employment and that problems showing up on time and consistently.\textsuperscript{315} The trial court acknowledged that the very small number of Black employees at Southwestern Bell pre-1966 was “probably discriminatory” but found for the telephone company on all counts.\textsuperscript{316} Through its prospective only application of Title VII, \textit{Parham} mirrored the district court opinions in \textit{Griggs} and \textit{Sheet Metal Workers}. Moreover, the \textit{Parham} district court accepted the employer’s post July 2, 1965 actions at face value, never questioning the disparity between those actions and evidence of continued discriminatory motivation.

The Eighth Circuit held as a matter of law that the statistical evidence alone established a Title VII violation.\textsuperscript{317} Further, the trial court erred “in completely absolving the Company of unlawful employment practices” based on its efforts after Mr. Parham filed his case.\textsuperscript{318} The Company’s belated efforts “cannot alter the fact that racial discrimination against blacks [as a class] existed well after July 2, 1965, the effective date of Title VII.”\textsuperscript{319}

The Eighth Circuit also held in favor of the class on Southwestern Bell’s recruitment policy. The word of mouth referral system had not changed between July 2, 1965 and the phone company’s rejection of Mr. Parham’s application in February 1967.\textsuperscript{320} Without using the words “freeze in place,” the Eighth Circuit held that word of mouth employment referral discriminated against Blacks: “With an almost completely white work force, it is hardly surprising that such a system of recruitment produced few, if any, black applicants. As might be expected, existing white employees tended to recommend their own

\textsuperscript{312} See id. at 425.

\textsuperscript{313} Southwestern Bell had initiated what it called “affirmative action” programs in 1967 and 1968 enrolling Black high school graduates in a special training program to help them compete successfully for the more skilled jobs. There were ten trainees in 1967. The phone company offered jobs to five. One accepted. In 1968, the program serviced eleven trainees. The phone company offered jobs to eight and four accepted. See id. at 425. This kind of headway against historical discrimination looks like the kind of headway the union locals were making in \textit{Sheet Metal Workers}. To Judge Meredith, the minimal progress was enough. It was not the previous racism of the Locals that caused the Black membership numbers to be so low. It was the Black people who failed to take advantage of the opportunity. In \textit{Sheet Metal Workers}, the Eighth Circuit specifically commented that the “failure” of Blacks to join racist Locals was not an unwillingness to take advantage of opportunity but a recognition of the notorious reputations of the Locals as bodies of racial iniquity. Although the low numbers of Black trainees who accepted offers of apparently skilled jobs with good pay may reflect a similar belief about Southwestern Bell, the Eighth Circuit did not comment on the issue.

\textsuperscript{314} See id. at 427 n.5.

\textsuperscript{315} See id. at 423. Mr. Parham also introduced testimony from other Black applicants Southwestern Bell did not hire. The phone company responded with “evidence tending to show valid business reason supporting its refusal to hire each of them.” Id. at 425.

\textsuperscript{316} Id. at 425 (“[A] preponderance of the evidence does not sustain plaintiff’s claim that defendant is now discriminating against Negroes as a class or that he (Parham) personally was a victim of any racial discrimination.”).

\textsuperscript{317} See id. at 426. In a footnote, the Eighth Circuit noted that the trial judge took judicial notice of census data showing that 21.9% of Arkansas’ population was Black. See id. at 426 n.4.

\textsuperscript{318} See id.

\textsuperscript{319} Id.

\textsuperscript{320} See id. at 426–27.
relatives, friends and neighbors, who would likely be of the same race."\textsuperscript{321} In a footnote, the Eighth Circuit pointed out that the trial judge came to the correct conclusion on the issue in that "employment in the 'all white' categories, would be continue to be all white, and employment in the predominantly lower Negro categories would continue to be predominately Negro."\textsuperscript{322}

As to Parham’s disparate treatment claim, the Eighth Circuit confirmed the district court’s judgement against him as not clearly erroneous.\textsuperscript{323} Nevertheless, the Eighth Circuit marshalled the facts, including Southwestern Bell’s history of discrimination, to highlight the underlying issue with Parham’s rejection as an individual. As the record stood, the Eighth Circuit agreed that it was not clear error for the judge to accept the company’s explanation that it did not hire Parham because of a poor reference.\textsuperscript{324} On the other hand, the Eighth Circuit noted that the EEOC’s cause finding on Parham’s individual case questioned the “objectivity” for the poor reference as possibly racially biased.\textsuperscript{325} The circuit court then described a Parham that did not match the poor reference. When Southwestern Bell rejected him, Parham went on a religious mission to the Arctic Circle and began successfully studying for the ministry.\textsuperscript{326} The Eighth Circuit concluded that he was “a young man possessed of considerable intellectual capability and sincerity.”\textsuperscript{327} The Eighth Circuit’s effort to reveal a Parham that conflicted with the record it affirmed suggests that the Eight Circuit too questioned the objectivity of Parham’s reference. The Eighth Circuit also focused heavily on the fact that the company’s compliance efforts began only after Parham filed his case. The court’s focus on Parham’s character and the company’s \textit{post facto} compliance evidence the Eighth Circuit’s growing jurisprudence of doubt. That jurisprudence would continue to develop after the Supreme Court issued its \textit{Griggs} opinion.


Marquez’s Title VII case was the Eighth Circuit’s first case after the Supreme Court \textit{Griggs} decision.\textsuperscript{328} At the district court, despite \textit{Quarles, Sheet Metal Workers, Parham}, and the Fourth Circuit’s \textit{Griggs} decision, Judge Robinson did not adopt the logic or reasoning supporting the jurisprudence favoring remedying the present effects of past discrimination.\textsuperscript{329} He acknowledged the existence of the jurisprudence that Title VII could remedy the present effects of historical discrimination, but he questioned the general application of the doctrine. With specific reference to \textit{Quarles}, Judge Robinson wrote: “As with seniority rights, the question here, and with any case involving the effects of past discrimination on present actions, is whether the past discrimination should be considered.”\textsuperscript{330}

Marquez, an American of Mexican descent, claimed that Ford discriminated against him because of his national origin when Ford failed to promote

\begin{itemize}
  \item \textsuperscript{321} \textit{Id.} at 427.
  \item \textsuperscript{322} \textit{Id.} at 427 n.5.
  \item \textsuperscript{323} See \textit{id.} at 428.
  \item \textsuperscript{324} See \textit{id.}
  \item \textsuperscript{325} See \textit{id.} at 428 n.6.
  \item \textsuperscript{326} See \textit{id.}
  \item \textsuperscript{327} \textit{Id.}
  \item \textsuperscript{329} See \textit{id.} at 1406.
  \item \textsuperscript{330} \textit{Id.} (emphasis added).
\end{itemize}
Ford asserted that its business required personnel in grade six positions, like Marquez, to have experience as grade seven field representatives to qualify for promotion to grade nine. Judge Robinson accepted Ford's business justification for refusing to promote Marquez and doubted the existence of any unlawful reason for Ford's decision. Marquez simply did not have the qualifications. For that reason, there was no discrimination against Marquez.

Tellingly, Judge Robinson dismissed as irrelevant Marquez' evidence that there were no minorities other than him at his place of work in Ford's Omaha, Nebraska office. Absence of Blacks, Jews, and Mexicans was insufficient to bring Marquez within the line of cases like Steel Workers and Parham because those cases were based on the presence of minorities in segregated employment. Judge Robinson also had evidence that Marquez had been in his grade six position for fifteen years. Moreover Judge Robinson found that Ford offered Marquez the grade seven job after Marquez complained of discrimination to the EEOC. The judge did not view this evidence as a sign that Ford had a past or present discriminatory motive. It did not cause him to question why Ford suddenly became willing to give Marquez the opportunity to obtain the required job qualification for the grade nine position. To Judge Robinson, the only significance of the post litigation job offer was that Marquez was not "frozen" in place like the plaintiffs in Quarles.

The Eighth Circuit held that Judge Robinson got everything wrong. Relying on the Supreme Court's recent Griggs opinion, the circuit court bypassed scrutinizing Ford's business judgment about the necessary qualifications for promotion into a grade nine job. It was a facially neutral policy that perpetuated and rejuvenated past discrimination. To the Eighth Circuit the lily-white fifty-five member staff of the Omaha office constituted evidence of past discrimination. Moreover, between 1950 and 1967, the period of Marquez employment before he filed suit, in a region reaching from St. Louis to Denver Ford only had two Black employees. In apparent response to Marquez suit, Ford hired two Black employees in Omaha and offered Marquez the job he needed to qualify for the job that he wanted. Judge Robinson was wrong to have dismissed these facts in analyzing a prima facie case of racial discrimination.

The Eighth Circuit also determined that Marquez had been "frozen" into his grade six job for fifteen years. Unlike Judge Robinson, the Eighth Circuit

331. See id. at 1405.
332. See id. at 1406.
333. See id. at 1405.
334. See id. at 1406.
335. See id.
336. See id. at 1407.
337. This fact does not appear in the district court opinion. It appears in the Eighth Circuit's opinion. See Marquez v. Omaha Dist. Sales Office, 440 F.2d 1157, 1160 (8th Cir. 1971). There is no reason to believe that Judge Robinson was not aware of this fact as he discussed Marquez' employment record noting that "there is also no evidence to indicate that the employment record of plaintiff is substantially different from other employees." Marquez, 313 F. Supp. at 1407.
338. See id. at 1406.
339. See id.
340. See Marquez, 440 F.2d at 1159.
341. See id. at 1160–61.
342. See id.
343. See id.
344. See id. at 1160 n.6.
345. See id. at 1160.
346. See id.
implicitly asked the question: Why didn’t Marquez ever get the chance to achieve the necessary qualification for the grade nine job? Ford could not answer that question. Marquez had not been promoted since 1956.\(^\text{347}\) Before he filed his complaint all his performance appraisals had been exemplary.\(^\text{348}\) He was rated promotable in 1961.\(^\text{349}\) In April 1963, without explanation in the trial record or his personnel file, Ford took Marquez off the promotable list.\(^\text{350}\) Moreover, undisputed evidence showed that Marquez was Ford’s only eligible employee denied training in comparison to similarly situated employees.\(^\text{351}\)

The Eighth Circuit did not specifically condemn Ford as racist. It doubted that Ford was free of racism: “If [Marquez’s] nonpromotional ‘frozen’ status was caused in part by racial discrimination, the company’s policy in refusing to consider him for any promotion is inherently invalid and discriminatory to him.”\(^\text{352}\) The evidence showed the Eighth Circuit that its doubts were correct about Ford because Ford offered “no rational reason” to dispel the doubts.\(^\text{353}\)

It would take exactly one year from Marquez for the Eighth Circuit to decide the McDonnell Douglas case. Marquez previewed the outcome of McDonnell Douglas in demonstrating the Eighth Circuit’s reconceptualization of discrimination. Its vision of the discrimination Title VII was meant to remedy involved a realistic assessment of the power of the past. In its experience, decades of engaging in discrimination without consequence did not end on July 2, 1965. Compliance with Title VII was not voluntary. Significant purveyors of employment like the Steel Workers Union, Southwestern Bell, and Ford had engaged in deliberate discrimination in the past. They claimed innocence in the exercise of their business judgment, but their inability or unwillingness to stop discriminating in the present was reflected in the actions they took after a person of color sued them. Discrimination was ubiquitous. As Professor Sovern had proposed and the Supreme Court in Griggs seemed to require, all employment decisions were subject to the jurisprudence of doubt—a doubt that could only be dispelled by affirmative proof that any adverse employment decision was untainted by a history of discrimination. Only objective proof of job-relatedness would suffice.

d. Green v. McDonnell Douglas Corp.: March 1972\(^\text{354}\)

Judge Meredith, the trial court judge in the Steel Workers case, decided the Green case against civil rights activist Percy Green in September 1970.\(^\text{355}\) Among other facts, Judge Meredith described Percy Green as an average employee basing his claim of discrimination in McDonnell Douglas’s failure to rehire him due to his civil rights activism.\(^\text{356}\) Green started working for the company in 1956 and was ultimately laid-off with eight others in August

\(^{347}\) See id. at 1162.
\(^{348}\) See id. at 1160.
\(^{349}\) See id.
\(^{350}\) See id.
\(^{351}\) See id.
\(^{352}\) Id.

\(^{353}\) See id. at 1162. Although the Eighth Circuit advanced its jurisprudence of doubt in the Marquez case, it followed the equality principle in denying Marquez instant promotion to a grade nine position. This would have been a grant of special privilege because of the undisputed facts that Marquez did not have the prerequisite experience in grade seven or eight. See id. Thus, the remand to the district court to fashion relief to allow Marquez to take a grade seven or eight job. See id. at 1162–69.


\(^{356}\) See id. at 847.
1964.\textsuperscript{357} He had already made his famous climb of the St. Louis Arch to protest the lack of Black workers on this federally funded project.\textsuperscript{358} After layoffs in his department became imminent McDonnell Douglas offered Green and his colleagues the opportunity to take a voluntary test to help find whether he and others could fill positions with higher job classifications. Green refused the test. According to Judge Meredith, Green "expressed the idea that because he was black and because of his prominence in civil rights activities, he should receive preferential treatment in the layoff."\textsuperscript{359} After the layoff, to protest McDonnell Douglas's employment record with Blacks generally and Green specifically, Green engaged in and approved of two self-help protests.\textsuperscript{360} He organized and participated in a "stall in" in October 1964 where he and other members of the Congress on Racial Equality parked their cars in key intersections surrounding the company's St. Louis operation during shift change. Green was arrested for this action. On July 2, 1965, as chairman of another civil rights group, ACTION, Green approved of a "lock in" of company personnel in one of McDonnell Douglas's administrative offices. An ACTION member chained and padlocked the building.\textsuperscript{361} On July 26, 1965, Green applied for an electrical mechanic job with the company. He was undisputedly qualified for the job, but McDonnell Douglas rejected him because of the "stall in" and the "lock in."\textsuperscript{362}

Judge Meredith analyzed Green's discrimination claim from the traditional management prerogatives perspective.\textsuperscript{363} McDonnell Douglas had the right to refuse Green's reemployment for any reason.\textsuperscript{364} Title VII only impacted that right if Green could prove McDonnell Douglas discriminated against him because of his race or a practice declared unlawful by the title.\textsuperscript{365} Judge Meredith did not believe Green's rejection was racially motivated. Nor did he believe that McDonnell Douglas had engaged in prohibited retaliation. There was no evidence that McDonnell Douglas ever criticized Green for his civil rights advocacy while he worked for the company between 1960 and 1964.\textsuperscript{366} He believed McDonnell Douglas's sole reason for Green's rejection were the "stall in" and the "lock in." This kind of illegal self-help was not the kind of civil rights advocacy Title VII protected from employer retaliation. Title VII's purpose was "not to license [employees] to commit unlawful or tortious acts or to protect them from the consequences of unlawful conduct against their employers."\textsuperscript{367}

On appeal, the Eighth Circuit agreed with Judge Meredith that Title VII did not protect Green's unlawful protests.\textsuperscript{368} McDonnell Douglas's rejection was not retaliatory. Consistent with its jurisprudence of doubt and its reconceptualization of discrimination, the Eighth Circuit remanded Green's race discrimination for the district court to determine whether McDonnell Douglas's

\textsuperscript{357} See id. The Eighth Circuit's description of the employment relationship between Green and McDonnell Douglas added that Green "remained with the company continuously, except for twenty-one months of honorable military service." McDonell Douglas, 463 F.2d at 339.

\textsuperscript{358} See McDonell Douglas, 518 F. Supp. at 848.

\textsuperscript{359} Id. at 848.

\textsuperscript{360} See id. at 848-49.

\textsuperscript{361} See id. at 849.

\textsuperscript{362} Id.

\textsuperscript{363} For an in-depth discussion of the relationship between Title VII and the at-will employment doctrine see Chuck Henson, \textit{In Defense of McDonnell Douglas: The Domination of Title VII by the At-Will Employment Doctrine}, 89 St. John's L. Rev. 551 (2015).

\textsuperscript{364} See McDonell Douglas, 318 F. Supp. at 850.

\textsuperscript{365} See id.

\textsuperscript{366} See id. at 850-51.

\textsuperscript{367} Id. at 851.

\textsuperscript{368} See Green v. McDonnell Douglas Corp., 463 F.2d 337, 341 (8th Cir. 1972).
reasons for rejecting Green "were related to the requirements of the job." 369 From the Eighth Circuit's perspective, the fact that Title VII's anti-retaliation provisions did not prohibit McDonnell Douglas's rejection of Green for Green's unlawful conduct, did not mean that McDonnell Douglas was exonerated from the claim of race discrimination. Race discrimination was a separate standard. From the court's perspective, McDonnell Douglas's position was that it retained the "right under Title VII to make subjective hiring judgments which do not necessarily rest upon the ability of the applicant to perform the work required." 370 Relying specifically on its jurisprudence of doubt and the Court's *Griggs* opinion, the Eighth Circuit made any "subjective" job qualification the proxy for race discrimination for two reasons. First, *Griggs* specifically commanded that "[i]f an employment practice which operates to exclude Negroes cannot be shown [by the employer] to be related to job performance, the practice is prohibited." 371 Second, subjective hiring criteria were a mask for the continuation of historical discrimination. 372 Subjective hiring judgments are entitled to "little weight" unless the employer demonstrates that they measure an applicant's ability to do the job. 373 Given the undisputed fact that Green had the ability to do the job, the Eighth Circuit remanded the case so that McDonnell Douglas could offer proof that other employees or supervisors would refuse to work with Green because of his unlawful protest activity. 374

Up to this time the Eighth Circuit's reconceptualization of discrimination based in its jurisprudence of doubt had been unanimous. Its *Green* decision was not. In dissent, Judge Johnsen bluntly criticized the remand as an exercise in futility for McDonnell Douglas. 375 The majority's holding can "only mean that McDonnell is being required to rehire Green." 376 Most significantly, Judge Johnson focused his opinion on revealing a latent tension between the majority's reconceptualization of discrimination and the equality principle.

According to Judge Johnsen, the majority was compelling McDonnell Douglas to grant Green special treatment because he was Black. Under his reading of *Griggs*, the purpose and scope of the Civil Rights Act of 1964 covered a lack of equal opportunity, thus discrimination, stemming from employer practices, process and test which, regardless of intention, kept "blacks from [employment of advancement] the same as whites, where the things so utilized are without any significant relationship to a performance of the work involved." 377

I do not see in [*Griggs*] a warrant for a holding that refusal by an employer to hire a person who has engaged in such illegal conduct against it, as is here involved, is entitled to be deemed to operate as a lack of equal opportunity in employment, if the one who has done the misdeeds is a Negro. Surely the majority does not mean to say that a Negro will not have equal opportunity for employment within the intent of Title VII unless unlawful acts committed by him against a business or an employer are required to be condoned, although American concepts have never required such a business condonation as to a white. 378

369. *Id.* at 342.
370. *Id.* at 343.
372. *See id.*
373. *See id.* at 343–44.
374. *See id.* at 344.
375. *See id.* at 350.
376. *Id.*
377. *Id.* at 350.
378. *Id.*
In short, the majority's reconceptualization of discrimination conflicted with the equality principle because Green did not have to bear the burden of proving race discrimination by showing that a white person who engaged in the “stall in” would have gotten the job McDonnell Douglas denied him.\textsuperscript{379} The majority was giving Green an opportunity of a “different and greater degree” than a white person.\textsuperscript{380} Judge Johnsen did not see room for application of the jurisprudence of doubt to question the “subjectivity” of the company’s rejection of Green. There could be no question of discrimination, including hidden discrimination on such an obvious point of rejection.\textsuperscript{381}

This was the argument that McDonnell Douglas used to support its appeal to the Supreme Court.\textsuperscript{382} The Eighth Circuit's reconceptualization of discrimination, by requiring employers to prove that all their employment decisions met the narrow business necessity definition of \textit{Griggs}, violated the equality principle Title VII was meant to establish.\textsuperscript{383} The Eighth Circuit's fully expressed jurisprudence of doubt was so strong that it operated to exclude evidence of an employer's “subjective” motivations which could not be supported when a decision maker's state of mind was the central question.\textsuperscript{384} Moreover, \textit{Griggs} had a context: an employer with a history of overt pre-Title VII discrimination that established general employment criteria that held back a disproportionate number of faultless Blacks.\textsuperscript{385} There was no evidence that McDonnell Douglas met either criterion, or that Green was suffering “the regrettable result of years of racial subjugation [or] publicly sanctioned deprivation of adequate education or training.”\textsuperscript{386}

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In \textit{Green}, the Eighth Circuit's reconceptualization of discrimination reached its apogee. \textit{Green} established the “basic assumption” \textsuperscript{1.0}. If the purpose of Title VII was the elimination of all built-in headwinds to Black employment access and advancement, those headwinds were not limited to standardized tests that impacted groups of Black applicants more than they did whites. Nor was Title VII's purpose limited in application to the notorious discriminators. Discrimination had no geographic limitations and was a very long-lived phenomenon in America. Every black worker or applicant was a victim of historical discrimination and a potential victim of the same discrimination in the present. The elimination of all employment discrimination necessarily required the practiced discriminators to prove they had stopped.

\textsuperscript{379.} See id. at 349.
\textsuperscript{380.} Id. at 355.
\textsuperscript{381.} See id. at 348-49 ("E\textsuperscript{v}en on the 'stall in' situation alone, I should not suppose that a Gallup poll would be needed to show that any employer with self respect and with concern for his relations with his other employees hardly would hire a workman, whether black or white, who had engaged in such an unlawful and indicative misdeed against him, against his employees, and against his business being permitted to operate.").
\textsuperscript{382.} See Brief for Petitioner, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (No. 72-490).
\textsuperscript{383.} See id. at 18 ("The majority opinion held that 'subjective' evidence offered by an employer is essentially unworthy of belief . . . ."); id. at 22 ("It must be borne in mind that the aim of Title VII is equality of employment opportunity, not a guarantee of employment. . . . Yet, in carving out special rules for blacks, the Court of Appeals has in actuality required discrimination against whites and has critically impaired the right of employers to make valid nondiscriminatory employment decisions." (emphasis in original)).
\textsuperscript{384.} See id. at 34-35.
\textsuperscript{385.} See id. at 26.
\textsuperscript{386.} Id. at 27.
IV. THE "BASIC ASSUMPTION" 2.0: MCDONNELL DOUGLAS CORP. v. GREEN—
THE UNITED STATES SUPREME COURT 1973

The Supreme Court rejected the Eighth Circuit’s reconceptualization of
discrimination. The Court also set up what scholars today recognize as the
"basic assumption" but what has not been recognized as a version 2.0 of the
"basic assumption" underlying all Title VII jurisprudence between Judge
Butzner’s decision in Quarles and the Eighth Circuit’s decision in Green. There
had not been a definitive segregation of legal theories limiting those that drove
the results in Quarles, Griggs, Sheet Metal Workers, Parham, Marquez, and Green
from applying to "a private non-class action challenging employment discrimi-
nation." Only with the Court’s McDonnell Douglas decision did scholars and
practitioners come to understand that the concept of discrimination applicable
to cases like Griggs did not overlap with cases of individuals like Percy Green.

By establishing a “basic assumption” 2.0, the Court validated Judge Johnsen
and McDonnell Douglas’s arguments that the “basic assumption” 1.0 articulated
by the Eighth Circuit was an impermissible infringement of the equality prin-
ciple. The Court stated that Title VII was not a guarantee of employment regard-
less of qualification. Moreover, “the Act does not command that any person
be hired simply because he was formerly the subject of discrimination, or because he
is a member of a minority group.” This conceptualization of discrimination
contained the specific rejection of the Eighth Circuit’s jurisprudence of doubt.
Where the Eighth Circuit saw the fact of American racism as a continuing men-
ace that existed because Blacks were the “subject of discrimination” in the past
and employers were so unlikely to have stopped discriminating against Blacks in
the present, the Court reinstated the safe harbor defined by the prospective-
only view of Title VII which the 88th Congress established, arguably, to keep the
realistic doubt about the ability of Americans to stop discriminating from
undermining the equality principle.

The Court described the equality principle in this way:

There are societal as well as personal interests on both sides of this equa-
tion. The broad, overriding interest, shared by employer, employee, and con-
sumer, is efficient and trustworthy workmanship assured through fair and
racially neutral employment and personnel decisions. In the implementation of
such decisions, it is abundantly clear that Title VII tolerates no discrimination,
subtle or otherwise.

The Court’s reference to the equality principle is somewhat opaque
because it supports a variety of mutually supporting arguments about Title VII’s
purposes and McDonnell Douglas’s role in limiting the Title’s elasticity. For
example, I have argued elsewhere that the Court’s reference to the equality
principle establishes the link between its Title VII jurisprudence and the title’s
legal context: the at-will employment doctrine. I have also argued that the
same language linked the McDonnell Douglas decision to Title VII’s legislative
history regarding the 88th Congress’s intent to outlaw only the worst forms of

388. Id. at 800.
389. See id. at 800.
390. Id.
391. Id. at 801.
392. See Henson, supra note 363, at 582-83; see also William R. Corbett, Of Babies, Bathwater, and
361, 363 n.12 (1998) ("The Court offered a succinct and eloquent statement of the interests and
policies to be balanced when Title VII steps into the modern employment setting, dominated by the
common law principles of employment at will . . . ").
discrimination. Nevertheless, the reference to the "broad overriding" interests of all Americans about the Civil Rights Act of 1964 most specifically points to the equality goal of the Civil Rights Era which, by 1973, remained a social and emotional landmark of immense proportions. It constitutes a restatement of the equality principle which is limited in application to access to employment opportunity. Title VII's intolerance of any discrimination is an intolerance of special treatment for Blacks because that would discriminate against whites.

The "basic assumption" 2.0 imbedded in McDonnell Douglas affirms this reading of the equality principle by limiting the jurisprudence of doubt to doubt about outcomes only, rather than doubt about motivation and outcomes. As the Court would later describe it, McDonnell Douglas's basic assumption inferred discriminatory animus because of history, but an inference of improper motivation is not proof of a discriminatory outcome. The inference merely allowed an employer, without shouldering a burden of proof, to dispel any doubt that the outcome was discriminatory by merely articulating that it was not discriminatory.

The result of the Court's reconceptualization of discrimination was not obvious immediately after McDonnell Douglas. As late as 1976, Griggs remained the centerpiece of Title VII analysis. One scholar was still reeling from the possibilities Griggs seemed to open for achieving first class economic citizenship for Blacks because under Griggs "past discrimination by [an employer or union] may not be required if there is present discrimination, including the present effects of past discrimination." McDonnell Douglas was not seen as the start of a distinctive line of what we now call disparate treatment jurisprudence. It was a part of the Griggs jurisprudence. McDonnell Douglas's "greatest contribution was to [allow the Court] to give [Griggs] more substantive content." That substantive content included a direction that Title VII was not limited to the southern pattern of de jure segregation but included northern de facto discrimination, that statistical evidence regarding testing, workforce composition were significant indicia of discriminatory patterns and the burden on employers of establishing the job relatedness defense would be a heavy one. McDonnell Douglas itself merely "cautioned against the overuse of Griggs." Griggs simply did not cover "the normal sanctions associated with serious employee misconduct.”

Similarly, Griggs so dominated Professor Derrick Bell's 1976 commentary on equal employment law that McDonnell Douglas was literally a footnote in his criticism of Title VII and its jurisprudence. According to Bell, Griggs and cases based in its jurisprudence are only significant for "very few workers" because on close analysis they "reveal conditions and restrictions on relief that limit the holding[s] to overt instances of discrimination seldom resorted to by contemporary employers." Griggs' mandate that tests measure only the ability to do the job was declaring itself to be limited to blue collar positions particularly after Washington v. Davis. The "rightful place" remedy only applied

393. See Henson, supra note 363, at 588; Henson, supra note 33, at 99-105.
395. See Henson, supra note 363, at 580 n.137.
396. Jones, supra note 13, at 3-4 (emphasis in original).
397. Id. at 6.
398. See id. at 7-8.
399. Id.
400. Id. at 9.
401. See Bell, supra note 11.
402. Id. at 682.
403. See id.; see also Note, Title VII and Employment Discrimination in Upper Level Jobs 73 COLUM. L. REV. 1614 (1973) (arguing that Griggs's application to discrimination in a variety management positions was possible but uncertain because of the smaller numbers of management jobs compared to
when jobs were plentiful but not when the recession of the mid-70s caused massive layoffs of more recently hired Blacks and courts upheld the reverse seniority layoff policies under Title VII. These legal events, among others, left Bell to conclude that “the law, as presently interpreted, [left] minority workers without protection against the adverse effects of past discrimination at just those points in the economic cycle when they need it most.” As a remedy, Bell advocated self-help because there would not be meaningful gains without protest. At the same time, citing _McDonnell Douglas_ for support in a footnote, Bell recognized that courts would not legitimize self-help.

Over time, however, _Griggs_ receded in importance. Its reconceptualization of discrimination to exclude discriminatory intent in limited circumstances narrowly avoided extirpation. _McDonnell Douglas_ came into its own. Its heavy presence as the conceptualization of discrimination blossomed as the Court took almost twenty years to fully explain what _McDonnell Douglas_ was. During that time, _McDonnell Douglas_ became known as the fount of the “basic assumption.” The cases that explain the true nature of _McDonnell Douglas_, particularly the final explanation in _St. Mary’s Honor Center v. Hicks_, were criticized for destroying the “basic assumption” and _McDonnell Douglas_ itself lost its luster. Although _McDonnell Douglas_ has been regularly touted as a gift to plaintiffs, the main proponent of this view has been the Court. And the apparent result for Blacks has been dismal.

In the absence of the Eighth Circuit’s jurisprudence of doubt of motive, including the burden of proof on the alleged discriminator, the “basic assumption” 2.0 of _McDonnell Douglas_ allowed a disbelief in the existence of discrimination against Blacks to prosper. Empirical research has shown that lower level jobs and because of the difficulty of evaluating the validity of “subjective” qualities on which much management level employment was based).
"[c]ompared to whites and other people of color, African-American plaintiffs are significantly more likely to have their cases dismissed or lose on all claims at summary judgment and are less likely to receive any settlement and to prevail at trial if the case goes that far."\(^{416}\) Moreover, white plaintiffs claiming race discrimination have "fared significantly better than nonwhite plaintiffs."\(^{417}\) A leading empiricist on disparate treatment, Professor Wendy Parker, has demonstrated that Blacks are suspiciously subject to losing their disparate treatment cases.\(^{418}\) The likelihood of Blacks losing is so high in proportion to other discrimination claims that Professor Parker questions whether, over time, judges have come to agree with employers that there is no racial discrimination and only a legitimate reason to explain why a Black applicant was rejected, or why a Black worker did not succeed.\(^{419}\)

Today, discrimination against Blacks, as understood by the courts, is something like radiation. It has a half-life. The potency it built up in American business, unions, and people over the 450 years before July 2, 1965, has been steadily dissipating with an anticipated end point in 2028.\(^{420}\) Following that reasoning, Title VII's accomplishments would include winning the cold war, erecting an enduring symbol of equality and successfully ending the discrimination against Blacks that caused the 88th Congress to pass the 1964 Civil Rights Act.


\(^{417}\) Id. at 231.

\(^{418}\) See Wendy Parker, Lessons in Losing: Race Discrimination in Employment, 81 NOTRE DAME L. REV. 889, 893, 893 n.15 (2006) (arguing that when it comes to race "the current perception of judges as ignoring subtle discrimination and deferring to defendants is perhaps a little too optimistic. The current status of race employment discrimination is actually worse than previously told. Courts are doing more than deferring to defendants; they are actually agreeing with the defendants due to what I term an "anti-race plaintiff ideology."). That ideology is not merely anti-plaintiff. "I am contending that race plaintiffs are treated worse for reasons that are perhaps unknowable or indefinable, but for reasons that don't appear to be race neutral." Id.

\(^{419}\) See id. at 893, 893 n.15; see also id. at 933 ("The courts today are not seeking to undermine employment discrimination jurisprudence. Instead, the judiciary believes quite often that the particular situation before it demonstrates no discrimination—that the plaintiff's claims lack merit and the defendants are right as a matter of law.")

\(^{420}\) See Grutter v. Bollinger, 539 U.S. 306, 343 (2003) ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."). Although Grutter discussed the sunset of a racially diverse law school student body as a compelling governmental interest, the case stands for the larger proposition of when does the United States stop any effort to remediate the continuing harms of past discrimination. As we approach 2028, the anticipated sunset of the lawful consideration of race in admission in higher education, the Court seems impatient with the idea that this country's history of racism remains relevant. For example, in \emph{Ash v. Tyson Foods}, 546 U.S. 454, 456 (2006), Justice Thomas writing for the Court declared that the use of the word "boy" by a white supervisor to address a Black employee in rural Alabama might or might not be evidence of racism, reversing the Eleventh Circuit decision declaring that it was not racist unless it was joined to race with a hyphen as in "black-boy." On remand, the Eleventh Circuit still found that "boy" was not racist under the circumstances. \emph{See Ash v. Tyson Foods, Inc.}, 190 F. App'x 926, 926 (11th Cir. 2006). One can view the Court imposed sunsetting of Section 5 of the Voting Rights Act of 1965 in \emph{Shelby County v. Holder}, 570 U.S. 529 (2013), as a similar statement that the country is on the verge of transcending centuries of racial inequality.
V. Re-Conceptualizing Discrimination?

Anyone living in or observing America since the election of Barack Hussein Obama as the 44th President of the United States must acknowledge that discrimination is alive and well. Its reality is unlike that of a radioactive element. It has no half-life. According to Professor Bell, racism and the discrimination that flows from it are likely “permanent component[s] of American life.”

This story of the conceptualization and reconceptualization fits in the pattern that flows from it are likely “permanent component[s] of American life.” Supportive of that proposition is how, as predicted, discrimination has evolved a clandestine language in the courts where “fit” and “appearance” mask obvious invidious choices based on primary and secondary characteristics directly tied to race. Is the solution to discrimination as ultimately reconceptualized by McDonnell Douglas in the “basic assumption” 2.0 a return to “basic assumption” 1.0 of the Eighth Circuit?

Title VII may continue to have a purpose beyond the symbolic if it can be interpreted to recognize the indelibility and pervasiveness of discrimination. It will never accomplish making Blacks first class economic citizens, but it might create a hope that Black Americans do not have to tolerate invidious treatment in their employment because of Title VII. A possible solution lies in combining a modern scientific understanding of how bias exists and operates with an abandonment of McDonnell Douglas’s burden shifting feature so that Black claimants can have juries decide whether, in their experience, an employer engaged in rightful or wrongful conduct.

The Court’s conception of discrimination is based on a false and simplistic view of how people make decisions about other people. Although based in lived experience and wise expectation rather than the science of implicit bias,

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422. Id. at 12.
424. Having practiced law as an employment defense litigator and trial lawyer for most of my nearly thirty years since graduation, I do not share Professor Calloway’s concerns about juries. See Calloway, supra note 410, at 998 (describing a fear that juries share judges’ unfounded and inaccurate beliefs about the “continued prevalence of virulent discrimination our society”). Professor Parker’s work has shown that although Black disparate treatment plaintiffs almost never win their cases, when they do it was at a jury trial. See Parker, supra note 418, at 894. On the other hand, she has also demonstrated that Blacks and Latinos claiming race discrimination have the lowest win rates in jury trials. See Parker, supra note 416, at 211. Professor Parker notes that the explanation may be juror bias, but the evidence is inconclusive. See id. I believe that no matter their convictions, every member of a venire has either worked a job and felt unfairly treated or known someone who has. Plaintiffs are better off having their peers judge the facts of their cases. Society is better off too because the democratic evaluation of the law that happens as a function of deliberating and rendering a verdict will be a more wholesome barometer of whether Americans believe in the validity of anti-discrimination law. If juries render verdicts predominately against Black plaintiffs, the data is more important than any suspicion or any mechanism, like McDonnell Douglas. In short, it would be better to know that, as a general proposition, society believes that racial discrimination against Blacks has ceased to exist.
425. Take, for example, the Court’s decision in *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978). *Furnco* involved the company’s hiring practices for bricklayers. A white superintendent of bricklaying hired only from a list of all white bricklayers with whom he was familiar and denied employment to qualified black bricklayers because they were not on his list. See Waters v. Furnco Constr. Corp., 551 F.2d 1085, 1086 (7th Cir. 1977). Before the Seventh Circuit, Furnco argued that white men not on the list would also not have been hired. The Seventh Circuit rejected that argument:

The record does not show that white bricklayers did in fact seek work in the same manner as plaintiffs. In any event, the seeming equality of treatment is deceptive. The historical inequality of treatment of black workers seems to us to establish that it is prima facie racial discrimination to refuse to consider the qualifications of a black job seeker before hiring from an approved list containing only the names of white bricklayers. How else will qualified
the Eighth Circuit's jurisprudence of doubt as to motivation was a correct description of how deep the roots of discrimination against Blacks run in this country. This is the concept undergirding the argument that every decision and every system is tainted in the present with a history of discrimination. Griggs was less explicit in acknowledging this argument but at its core, it made intent a non-issue and recognized that historical discrimination can have present remediable impacts. Griggs's core survived in the 1991 Civil Rights Act and became a formal part of Title VII.426 If intent can be irrelevant for disparate impact, the meaning of intent for disparate treatment could be mined for values beyond evil motive, to the knowing consequences of an action to ignoring well known concepts about how all people make decisions. If, for example, an employer knows that implicit bias exists (and how could they not) and that it can be revealed for free by taking one or more online the Implicit Association Tests, why should Title VII shield an employer from liability for discriminating against a Black employee or applicant merely because an employer denied discriminating? Arguably, the equality principle demands using the discovery of information tending to show that a decision was not race neutral, like implicit bias, to balance the scales.

Judges must stand aside at this point and allow juries to use their knowledge of employment discrimination at trial. As Professor Parker, among others, points out, judges seem to be part of the problem.427 They have lost the ability to identify discrimination against Blacks that Title VII could penalize.428 This has happened, I assert, for at least two reasons. First, judges have been trained not to see employment discrimination against Blacks. It is part of their training in law school and part of the training that comes from being reversed by courts.
Second, judges are so far removed from the ordinary experiences of people's ordinary lives that they cannot successfully fulfill the role of peers finding facts and processing those facts through the lived experience of people who can lose their jobs. This is not to say that judges as a class have never experienced discrimination. For example, all Black judges have experienced discrimination in this country. Social scientists tell us that they also experience discrimination as judges because their white peers are statistically more likely to question their judgments. On the other hand, a federal district court judgeship is a lifetime sinecure regardless of every classification protected under Title VII. I submit that having a job of that stature from which one cannot be fired diminishes rather than increases a sensitivity to the reality of the modern workplace.

McDonnell Douglas as a scheme for parsing evidence had its day. It was adopted for use by judges in bench trials when Title VII claimants could not have a jury trial. Even then, it was harmfully simplistic in its fixation on a single motivation. It was never intended, by its own language, as an exclusive method of understanding whether discrimination occurred. Wise judges should reject it as an unhelpful, unnecessary anachronism. The equality principle will be just as virulent in preventing "special treatment" for Blacks without it.

CONCLUSION

Title VII has served at least two related purposes; both entirely symbolic. For foreign audiences, it gave the United States a valid basis for asserting that America was the model for equality in a democratic society in the Cold War. Domestically, it created a similar symbol. Problematically, the equality principle, which sat at the center of the symbol, prohibited Title VII from having any greater purpose, such as a compensatory remedy that would deal with specifically training Blacks for jobs and giving Blacks jobs on a preferential basis as compensation for hundreds of years of inequality specific to the Black experience in this country. I hope that I have shown how, in the period of time before the Court drew a line between disparate impact and disparate treatment in McDonnell Douglas, it was possible to reconceptualize discrimination to briefly remedy the present impact of historical discrimination driven in large part by

430. Id. at 113 (discussing reasons for anti-plaintiff bias at appellate court level, suggesting that "unconscious biases may be at work at the appellate level. Perhaps appellate judges' distance from the trial process creates an environment in which it is easy to discount harms to the plaintiff.").
431. Cf. Hidden Brain: A Conversation About Life's Unseen Patterns, Mind of the Village, NPR (Mar. 9, 2018), https://www.npr.org/2018/03/09/591895426/the-mind-of-the-village-understanding-our-implicit-biases. In this episode, Dr. Maya Sen, Associate Professor at the Harvard Kennedy School, describes research in the field of implicit bias on whether and why Black judges get reversed more often than their white peers. Such implicit bias exists. According to Dr. Sen:

So essentially what we find—what I find—and this is very consistent across different kinds of ways of slicing and dicing the data, which is that black judges have a very, very consistently have a consistently higher reversal rate. They are much more likely to be reversed once a case that they've written has been appealed to a higher court. And that's the case regardless of whether we control for or take into account differences in the court in which they sit, the kinds of cases that they hear, their age, their gender, their professional experience, their qualifications ratings from the American Bar Association. It's actually a very, very sticky finding. So essentially, black judges are more likely to be reversed by higher courts.

Id.
433. Sandra F. Sperino, Beyond McDonnell Douglas, 34 BERKLEY J. EMP. & LAB. L. 257 (2013) (asserting that over the last twenty years courts have been in the process of "eroding the McDonnell Douglas test's power through both procedural and substantive means"). Moreover, the continued overstatement of McDonnell Douglas's vitality by scholars and courts is holding back a speedier erosion. See id. at 271.
the Eighth Circuit’s jurisprudence of doubt which led to *Griggs* and then moved beyond a small set of incumbent Black employees in racially stratified employment in southern businesses to all employment decisions impacting Blacks whether applicants or veteran employees. Although I am not sanguine about any positive developments in Title VII’s purpose today, I hope the ideas I proposed may be useful in some subsequent reconceptualization of discrimination. As it stands, however, Title VII has failed to move beyond the symbolic and seems to be, ironically, the reason why Blacks continue to suffer from employment discrimination.