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Title VII and Layoffs Under the "Last Hired, First Fired" Seniority Rule: The Preservation of Equal Employment

Timothy J. Sheeran*

The Civil Rights Act of 1964 was passed during a period of unparalleled economic growth. Title VII of the Act triggered a corresponding period of expansion of employment opportunity for long-time victims of employment discrimination—women and racial minorities. The recent economic slump and its accompanying layoffs not only have curtailed economic growth but, through "last hired, first fired" layoffs, have seriously threatened the gains made by women and minorities in employment opportunity. The author reviews and analyzes the legislative and judicial history of Title VII and concludes that, contrary to several recent cases, the courts have both the power and the duty to preserve these gains even in hard times.

I. INTRODUCTION

The recent economic slump has once again focused attention on the basic disparity in the position of minority members of the American work force. Many companies have been forced to reduce their employee rosters in order to bring costs in line with falling sales and shrinking profits. These layoffs are having a disproportionate impact on minority group workers, many of whom have only recently obtained their jobs through hiring changes brought about by the equal employment opportunity legislation of the last decade. Since workers are usually selected for force cutbacks on the basis of the facially neutral "last hired, first fired" seniority principle, the recent rash of layoffs has had a more severe impact on recently hired minority group members than on other segments of the work force. For example, during the fourth quarter of 1974, the Bureau of

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1. Minority groups affected by the slump include blacks, women, Mexican-Americans, Spanish-surnamed Americans and other minorities which historically have been the victims of employment discrimination. See Kaplan, Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment, 61 NW. U.L. REV. 363 (1966). The text usually will refer only to blacks, largely because the courts and the commentators have tended to pay greater attention to the employment discrimination problems of that racial minority. Unless otherwise indicated, the analysis offered here is equally applicable to women and other minority groups.

2. N.Y. Times, Jan. 29, 1975, § 1, at 1, col. 1.
Labor Statistics reported an average unemployment rate of 6.5 percent. That period saw the jobless rate for blacks and other minorities increase 2.3 percent—from 9.5 to 11.8 percent. In sharp contrast, unemployment among whites rose only 0.9 percent—from 5.0 to 5.9 percent. By October, 1975, the situation had noticeably worsened. The overall unemployment rate was 8.6 percent. The jobless rate for blacks stood at 14.2 percent while, by contrast, the rate for adult males was only 7.1 percent.

In an address to a breakfast gathering of reporters at the National Press Club, Philip Buchen, special counsel to President Ford, said that his office is looking into the legal problems and ramifications of layoffs based on order of seniority as regards the effects of such layoff patterns on minority group workers. He described it as a "tough, knotty" situation, acknowledging that important interests of incumbent majority workers could be adversely affected by any change.

Eleanor Holmes Norton, Chairperson of the New York City Commission on Human Rights, wrote that, as a result of these layoffs, employers, unions, and employees are facing an "emergency situation," one that "could have the effect of literally wiping away ten years of gains."

In addition to the basic social dilemma, a number of courts and at least one commentator have grappled with whether Title VII of the Civil Rights Act of 1964 permits the continued application of

4. N.Y. Times, Nov. 8, 1975, § 2, at 33, col. 4.
5. 88 L.R.R.M. 87 (Jan. 27, 1975).
6. Id. Mr. Buchen said his staff is studying the problem and will attempt to draft legislation for congressional consideration.
the seniority layoff rule where, as a consequence of following that rule, "last hired" blacks and women will be the "first fired," thereby decreasing the proportions of such persons employed. In Waters v. Wisconsin Steel Works of International Harvester Co.,\textsuperscript{12} Jersey Central Power & Light Co. v. Local Unions IBEW,\textsuperscript{13} and Watkins v. Steelworkers Local 2369,\textsuperscript{14} the Seventh, Third, and Fifth Circuits agreed that application of a collectively bargained "last hired, first fired" layoff principle, in the context of a "bona fide"\textsuperscript{15} seniority system, does not conflict with sections 703(a) or 703(h) of Title VII, despite the fact that a disproportionate number of female and minority employees are displaced under this procedure. However, the Sixth Circuit indicated in Meadows v. Ford Motor Co.\textsuperscript{16} that a different legal construction would be reasonable. This suggestion was adopted by a Michigan federal district court in Schaefer v. Tannian,\textsuperscript{17} which rejected the analysis of the Seventh, Third, and Fifth Circuits, finding that seniority layoffs having a disparate impact on minority employees perpetuate past discrimination in hiring and thus are inconsistent with the policies and provisions of Title VII.

The "last hired" rule is found in most collective bargaining agreements currently in force.\textsuperscript{18} The disparate effect of that principle on minority employment is widely recognized; indeed, one proponent of Title VII suggested that this "operational principle" seems to rule the daily lives of minority group members and helps to account for the fact that unemployment rates are far higher for minority groups than for white workers.\textsuperscript{19} This, in conjunction with the apparent split among the circuits and the Supreme Court's grant of certiorari in the case of Franks v. Bowman Transportation Co.,\textsuperscript{20} brings into sharp relief the necessity of reconciling seniority layoff rules with the requirements and policies of Title VII.

Such a reconciling requires the analysis of certain background material. First, the role and potential discriminatory effects of var-

\textsuperscript{14} 516 F.2d 41 (5th Cir. 1975).
\textsuperscript{16} 510 F.2d 939 (6th Cir. 1975).
\textsuperscript{17} 10 F.E.P. Cases 897 (E.D. Mich. 1975), appeal docketed, No. 75-1960, 6th Cir., Aug. 8, 1975.
\textsuperscript{18} BUREAU OF NATIONAL AFFAIRS, BASIC PATTERNS IN UNION CONTRACTS 75: 2-3 (7th ed. 1971).
\textsuperscript{19} 110 CONG. REC. 6562 (1964) (remarks of Senator Kuchel).
\textsuperscript{20} 495 F.2d 398 (5th Cir. 1974), cert. granted, 420 U.S. 989 (1975) (No. 74-728).
ious types of seniority systems must be examined. Secondly, the language and legislative history of Title VII relating to seniority provisions must be reviewed. Thirdly, the lines of cases dealing with the Title VII's impact on seniority systems must be analyzed against the background of this legislative history.

Three critical points emerge from this analysis. The first is that Congress intended that the "fruits" of discriminatory hiring practices acquired by white incumbents through seniority systems prior to the effective date (July 2, 1965) of the Act were not to be disturbed. A second critical point emerges from an analysis of the principle cases on Title VII and seniority rights. It seems that the authority upon which recent cases, such as Watkins, rely is unsound. The origin of the theory that sections 703(h) and 703(j) of Title VII give protection to plant-wide seniority systems is simply obiter dicta used by the courts to justify judicial modification of other types of seniority systems. The third fact is that the courts have not refrained from imposing remedies which affect pre-Act employment rights. Where necessary, the courts have forcefully imposed hiring and referral quotas, limiting their remedies only somewhat to minimize their impact on white workers. Sections 703(h) and (j) have either been ignored or interpreted as being applicable to some state of facts other than that actually before the court.

After such background analysis, this article goes on to analyze the statutory language and the legislative history with a view toward resolving the problems created by seniority layoff systems. A simple theory emerges from this study: Where employment discrimination has persisted since the passage of Title VII, seniority rights acquired during this period may be modified to prevent the perpetuation of the discrimination such as that currently created by adherence to the "last hired, first fired" layoff rule.

II. SENIORITY SYSTEMS—DIFFERENT MODELS WITH DIVERSE DISCRIMINATORY EFFECTS

Seniority is inevitably involved in the problems of racial discrimination and job advancement.21

A. The Role of Seniority

Seniority is generally understood to mean a set of rules which insure workers with longer years of continuous service for an employer

a priority claim to a job over others with fewer years of service. For purposes of this article, a "seniority system" is defined as a series of procedures, usually embodied in a collective bargaining agreement, governing job movements in an employment unit. Usually called "competitive status seniority," the rules are concerned with promotion, transfer, downgrading, and layoff. The term "seniority layoff" refers to a system which lays off workers on a "last hired, first fired" basis.

Seniority normally has been among the most highly desired of the terms and conditions of employment. "More than any other provision of the collective agreement, . . . seniority affects the economic security of the individual employee covered by its terms." Organized labor has fought long and hard to secure seniority provisions in collective bargaining agreements because such rules place some objective restraints on employer action, thus providing the worker with considerable job security.

Such systems have other desirable characteristics as well. For employees, seniority provides a basis for predicting their future employment situation, enabling the workers to plan more confidently and adding a certain "continuity and stability to their life experience." Management, too, often finds advantages in a seniority system. It provides a needed job-training sequence where employees must progress up the line to more difficult and responsible positions;

22. B. WOLKINSON, BLACKS, UNIONS AND THE EEOC 17 (1971) [hereinafter cited as WOLKINSON].

23. Note, Title VII, Seniority Discrimination and the Incumbent Negro, 80 HARV. L. REV. 1260, 1263 (1967) [hereinafter cited as Note, Title VII and the Incumbent Negro]. In Meadows v. Ford Motor Co., 510 F.2d 939 (6th Cir. 1975), the court offered a definition of seniority which may be a bit more accurate during a recession: "Seniority is a system of job security calling for reduction of work forces in periods of low production by layoff first of those employees with the most recent date of hire." Id. at 949.

24. The "last hired, first fired" seniority principle is a facially neutral, objective standard long used to allocate work opportunities during force reductions. Some of the most persistent barriers to attaining equal employment opportunity for minority groups are created by the use of facially neutral standards, e.g., intelligence tests, educational requirements, and arrest records, which have a disparate impact. In such instances, it is most difficult for the courts to strike a balance between the interest in improving the economic status of minorities, the interests in productivity, and the interests in fairness to majority workers. See Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 HARV. L. REV. 1109 (1971) [hereinafter cited as Developments—Title VII].


27. Developments—Title VII 1156. See also Cooper & Sobol 1604-5.
it increases employee loyalty and incentive as his or her position with the company becomes more secure over time; it serves as a mechanism whereby work allocation decisions can be made in an efficient and orderly manner.\(^{28}\)

Although important, seniority provisions do not grant vested property rights to employees.\(^{29}\) The employees' expectations thus created are subject to disappointment through the actions of either their union representatives or the courts.\(^{30}\) Even prior to the passage of Title VII, courts recognized that the contracting parties, employer and union, could modify these agreements at any time.\(^{31}\) Subsequent to Title VII, judicial modification has not been uncommon.\(^{32}\)

### B. Discriminatory Effects of Seniority Systems

Of course, seniority systems grant the least advantage to the most recently hired employees and the greatest advantage to the most senior. In the broadest sense, such procedures are intended to discriminate in allocating work opportunities and fringe benefits.\(^{33}\) Where women and members of racial minorities are involved, however, seniority systems produce an invidiously discriminatory effect due to the disparate treatment accorded such individuals in the hiring and job-assignment process.

The discriminatory effects of these systems rarely can be traced to express terms in the collective bargaining agreement.\(^{34}\) Rather, the injury to minority employees laboring under neutral systems is attributable to hiring practices, such as the complete exclusion of women or racial minorities from the work force or, if they are hired, by their deliberate assignment to segregated seniority groups and, frequently, unattractive jobs.\(^{35}\)

Hiring practices which have resulted in total exclusion present

\(^{28}\) Comment, *Interplay of Title VII and the NLRA* 162.


\(^{30}\) *See, e.g.*, Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 516-21 (E.D. Va. 1968). "The union, however, has broad discretion to bargain for changes in existing seniority arrangements, even though the changes seriously curtail the expectations of some employees." *Note, Title VII and the Incumbent Negro* 1264.

\(^{31}\) Humphrey v. Moore, 375 U.S. 335 (1964); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Aaron, *supra* note 25, at 1541-42.


\(^{33}\) *See* Palmer v. General Mills, Inc., 10 F.E.P. Cases 465, 466-67 (6th Cir. 1975).

\(^{34}\) *See Note, Title VII and the Incumbent Negro* 1264.

\(^{35}\) *See* Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 515; Cooper & Sobol 1603.
far different problems, however, from those in which minorities have been hired but, due to separate seniority units or to discriminatory job assignments and transfer restrictions, are prevented accumulating seniority credits in formerly all-white or all-male units. The discriminatory potential of exclusionary hiring schemes, given the current spate of layoffs, is quite clear: seniority based on length of service, though facially neutral, is not neutral in effect where minority group members who have only recently been hired have been unable to accumulate sufficient seniority in a plant, department, or job to withstand seniority layoffs.36 But, though the harm is obvious, the availability of a remedy under Title VII is hotly contested, due largely to the language of section 703(h), which exempts bona fide seniority systems from the scope of Title VII,37 and section 703(j), which prohibits preferential treatment.38 Furthermore, given the crucial role of seniority status in a declining economy, the notion that white incumbents should be laid off ahead of junior minority employees clashes dramatically with the traditional belief that job security accompanies greater seniority.

Courts are, however, more familiar with the seniority discrimination problems arising in cases where minority group members, though hired, have been subjected to discriminatory job assignments or placed in artificial, i.e., in black-only or women-only, departments, than with problems arising from exclusionary hiring.39 Such discriminatory assignment practices can fall into three basic patterns. The simplest pattern is that in which minority group workers and white male workers perform the same tasks but are registered on separate seniority lists; as a result, minority groups are precluded from advancing into the better paying positions which require residency in the white seniority group. The second is that in which groups of jobs are so functionally related that they would properly constitute a single seniority unit but, while both minority group workers and white males fill the low-level positions, only white males are eligible for advancement to higher paying jobs. These different progression lines are often reinforced by rules prohibiting transfer between lines.40 The third and most common pattern involves the establishment of two or more distinct job categories, each with its own seniority ladder. Blacks or women, however, are only hired into those

36. Comment, Interplay of Title VII and the NLRA 163.
38. Id. § 2000e-2(j).
40. See id. at 20; Developments—Title VII 1158; Note, Title VII and the Incumbent Negro 1264.
categories where the work requires little skill and conditions are unpleasant. The system either prohibits transfers between job groups or provides that a transferring employee loses all seniority previously acquired in his or her old job slot. All three of these "departmental" or "job" seniority systems restrict minority opportunities.

Departmental seniority provisions provided the grist for most of the court decisions on Title VII's effect on seniority rights. Since the systems were based on departmental or job assignments, seniority was computed according to the amount of time spent working in a particular job or department. These provisions thereby perpetuated the effects of past discrimination by "freezing" minority employees into less desirable and lower paying positions in segregated departments. Even after the blatant restrictions on transfer were removed or the segregated lines merged, minority workers were yet subject to discrimination. Later-hired whites placed in the higher slots had accumulated more seniority in those jobs, though they often had spent far less time in the employ of the company. When faced with such discriminatory seniority systems, courts have usually ordered not only the abolition of the segregated seniority lines but also the use of full plant seniority for purposes of promotion and transfer.

III. Title VII—The Legislative and Judicial History

Although the disparate effects of seniority systems can arise from two basic sources—total exclusion from employment and discriminatory job assignment—the consequences of these employer actions are quite different. Some indication of the propriety of remediating their detrimental impact may be obtained by examining the language, the legislative history, and the judicial interpretations of Title VII.

A. The Act Before the Congress

After more than twenty years of deliberations on dozens of equal employment opportunity bills, Congress enacted Title VII as part of the sweeping Civil Rights Act of 1964. Originally introduced on June 20, 1963, the Act was passed by the Senate on June 19, 1964. House passage came on July 2, 1964, and President Johnson signed

41. Wolkinson 22-23.
the bill into law that same day.\textsuperscript{45} Title VII was described, in rather pessimistic fashion, as “at least a beginning.”\textsuperscript{46} Title VII had not given the Equal Employment Opportunity Commission any real enforcement powers. Congress had also not defined the key word, “discrimination.” Its breadth and depth in the employment relationship were left for the courts to decide.\textsuperscript{47} And, most important for this discussion, some early commentators believed that the addition of section 703(h) represented a congressional acceptance of discrimination arising from long-standing seniority systems.\textsuperscript{48}

In retrospect, such pessimism was unfounded. Title VII was a dramatic beginning. Even a cursory examination of federal equal employment opportunity law as developed in the courts over the last ten years indicates that the worst fears of Title VII’s opponents have indeed come true—the Act has forced the hiring, promotion, and retention of minority group members.\textsuperscript{49}

Basically, Title VII makes it an “unlawful employment practice” for any employer covered by the Act:

\begin{quote}
[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.\textsuperscript{50}
\end{quote}

Further, an employer may not “limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee” on like grounds.\textsuperscript{51} Labor organizations are not permitted to deny membership or to act to deprive any individual of employment opportunities or “otherwise adversely affect his status as an employee or as an applicant for employment.”\textsuperscript{52} Labor organizations covered by the

\begin{itemize}
\item \textsuperscript{45} \textit{Id. at 62.}
\item \textsuperscript{46} \textit{Id. at 61.}
\item \textsuperscript{47} “Congress seems to have contemplated the judicial development of a ‘common law’ of unfair employment practices.” Cooper & Sobol 1614.
\item \textsuperscript{49} Senator Stennis predicted the outcome correctly: “[I]t should be clear, even to the uninitiated, that the entire purpose, design and effect of title VII is to force the hiring, promotion, and retention of persons that an employer would not hire, promote, or retain in the absence of governmental interference and coercion.” 110 CONG. REC. 5810 (1964).
\item \textsuperscript{51} \textit{Id. § 703(a)(2), 42 U.S.C. § 2000e-2(a)(2).}
\item \textsuperscript{52} \textit{Id. §§ 703(c)(1) and (2), 42 U.S.C. §§ 2000e-2(c)(1) and (2).}
\end{itemize}
Act also cannot "cause or attempt to cause an employer to discriminate against an individual" in violation of the duties imposed on employers by the Title.\(^{53}\) As amended by the Equal Employment Opportunity Act of 1972,\(^{54}\) these provisions apply to employers and unions with 15 or more employees or members.\(^{55}\)

As initially passed by the House and debated in the Senate, the bill looked somewhat different from its final form. The antidiscrimination provisions remained, but the sections most important to this study, the exemption for bona fide seniority systems and the anti-preference provision, were added by the Mansfield-Dirksen amendment.\(^{56}\) Because the amended version was drafted through a rather informal conference procedure, the legislative history of Title VII as enacted into law—especially that pertaining to the important seniority provisions—is rather sketchy. The history can, in fact, be characterized as significant for what it does not say.\(^{57}\)

To understand the intended effect of these additions, one must examine the Senate debate surrounding the introduction of the Mansfield-Dirksen amendments. Shortly after that debate began, opponents of Title VII asserted that, in addition to forcing a drastic change in the way businesses were run, the adoption of Title VII would undermine the vested seniority rights of white workers\(^{58}\) and require the imposition of racial quotas, all at the expense of "the average, garden-variety American citizen—the average young fellow who cannot claim that he is associated with any of the minority groups."\(^{59}\) Senators Clark and Case, the floor managers for Title VII, responded swiftly and reassuringly. Their oft-quoted interpretive memorandum and two other entries in the Congressional Record of April 8 serve as perhaps the most important statements of congressional understanding as to the effect of Title VII on seniority rights:

\(^{53}\) Id. § 703(c)(3), 42 U.S.C. § 2000e-2(c)(3).
\(^{56}\) An informal bipartisan committee made up of majority leaders Mansfield and Humphrey and minority leaders Dirksen and Kuchel drafted the substitute bill which ultimately passed the Senate and was adopted by the House. See Vass, Title VII: Legislative History, 7 B.C. IND. & COM. L. REV. 431 (1966).
\(^{57}\) Unfortunately, the legislative history of the Civil Rights Act of 1964 is recorded not so much in Committee Reports as in the pages of the Congressional Record... For the formulation of the Mansfield-Dirksen substitute amendments... which forms a significant part of that history—the Congressional Record itself is not complete.
\(^{58}\) Id. at 457. See also Gould, supra note 21.
\(^{59}\) 110 CONG. REC. 7207 (1964) (remarks of Senator Clark).
\(^{59}\) Id. at 7878-79 (remarks of Senator Russell).
Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, 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 non-discriminatory 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 the white workers hired earlier.  

That same day, Senator Clark responded to charges made by Senator Hill that Title VII would undermine vested seniority rights and impose a racial balance requirement with a rebuttal prepared by the Department of Justice:

Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. It is perfectly clear that where a worker is laid off or denied a chance for promotion because under established seniority rules he is "low man on the totem pole" he is not being discriminated against because of his race. Of course, if the seniority rule itself is discriminatory, it would be unlawful under title VII. But, in the ordinary case, assuming that seniority rights were built up over a period of time during which Negroes were not hired, these rights would not be set aside by the taking effect of title VII.

60. Id. at 7212, 7213 (Clark-Case Interpretive Memorandum of Title VII). On the quota question, the Senators were decisive:

There is no requirement in title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of title VII because maintaining such a balance would require an employer to hire or refuse to hire on the basis of race.

61. Id. at 7213.

62. Id. at 7207 (Justice Dep't Summary Statement). With reference to quotas, the memo noted:

There is no provision . . . that requires or authorizes any Federal agency or Federal court to require preferential treatment for any individual or any group for the purpose of achieving racial balance . . . . On the contrary, any deliberate attempt to maintain a given balance would almost certainly run afoot of title VII because it would involve a failure or refusal to hire some individual because of his race, color, religion, sex, or national origin.

What title VII seeks to accomplish, what the civil rights bill seeks to accomplish, is equal treatment for all.

Id. at 7407.
Finally, Senator Clark prepared answers to questions submitted by Senator Dirksen. One of the more pointed inquiries related to the possibility of discrimination arising from the continued use of the "last hired" seniority principle:

**Question:** . . . Normally labor contracts call for "last hired, first fired." If the last hired are Negroes, is the employer discriminating if his contract requires they be the first fired and the remaining employees are white?

**Answer:** Seniority rights are in no way affected by the bill. If under a "last hired, first fired" agreement, a Negro happens to be the "last hired," he can still be the "first fired" as long as it is done because of his status as "last hired" and not because of his race.62

Two important points made in the "April 8 statements" are easily overlooked. First, the discrimination discussed in the examples used by Senator Clark and the Justice Department was discrimination in hiring, *not* discrimination in either the establishment or operation of the seniority system itself. Second, the statements referred to "established seniority rights,"63 "seniority rights existing at the time it [Title VII] takes effect."64 The clear intent of these comments was to insure the doubters that the Title would operate only prospectively, that rights acquired *before* the effective date of the Act, "built up during a period of time during which Negroes were not hired . . . would not be set aside by the taking effect of Title VII."65 Rights which white incumbents had accumulated partly as the result of pre-Act hiring discrimination were not to be disturbed. But the statements suggested no similar exemption for seniority credits acquired *after* July 2, 1965, the effective date of Title VII.

These remarks were not, however, sufficiently reassuring; the Mansfield-Dirksen substitute still added sections 703(h) and (j).66 Section 703(j) specifies that employers and labor organizations are not to be required "to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance" existing in the percentage or number of such persons employed or admitted to union membership compared with the percentage or number of such individuals "in any community, State, section, or other area."67

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62. *Id.* at 7217 (response of Senator Clark to Dirksen Memorandum).
63. *Id.* at 7212, 7213 (Clark-Case Interpretive Memorandum of Title VII).
64. *Id.* at 7207 (Justice Dep't Summary Statement).
65. *Id.*
66. *Id.* at 11926, 11931-32.
Section 703(h) guarantees that:

It shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. 68

Two important elements of section 703(h) are left unclear by its language. First, only “bona fide” seniority systems are excepted, yet there is no attempt to define this status either in the section itself or in the debates after the amendments were introduced. Senator Dirksen offered a written explanation which did no more than rephrase the language of section 703(h). 69 Senator Humphrey indicated that the addition of section 703(h) did “not narrow application of the title, but merely clarifies its present intent and effect.” 70

Secondly, the proviso limits the scope of its exemption only to those bona fide systems in which “differences are not the result of an intention to discriminate.” 71 The effect of this clause was left conspicuously ambiguous.

Though a more detailed examination follows, it is vital at this point to note exactly what Congress did and did not say in relation to the two different, adverse effects of seniority systems mentioned earlier—total exclusion from employment and discriminatory job assignments. The plain terms of section 703(h) indicate that “bona fide” seniority systems are to be left undisturbed, unless the differences under such systems result from an “intent to discriminate.” Since Senator Dirksen and the other supporters of his substitute made no real effort to explain the meaning of these terms, one is forced to search for some explanation in the positions taken during the debates preceding the bill’s introduction. 72 The sole sources for ideas on what constitutes a “bona fide” seniority system are the Clark-Case memorandum, the Clark answers to the Dirksen questions, and the Justice Department memo discussed earlier. 73

Basicall, proponents concentrated on charges that the Act would require reverse discrimination by preferring later-hired minority employees

68. Id. § 2000e-2(h).
69. 110 Cong. Rec. 12818 (1964); Note, Title VII and the Incumbent Negro 1272.
70. 110 Cong. Rec. 12724 (1964); Note, Title VII and the Incumbent Negro 1272.
73. See text accompanying notes 58-66 supra.
over earlier-hired white incumbents, \textit{i.e.}, that Title VII would take something then existing away from white employees by interfering with the operation of nondiscriminatory seniority systems. In short, the legislative history concentrates on seniority problems arising as the result of prior \textit{exclusionary} hiring practices. At no point in the debate did Congress directly confront the difficulties posed by systems which had, through discriminatory job assignments, subordinated the rights of minority workers to those whites with equal or less tenure. Opponents raised the alarming possibility that incumbent whites would be tossed out of their present positions to make room for blacks who had previously been denied employment opportunities, thus destroying the "vested" seniority rights of the displaced whites. Senator Clark and his colleagues vigorously denied any such purpose for Title VII. "Title VII would have no effect on established seniority rights." Assuming that seniority rights were built up over a period of time during which Negroes were not hired, these rights would not be set aside by the taking effect of title VII. "The bill is not retroactive, and it would not require an employer to change existing seniority lists." The import of these statements is plain. The Senate supporters of Title VII understood that the rights which white workers had built up under seniority systems prior to the effective date of the Act were not to be disturbed. Of course, this conclusion still does not move one any closer to an understanding of what a "bona fide" seniority system is, except perhaps in a negative sense. Since its supporters went to such great pains to insure that rights established under systems which had deliberately excluded blacks prior

74. Gould, \textit{supra} note 21, at 20; Note, \textit{Title VII and the Incumbent Negro}, 1271; Comment, \textit{Interplay of Title VII and the NLRA} 162.
75. \textit{Id.}
76. 110 CONG. REC. 7213 (1964) (Clark-Case Interpretive Memorandum of Title VII).
77. \textit{Id.} at 7207 (remarks of Senator Clark).
78. \textit{Id.} at 7217 (response of Senator Clark to Dirksen Memorandum).
80. This view may not have been shared, at least initially, by the House proponents. The House Bill made no express reference to seniority systems. Some members of the House Judiciary Committee dissented from a favorable report on title VII, in part on the ground that it would require plants that had in the past refused to hire black workers to revise their seniority practices when blacks were hired. This interpretation \ldots{} was not contradicted by supporters of the bill either in the majority committee report or on the house floor.
to the effective date of Title VII would not be changed, it certainly can be inferred that systems based on discriminatory hiring practices would not otherwise be bona fide. Those rights accruing under discriminatory systems after July 2, 1965, are not protected by these statements and thus could be subject to remedial modification.

B. The Act Before the Courts

Taking their cue from the commentators, a number of federal judges rapidly accepted an interpretation of section 703(h) which was, in effect, rather circular. A bona fide seniority system was defined as one which did not perpetuate the effects of past discrimination. This, in turn, depended on whether the system in question was adopted as a result of an "intention to discriminate." Where such intention was found in the structure of the seniority procedure itself or in hiring and assignment practices of the employer, the system was declared to fall outside the section 703(h) exception and thus was subject to remedial modification, unless it was justified by the business-necessity doctrine.

Before the first major seniority case reached the courts, a number of perceptive articles had suggested that the plain terms of Title VII made seniority systems far more vulnerable to a finding of illegal discrimination than the statements of Senator Clark would suggest. One author focused on the exclusion problem specifically. "Can a seniority system set up prior to the Civil Rights Act which deliberately excluded Negroes ever be bona fide? Who was acting in good faith? It certainly was not the employer, the union or the employee beneficiary of this policy."

Most early cases focused on the seniority problems created by

81. See Cooper & Sobol 1611; Rachlin, supra note 70, at 479-80.
82. Id. at 480; Note, Title VII and the Incumbent Negro 1260-71.
85. See note 108 infra.
86. Rachlin, supra note 70, at 480. He also suggested that the normal meaning of the term "bona fide" is good faith. Id. Rachlin foreshadowed the idea that courts should look for perpetuation of discrimination. Noting that the Supreme Court, in Humphrey v. Moore, 375 U.S. 335 (1964), held that seniority rights were subject to modification, he suggested that courts be urged to modify the seniority rights of white employees where the incumbents had secured their seniority, at least partly because of their employer's discriminatory hiring practices. "In making this argument, it should be urged that the result of past discrimination continues into the present and future, creating differences in classifications and rates of pay." Rachlin, supra, at 480.
discriminatory job assignments. A most important early contribution to the development of a formula for judicial action in this area was made by a law student's Note published in 1967. When the substantive provisions of Title VII became effective, the author argued, the Act "immediately [barred] any further application of discriminatory seniority rules" like those involved with discriminatory job assignment procedures. The effect of the prior exclusion of incumbent minority workers from "white" jobs and departments is reasserted whenever blacks transfer into the more desirable units. The transferring minority worker, regardless of his or her total length of service with the employer, would have a seniority status inferior to that of even the most junior white in the formerly closed department or job.

The Note discussed three possible solutions to the seniority problems facing incumbent minority workers: (a) "freedom now," requiring immediate displacement of whites by employed blacks who, without prior discrimination, would have held the "white" place; (b) "rightful place," allowing an incumbent black to bid against whites for future job openings based on his or her full length of service with the employer; (c) "status quo," preserving intact the rights of white incumbents which accrued prior to July 2, 1965.

The Note narrowly interpreted the concerns addressed by the Clark-Case memo and the other April 8 documents. Noting that these arguments had been addressed to the charge that Title VII would require displacement of incumbent whites, the author agreed that the legislative history indicates an unequivocal rejection of that possibility. Ignoring the fact that these same statements also unambiguously indicate that seniority rights established before the effective date of the Act will not be disturbed, the Note stated:

[I]t does not necessarily follow from this proposition that Title VII may not require a redistribution of jobs currently held by incumbent whites and Negro employees or a rede-

87. Nearly all seniority cases thus far decided under Title VII have involved already-hired minority employees seeking promotion or transfer within segregated (or formerly segregated) departmental systems. See Comment, Interplay of Title VII and the NLRA 165.
88. Note, Title VII and the Incumbent Negro 1260.
89. Id. at 1268.
90. Id. Though the Note speaks of exclusion from seniority units, that term is used in a different sense in this paper. The Note author was focusing on the problems facing incumbent minority employees excluded from certain jobs and departments. Here, that situation is covered when discriminatory job assignments are discussed. The word exclusion, as used in this article, has a more limited but perhaps more accurate meaning.
91. Id. at 1268-69.
termination of their seniority rights to reflect seniority and ability on a non-discriminatory basis.\textsuperscript{92}

Despite Senator Clark's assurance that seniority lists would not have to be changed,\textsuperscript{93} the Note argued that the positions of incumbent white and minority employees, positions established before the passage of the Civil Rights Act, may be modified.\textsuperscript{94}

The author found it impossible to interpret section 703(h) "as providing a blanket exemption for all differences in treatment resulting from seniority arrangements set up before Title VII came into force."\textsuperscript{95} Predicting the judicial reaction to that section, the Note interpreted a "bona fide" seniority system to be one "which can be explained or justified on non-racial grounds." But, even though a system may be justifiable on neutral grounds, if designed to discriminate, "certain 'differences' in treatment authorized by the system will 'result' from the discriminatory intention which entered into its establishment" and thus the system will fall outside of the section 703(h) exemption.\textsuperscript{96}

After concluding that the language of Title VII "discloses no intention to exclude from its protection the generation of Negroes who have worked under discriminatory systems,"\textsuperscript{97} the Note argued for the adoption of the "rightful place" theory.

The first cases dealing with the discriminatory effects of seniority systems were ideally suited for the "rightful place" remedy. For the most part, those cases involved plaintiffs who had been shunted into segregated seniority units or departments and thereby denied the chances for advancement provided in the white-only units. Other cases involved challenges of craft union rules imposing standards and qualifications that were, for all practical purposes, impossible for minorities to meet due to pre-Act discrimination. In both of these lines of cases, the prior discriminatory causes of the present discriminatory effects occurred prior to the effective date of the Act. The courts were therefore put in a dilemma. They could adhere to the congressional intent reflected in the April

\textsuperscript{92} Id. at 1271.

\textsuperscript{93} 110 CONG. REC. 7217 (1964) (remarks of Senator Clark).

\textsuperscript{94} This interpretation of the legislative history is not without support. Professor Blumrosen, for example, concluded that the April 8 statements are addressed solely to a possible conflict between incumbent whites and later-hired Negroes. A. Blumrosen, \textit{Black Employment and the Law} 179 (1971). He argues that the post-Act use of seniority lists compiled under a discriminatory job assignment system perpetuates pre-Act discrimination, and by bringing it into the time frame covered by Title VII, can be found illegal. \textit{Id.} at 180.

\textsuperscript{95} Note, \textit{Title VII and the Incumbent Negro} 1272.

\textsuperscript{96} \textit{Id.} at 1273.

\textsuperscript{97} \textit{Id.}
8 statements and deny relief, thereby preserving pre-Act seniority rights of white employees. Or, they could find a gloss for the April 8 statements which would make them consistent with a remedy which substantially altered the white employees' pre-Act seniority rights. The courts took the latter course, adopting the "rightful place" remedy and reading the April 8 statements and section 703(h) as applying only to seniority systems based on total exclusionary hiring practices.

1. The Segregated Plant Cases. Beginning with Quarles v. Philip Morris, Inc., the courts quickly adopted both the reason and the remedy of the "rightful place" theory. Quarles involved a production operation organized along departmental lines where, though both blacks and whites were employed, job assignments were made on a racially segregated basis before the effective date of Title VII. Thus, the court had to determine whether the restrictive seniority provisions of the collective bargaining agreement constituted unlawful employment practices because they were imposed on a racially segregated departmental structure. While such a departmental organization could serve legitimate management needs, the court recognized that the structure had prevented blacks "from advancing on their merits to jobs open only to white persons." Rejecting the company's argument that the present consequences of past discrimination were outside the coverage of the Act, Judge Butzner stated: "The defendants rely on legislative history to sustain their thesis; the text of the act does not support it." After quoting the April 8 statements, he concluded:

99. Id. at 510.
100. Id. at 513.
101. Id. at 515.
102. Id. at 516.
The court noted that until January 1, 1966, the departmental seniority system was established "on the basis of racial discrimination in [the] hiring policy." The fact that the seniority lists were maintained as current moved the court to find that "a departmental seniority system that has its genesis in racial discrimination is not a bona fide seniority system."

Judge Butzner found section 703(h) inapplicable, since the differences between the white and black incumbent employees were "the result of an intention to discriminate in hiring policies on the basis of race." The court held that the "present differences in departmental seniority of Negroes and white [sic] that result from the company's intentional, racially discriminatory hiring policy before January 1, 1966 are not validated by the proviso of § 703(h)." The taint of the earlier discrimination extended to the seniority procedure. In so ruling, the court also concluded that the departmental procedures here were not justified by the business-necessity doctrine, particularly since the departmental system was not necessary to the efficient operation of the company.

103. Id. at 517.
104. Id. The effect of using these lists arguably constitutes present discrimination barred by section 703(a).
105. Id.
106. Id. at 518. Cooper and Sobol argue that this rationale is sufficient to justify the elimination of the section 703(h) "bona fide" exemption for systems established on the basis of an exclusionary hiring policy. Cooper & Sobol 1627-29.
108. Quales v. Philip Morris, Inc., 279 F. Supp. 505, 518 (E.D. Va. 1968) (distinguishing Whitfield v. Steelworkers Local 2708, 263 F.2d 546 (5th Cir.), cert. denied, 360 U.S. 902 (1959). This rule, known as the business-necessity doctrine, exempts employment practices having a disparate impact on female and minority employees if necessary to the safe and efficient operation of the employer's business. Though not mentioned during the course of congressional debates on Title VII, the rule has been adopted by the courts as a means of ameliorating some of the potentially devastating consequences for business operations of requiring an immediate end to discriminatory practices. It has evolved, however, into a very limited exception. See Griggs v. Duke Power Co., 401 U.S. 424 (1971).

The Fifth Circuit apparently has adopted the more restrictive interpretation of the business-necessity test. In United States v. Jacksonville Terminal, 451 F.2d 418, 451 (5th Cir. 1971), cert. denied, 406 U.S. 906 (1972), the court found that the company had failed to meet its burden of proving that the seniority systems were essential to its safe and efficient operation. The most widely accepted version of the test, however, was stated in Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971):

The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact . . . there must be available no acceptable alternative policies or practices which would better accomplish the business
Judge Butzner did not find, as some later cases have intimated, that departmental seniority systems were discriminatory per se nor did he find that there was a presumption in favor of a plant-wide system. Indeed, the relief granted was fashioned in a manner which protected the efficiencies generated by the company's departmental organization. Judge Butzner found only that a departmental procedure having its genesis in a discriminatory hiring practice was not bona fide.

The "rightful place" remedy adopted in Quarles provided that qualified blacks hired and assigned before 1966 were to be given the opportunity to transfer to other departments and to bid for other vacancies on the basis of total employment seniority. After transfer, their seniority was to continue to be based on employment rather than departmental seniority. This, in effect, would give newly transferred blacks greater seniority than some whites who had been in the department prior to 1964. The seniority rights acquired by whites prior to the effective date of Title VII would therefore be disturbed by this remedy. In order to avoid conflict with section 703(h) and its legislative history as reflected in the April 8 statements, Judge Butzner read the exemption of bona fide seniority systems and the admonition that Title VII was only to be applied prospectively as referring to cases involving systems based on totally exclusionary hiring practices rather than departmental discrimination cases like the one before his court.

The next major statement came from the Fifth Circuit in Papermakers Local 189 v. United States, where the court faced the same perplexing issue: "how to reconcile equal employment opportunity today with seniority expectations based on yesterday's built-in racial purpose advanced, or accomplish it equally well with lesser differential racial impact.


111. Id. at 519-20.
112. Id. at 521.
discrimination." In 1966 racially segregated progression lines were merged by "tacking" the black jobs in each department below the white positions; concurrently, racial restrictions on transfer were eliminated. The action effectively confined blacks to the lowest positions, despite the fact that many whites above them in the progression line had far fewer total years of service. The district court had resolved the issue by ordering the use of plant rather than job seniority, though transferees were still required to advance job-by-job through the progression line.

The Attorney General maintained on appeal that continued use of job seniority was discriminatory because, prior to the recent desegregation of the plant, blacks had no way of attaining relevant credits in the white slots. In effect, it was argued, minority employees should not be penalized for the lack of some qualification which the employer's prior discriminatory practice had prevented them from obtaining. The defendant company and union, in turn, stressed those parts of the legislative history which appeared to immunize accrued seniority rights.

The court of appeals commenced its analysis with the statement that "[n]o one can quarrel that Title VII operates only prospectively." This is rather puzzling in light of the fact that Judge Wisdom, writing for the court, then went on to adopt specifically the Quarles view that discriminatory systems established before the effective date of the Act do not qualify for the section 703(h) exemption. He reasoned that "but for" the earlier discrimination, blacks would hold more responsible positions in the progression lines.

Every time a Negro worker hired under the old segregated system bids against a white worker in his job slot, the old racial classification reasserts itself, and the Negro suffers anew for his employer's previous bias. It is not decisive therefore that a seniority system may appear to be neutral on its face if the inevitable effect of tying the system to the past is to cut into the employees [sic] present right not to be discriminated against on the ground of race.

Therefore, in order to correct this present effect, Judge Wisdom ef-

116. Id. at 982-83.
117. Id. at 983-85.
118. Id. at 986-87.
119. Id. at 987.
120. Id. at 988.
121. Id.
fectively altered some of the pre-Act seniority rights of whites by adopting the "rightful place" remedy of *Quarles*.

Judge Wisdom recognized, as did Judge Butzner in *Quarles*, the need to reconcile a remedy which affected the pre-Act seniority rights of white incumbents with what appeared to be a congressional intent to protect such rights through the exemption in section 703(h). He accomplished this reconciliation by effectively merging sections 703(h) and 703(j), concluding that Congress' intent was "to protect certain seniority rights that could not have existed but for previous discrimination." The act of discrimination which he used to distinguish these protected rights from the unprotected rights under a job or departmental seniority system was the act of refusing to hire the black as opposed to that of hiring him into a segregated job or seniority unit. Although neither the protected nor the unprotected rights would have existed "but for" some discriminatory act, Judge Wisdom thought that providing a remedy in the refusal-to-hire situation would require the use of fictional seniority, that is, to give a later-hired black greater seniority than an earlier-hired white. This would amount to preferential treatment and so run afoul of section 703(j). Therefore, Judge Wisdom seemed to conclude, rights arising from exclusionary hiring practices must be the rights protected by section 703(h). By contrast, the "rightful place" remedy in the departmental seniority cases merely recognized "time actually worked in Negro jobs as the equal of white time."

*Papermakers Local 189* endorsed the rightful place remedy and adopted the *Quarles* interpretations of both the legislative history and the scope of the section 703(h) bona fide exemption. No court after *Papermakers Local 189* has hesitated to modify seniority systems, and so to affect the rights of white incumbents, where past discrimination is perpetuated, at least if the discrimination is the result of discriminatory job assignments. However, the court's

122. *Id.*
123. *Id.* at 994-95.
124. *Id.* at 994.
125. *Id.*
126. *Id.* at 995.
127. *Id.*
128. *Id.*
129. In United States v. Roadway Express, Inc., 457 F.2d 854 (6th Cir. 1972), white over-the-road truck drivers claimed that a consent order permitting transfer of 4 blacks and 16 whites to over-the-road positions, with backdated seniority, was reverse discrimination. The court rejected the appeal: "The appellants suffer no inequity by being deprived only of that which they received as a consequence of discrimination, even though that discrimination may have been on the part of Road-
use of exclusionary hiring as an example of the sort of situation exempted by sections 703(h) and 703(j) was highly influential. Judge Wisdom's conclusion that Congress added section 703(h) to prevent reverse discrimination and to bar priority, via fictional seniority, for later-hired minority workers over earlier-hired whites is one of the chief authorities cited for denying relief in the current exclusion cases, despite the fact that Judge Wisdom's example involved a black rejected on racial grounds before the passage of the Act. Neither the example itself nor the rest of the opinion makes any reference to the problems involved when minority workers have not been hired, due to discrimination, after the effective date of Title VII.

In United States v. Bethlehem Steel Corp., the Second Circuit stated its position on the problems posed by discriminatory job assignments and departmental seniority. The defendants stipulated to both pre- and post-Act discrimination in hiring, promotion, and transfer in that limited plant-wide transfer rights to entry-level jobs were instituted in 1965, but only at the loss of accrued seniority. Though overtly discriminatory practices had ended, the court concluded that these provisions perpetuated past discrimination by locking discriminatorily assigned employees into their present jobs and by preventing a transferee from ever reaching the level of a white employee with equal plant seniority already in that department. The court followed Quarles and Papermakers Local 189 in granting "rightful place" relief and in denying the "bona fide" exemption to a seniority system which excluded minority workers from equal participation because of the employer's discriminatory hiring policies. The Second Circuit showed far greater solicitude for the seniority rights of white employees than did Judge Butzner in Quarles, in that the court limited the time during which minority workers could transfer without loss of seniority. Yet the court of-

way Express." Id. at 856; cf. United States v. N.L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973); Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972).
131. 446 F.2d 652 (2d Cir. 1971).
132. Id. at 656.
133. Id. at 658-59. In concluding that the section 703(h) exemption did not apply, the court quoted the Justice Department which seemed to focus on formerly white-only plants and the clash between earlier-hired whites and later-hired blacks. Senator Clark's comments, which were far more protective of accrued seniority and which could be construed to apply to the discriminatory assignment problem, were not discussed. Compare text accompanying note 61 supra with text accompanying note 60 supra.
134. 446 F.2d at 666.
ferred no real explanation for this effort at limiting the disruption of the expectations of incumbent workers and no support from the language or the legislative history of the Act for this line-drawing exercise.\textsuperscript{135}

The rule as laid down by \textit{Quarles}, \textit{Papermakers Local 189}, and \textit{Bethlehem Steel} is really both simple and limited: "When a departmental seniority system perpetuates the effect of past discrimination it is an unlawful employment practice proscribed and remediable under Title VII."\textsuperscript{136} Similarly, the remedy is, in the context of departmental seniority systems, quite simple: the courts merely order that departmental seniority be ignored and that only plant seniority be used. Although this remedy has been modified to some extent, it remains the principal remedial device employed in similar department seniority cases today.\textsuperscript{137}

Of great significance, however, is that these three cases allow courts to readjust or modify seniority rights that existed prior to the effective date of the Act as well as rights acquired in the post-Act period. This is best illustrated by a case decided by the Fifth Circuit in 1973, \textit{Bing v. Roadway Express Co.}\textsuperscript{138} In that case, plaintiff Bing had been hired as a city driver some time prior to the effective date of the Act. At the time, the defendant maintained a policy of not hiring any blacks to work as over-the-road drivers. Bing was qualified for this position at the time he applied for work, but was excluded from the position because of the company's discriminatory policy. The court had no trouble in requiring that Bing be awarded seniority as an over-the-road driver dated from his date of application since "the application date marks the earliest opportunity following their qualification dates at which any applicant could have been hired as a road driver."\textsuperscript{139}

To provide remedies which would eliminate the present effects of past discrimination, the avowed judicial purpose in the departmental seniority cases,\textsuperscript{140} the courts were forced to distinguish in some way the exemption granted to bona fide seniority systems in section 703(h). This was done by what at the time must have

\begin{footnotes}
\item[135] \textit{Id.} at 661.
\item[138] 485 F.2d 441 (5th Cir. 1973).
\item[139] \textit{Id.} at 452.
\end{footnotes}
seemed the safest possible way: draw the line between those systems based on employment practices which hired blacks but kept them in segregated departments or jobs and those systems which refused to hire blacks altogether. This distinction, however, has produced the anomalous result of treating white incumbents in formerly exclusionary systems far better than those working for employers who hired minorities but discriminated only in job assignments. Although this approach was effective in correcting many injustices, it did not wholly explain why an Act which was said to be prospective only could be used to strike down rights existing prior to the effective date of the Act and to remedy discriminatory acts taken prior to the passage of Title VII.

2. The Craft Union Cases. The courts have not applied the distinctions drawn in the Quarles line to all cases involving seniority rights. Where craft unions have engaged in discriminatory work referrals, the courts have proved quite willing and able to provide remedies to those members of minority groups who have been totally excluded from working in a particular trade.

Under craft-union referral systems, when construction workers are needed, the union refers them; the unions, through membership selection and referral procedures, determine who will be afforded work opportunities. The possibility of discrimination under such systems has proven all too real. Unlike the segregated job-assignments in Quarles, this discriminatory practice is more likely to take the form of total exclusion. Rather than allow such discrimination to go uncorrected, the courts have treated these situations differently from Quarles-type cases.

Under the terms of the collective bargaining agreement, in Dobbins v. Local 212, IBEW,142 the union hiring hall divided applicants for employment into four priority groups. The top group required four years trade experience and at least one year's work out of the last four under the union's contract.143 Blacks were denied union membership and thus the ability to work under the contract. The court found, in light of the union's refusal to accept blacks for membership, that the priority procedure which effectively barred minority employment in the trade violated Title VII.144 The court re-

141. The National Labor Relations Act, 29 U.S.C. §§ 158(b)(1)(a) & (b)(2) (1970), prevents unions from preferring their own members in the referral process. Alternative referral procedures, which achieve the same result, are often employed. Cooper & Sobol 1624-26.
143. Id. at 420.
144. Id. at 445.
fused to abolish the referral system entirely but did not hesitate to order the establishment of a temporary procedure which did not include differentiations based on prior union membership, passage of a union examination, or work under the union contract. This decree clearly and dramatically affected the allocation of work opportunities under the referral process and thus interfered with the rights and expectations of incumbent union members under their contract. The court apparently did not think that Title VII's seniority provisions were relevant as the opinion cites to neither section 703(h) nor to Title VII's legislative history on seniority.

Similar facts were present in United States v. Sheet Metal Workers Local 36. In that case, the district judge had refused to modify the referral practice despite the government's contention that application of the priority standards was discriminatory because blacks could not meet the requirements due to their exclusion. The district court had concluded that Title VII "was not intended to penalize unions and others for their sins prior to the effective date of the Act. It is prospective only." The Eighth Circuit reversed, finding that a system which allocated work opportunity based on pre-Act work experience which blacks had been unable to obtain had a present discriminatory effect and was illegal under section 703(c)(2). The court ruled that experience under the collective bargaining agreement must be eliminated as a requirement for future referrals. Blacks who qualified under industry standards were to be placed in the top priority group and referred immediately. Judge Heaney, speaking for the court, rejected a contention that this remedy deprived nonminority craftsmen of bona fide seniority rights. Agreeing that the referral system established a form of seniority, the court relied on Quarles and Papermakers Local 189 to find that the system was not bona fide due to prior discrimination.

145. Id. at 453.
146. Section 703(h) was reprinted in Appendix B of the decision, but was not cited in the body of the opinion for its seniority language. See id. at 456. It should be noted, however, that the court refused the government's request for affirmative action to correct the effects of pre-Act discrimination, finding that such relief would constitute preferential treatment in violation of section 703(j).
147. 416 F.2d 123 (8th Cir. 1969).
148. Id. at 126.
150. Id. at 133-34 n.20. The court quoted a portion of the Clark-Case memorandum which seemed to open discriminatory pre-Act referral procedures to modification: "[W]hen 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." See 110 CONG. REC. 7213 (1964).
The Fifth Circuit's early contribution in this area came in Vogler v. McCarthy, Inc.\(^{151}\) The union had engaged in nepotistic and discriminatory membership and referral practices; the district court enjoined these activities and ordered the union to alternate white and black referrals. On the first appeal,\(^{152}\) the court affirmed that relief, finding it appropriate to eliminate the present effects of past discrimination.\(^{153}\) In a subsequent opinion, the court affirmed a modified remedial order entered after the initial alternate referral remedy had failed to provide full employment opportunities for minority workers. By the end of 1970, the depressed economy, and the influx of blacks into the trade, prevented many whites from obtaining employment. As a result of lengthy layoffs, some had lost their eligibility for hospitalization and pension benefits.\(^{154}\) The lower court modified its order to create three groups of white employees differentiated according to experience. Under that procedure, the most experienced whites had stable employment, but at the expense of less experienced whites. The change had no effect on minority workers because the one-to-one referral system was preserved.\(^{155}\) Despite the negative impact on both pre- and post-Act rights of white employees, the court affirmed the order:

> Adequate protection of Negro rights under Title VII may necessitate, as in the instant case, some adjustment of the rights of white employees. The Court must be free to deal equitably with conflicting interests of white employees in order to shape remedies that will most effectively protect and redress the rights of the Negro victims of discrimination.\(^{156}\)

Recent cases in the work referral area have followed the lead of Dobbins, Sheet Metal Workers Local 36 and Vogler in finding that facially neutral referral requirements, such as membership and experience cannot be applied where minority persons have been prevented, by prior exclusion, from attaining the requisite qualifications.\(^{157}\) The rightful-place remedy was not involved; the statements in the legislative history (which Judge Wisdom in

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151. 451 F.2d 1236 (5th Cir. 1971).
153. Id. at 1052-53.
155. Id. at 1238.
156. Id. at 1238-39.
157. See Rios v. Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); United States v. Masonry Contractors Ass'n, 497 F.2d 871 (6th Cir. 1974); United States v. Metal Lathers Local 46, 471 F.2d 408 (2d Cir.), cert. denied, 412 U.S. 939 (1973); United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971). Note that these cases also uphold the use of remedial quotas.
Papermakers Local 189 interpreted to bar modification of the seniority rights of earlier-hired whites) were, for the most part, conveniently ignored. Though the remedies imposed (e.g., the one-for-one referral of Vogler) clearly had a detrimental effect on the work opportunities afforded incumbent white workers, and though these referral procedures have many of the most important attributes of seniority systems, the courts did not find it necessary to examine the section 703(h) exemption. Finally, these cases did not require, as was true in the segregated-plant situations, that the beneficiaries of the relief be the individuals who had actually experienced discriminatory treatment at the hands of the defendants.

3. The Supreme Court and Title VII—Griggs v. Duke Power Co. In Griggs v. Duke Power Co., the Court confronted "an archetypical of the subordination of black workers in the South." Before 1965, blacks were restricted to one department and performed only janitorial and low-level maintenance work. In 1955, a high school diploma requirement for entry into the white departments was added. When the racially restricted departmental policy ended, completion of high school was continued as a requirement for transfer to other departments. After July 2, 1965, satisfactory scores on two professionally prepared aptitude tests became necessary for entry-level jobs in all but the formerly all-black department.

The district court concluded that, since the restrictive policy had

158. One notable exception is United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969), where the court quoted a statement which appeared to bar post-Act use of referral lists compiled in a discriminatory manner before July 2, 1965. Id. at 126-27.
160. An exception, again, is United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969), where the court found that the referral procedure did not qualify as bona fide under section 703(h) because it was grounded in discrimination. Id. at 133-34 n.20.
ended, no remedy was authorized to correct prior inequities.\textsuperscript{166} The Fourth Circuit rejected this view, finding that Title VII relief was available to correct residual discrimination created by past practices. Although agreeing that the adoption of the testing and diploma requirements evinced no invidious intent or racial purpose, the court rejected an argument that such requirements, which had a disproportionate impact on minority employees, were illegal unless demonstrably job-related.\textsuperscript{167}

Chief Justice Burger, writing for a unanimous Court, began his analysis with a rather sweeping explanation of the congressional intent manifested in Title VII:

The objective of Congress . . . was to achieve equality of employment opportunities and remove barriers that had operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures or tests neutral on their face or even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.\textsuperscript{168}

Noting that whites fared better on these requirements, the Chief Justice attributed this "consequence" to the "inferior education in segregated schools" received by members of the plaintiff class.\textsuperscript{169} He stressed, however, that individuals must still be qualified to obtain work, stating that the Act does not "guarantee a job to every person regardless of qualifications."\textsuperscript{170} The Court defined permissible types of employment criteria in terms of their effect, finding that requirements which are facially neutral but operate in a discriminatory fashion are barred unless justified by the business-necessity doctrine.\textsuperscript{171} The diploma and testing requirements failed to meet that test because it had not been shown that they bore "a demonstrable relationship to successful performance of the job for which they were used."\textsuperscript{172}

The critical aspect of the \textit{Griggs} decision was the Court's rejection of a subjective intent requirement. Section 706(g) requires that the court find that "the respondent has intentionally engaged in an unlawful employment practice" before affirmative relief may

\begin{itemize}
  \item \textsuperscript{166} \textit{Id.} at 428.
  \item \textsuperscript{167} \textit{Griggs v. Duke Power Co.}, 420 F.2d 1225, 1233-35 (4th Cir. 1970).
  \item \textsuperscript{168} \textit{Griggs v. Duke Power Co.}, 401 U.S. 424, 429-30.
  \item \textsuperscript{169} \textit{Id.} at 430.
  \item \textsuperscript{170} \textit{Id.} at 430-31.
  \item \textsuperscript{171} \textit{Id.} at 431. The Court did not choose to adopt any of the definitions of that doctrine. \textit{See} note 108 \textit{supra}.
  \item \textsuperscript{172} 401 U.S. at 431-32.
\end{itemize}
be granted.\textsuperscript{173} Congress, however, did not attempt to define the terms "intent" or "discrimination," but rather left these tasks to the courts and the EEOC.\textsuperscript{174}

The Court performed that task in \textit{Griggs}, making it quite clear that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."\textsuperscript{175} Indeed, the Court found a clear absence of discriminatory intent in the company's "special efforts to help the undereducated employees" through financing two-thirds of high school tuition costs.

The Court interpreted Congressional desires as requiring a "consequence" test for discriminatory intent. "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation."\textsuperscript{176} Under this standard the diploma-testing criteria could not stand, regardless of the lack of evil motive

\textsuperscript{173} 42 U.S.C. § 2000e-5(g) (1970). Recall that "bona fide" seniority systems are exempt unless the differences they create are the "result of an intention to discriminate." \textit{Id.} § 2000e-2(h).
\textsuperscript{174} \textit{See} Cooper & Sobol at 1614.
\textsuperscript{175} \textit{Griggs v. Duke Power Co.}, 401 U.S. at 432.
\textsuperscript{176} \textit{Id.} at 432. This statement of congressional intent is rather surprising. The House Report on the Equal Employment Opportunity Act of 1972 admitted to a rather naive legislative understanding of the problems of employment discrimination when the 1964 Act was adopted:

- During the preparation and presentation of Title VII ... employment discrimination tended to be viewed as a series of isolated and distinguishable events, due ... to ill-will on the part of some identifiable individual or organization. ... Experience, however, has shown this to be an oversimplified expectation, incorrect in its conclusion.
- Employment discrimination, as we know today, is a far more complex and pervasive phenomenon. Experts familiar with the subject generally describe the problem in terms of "systems" and "effects" rather than simple intentional wrongs.

H.R. REP. No. 92-238, 92d Cong., 2d Sess., \textit{reprinted in} 1972-2 U.S. CODE CONG. & AD. NEWS 2137, 2143-44 (1972). The House Committee apparently has accepted the Court's interpretation, however, as it cited the \textit{Griggs} opinion to support granting enforcement powers to the EEOC. \textit{Id.} at 2144.

To date, the High Court's other major pronouncement is McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). There, the plaintiff, a black civil rights activist, was laid off; thereafter, he took part in an illegal demonstration on the company's property. The defendant later advertised for mechanics, the plaintiff's trade, but plaintiff was rejected due to his involvement in the demonstration. The district court refused his section 703(a)(1) charge (discriminatory refusal to hire) because the EEOC had not made a prior reasonable-cause determination. The Eighth Circuit reversed on that ground, and the Supreme Court affirmed.

The Court cited \textit{Griggs} for the proposition that the purpose of Congress in enacting Title VII was to assure equality of employment opportunities and to end discriminatory practices. Justice Powell, for the Court, distinguished \textit{Griggs}, noting that it dealt only with standardized testing devices which, though facially neutral, operate to exclude many capable minority group citizens.
in their adoption, because they had a disproportionate impact on minority employees and could not be justified on grounds of business necessity.\textsuperscript{177}

Although the general rule had developed in the circuit courts that the necessary intent was established if the defendant was aware of the disparate impact of its employment practices on minority employees,\textsuperscript{178} the Court's embrace of the consequence test, while not totally surprising, was hailed as a vital step forward.

In an article written shortly after the decision was handed down, Professor Blumrosen traced the development of the concept of discrimination.\textsuperscript{179} In his opinion, the consequence test was spawned by the realization that the earlier "evil motive" and "equal treatment" theories were inadequate to solve the social problems that had prompted passage of the Civil Rights Act:

Under this concept, discrimination was measured in terms of the adverse consequences inflicted upon minorities, no matter how achieved. Discrimination became conduct rather than a state of mind—conduct that was illegal unless justifiable under the narrow corridor provided by Title VII.\textsuperscript{180}

That narrow corridor, of course, was the business-necessity defense. According to Blumrosen, \textit{Griggs} adopted the full measure of the consequence test: equal opportunity must indeed be equal and real;

\textsuperscript{177} The test adopted by the Court admits of this one major limitation: an applicant must be qualified to perform the work required in the job he or she seeks. \textit{Griggs v. Duke Power Co.}, 401 U.S. at 430. The Court emphasized that Title VII "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." \textit{Id.} at 430-31. A preference for a minority person would not be imposed simply because of that person's group identification. The effect of this language on the appropriate scope of remedial decrees, particularly hiring and referral preference orders, has caused some concern among the commentators, though the courts rarely have bothered to consider it. Those remarks should be given weight only when read in context, as the Court was speaking only of actions which constitute illegal discrimination; no remedial order was presented for review. The Court's "no job guarantee" statement, fairly read, indicates that hiring, a proper item for inclusion in a remedy under section 706(g), will only be required if qualified minority individuals are available. See Comment, \textit{Race Quotas}, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 128, 170 (1973); Note, \textit{Constitutionality of Remedial Minority Preferences in Employment}, 56 MINN. L. REV. 842 (1972).


\textsuperscript{179} Blumrosen, \textit{Strangers in Paradise} at 66-75.

\textsuperscript{180} \textit{Id.} at 71.
barriers are to be eliminated unless justified by business necessity; the burden is shifted to the defendant, once disparate consequences are established.\footnote{181}

The Court's acceptance of the consequence test serves to make facially neutral employment practices, which have a disproportionate impact on minority group members, vulnerable to attack under Title VII. Griggs clearly sanctions efforts to change practices which have operated to exclude blacks and women from a work force. Whether it mandates revision of a “last hired, first fired” seniority practice, which has a disparate impact on recently hired minority employees as a “consequence” of their prior exclusion from the seniority unit, is less certain.

4. The “Quota” Cases—Remedial Preference or Specific Relief. In Louisiana v. United States,\footnote{182} a voting rights case, the Supreme Court described the role of a court, once discrimination has been found, as “not merely the power, but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.”\footnote{183} Determining the proper scope of a remedial order under Title VII, in light of the antipreferential provision, section 703(j),\footnote{184} and section 706(g)'s grant of equitable powers,\footnote{185} has been a recurring problem. Are remedies requiring alternate work referrals of black and white workers by a craft union\footnote{186} or hiring of minority group persons\footnote{187} compatible with Title VII's prohibition of minority preferences? May the expectations of majority employees be disturbed by such color-conscious relief?

In light of the legislative history of Title VII, it is remarkable that the courts have been nearly unanimous in taking an affirmative position on these issues. As discussed earlier,\footnote{188} the proponents of Title VII vigorously denied that the Act was intended to foster racial balance or the “preferential advancement of so-called minority groups.”\footnote{189} Senators Clark and Case sought to reassure the doubters by asserting:

\footnote{181}{Id. at 79-80.}
\footnote{182}{380 U.S. 145 (1965).}
\footnote{183}{Id. at 154.}
\footnote{185}{Id. § 2000e-5(g).}
\footnote{186}{Asbestos Workers Local 53 v. Vogler, 407 F.2d 1047 (5th Cir. 1969).}
\footnote{187}{Boston Chapter, N.A.A.C.P., Inc. v. Beecher, 504 F.2d 408 (2d Cir.), cert. denied, 412 U.S. 939 (1973).}
\footnote{188}{See text accompanying notes 79-80 supra.}
\footnote{189}{110 CONG. REC. 6563 (1964) (remarks of Senator Kuchel).}
There is no requirement in title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance . . . would involve a violation of title VII because maintaining such a balance would require an employer to hire or refuse to hire on the basis of race.\textsuperscript{190}

Senator Humphrey indicated that section 703(j) stated in print what the bill's proponents had said all along: "[T]itle VII does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group."\textsuperscript{191}

Despite these reassurances, the courts have been energetic not only in stopping discriminatory practices, but also in correcting the effects of past discrimination. In \textit{Asbestos Workers Local 53 v. Vogler},\textsuperscript{192} the Fifth Circuit rejected the union's request for a "forceful, but formless order."\textsuperscript{193} The court noted that "[I]n formulating relief from such practices, the courts are not limited to simply parroting the Act's prohibitions but are permitted, if not required, to 'order such affirmative action as may be appropriate'."\textsuperscript{194} To meet its duty under section 706(g), the court affirmed a decree requiring the immediate admission of four individuals previously excluded on racial grounds, eliminating as a membership criterion work experience gained prior to the date of the injunction (due to the earlier exclusion of minority persons), and ordering alternate black and white referrals until objective membership criteria were developed.\textsuperscript{195} The court rejected a union assertion that the elimination of its "related by blood or marriage" membership policy constituted a racial preference in violation of section 703(j). The court reasoned that the decree simply banned future discrimination via a procedure "which was originally instituted at least in part because of racial discrimination."\textsuperscript{196}

The Sixth Circuit proffered a different rationale in \textit{United States

\textsuperscript{190} Id. at 7213 (Clark-Case Interpretive Memorandum of Title VII). The Justice Department memo parroted this language, adding, "What title VII seeks to accomplish, what the civil rights bill seeks to accomplish, is equal treatment for all." \textit{Id.} at 7207 (Justice Dep't Summary Statement).

\textsuperscript{191} \textit{Id.} at 12723 (1964).

\textsuperscript{192} 407 F.2d 1047 (5th Cir. 1969); see Comment, \textit{The Hiring Preference Order as a Remedy for Employment Discrimination}, \textit{supra} note 188, at 308-13.

\textsuperscript{193} 407 F.2d at 1051.

\textsuperscript{194} \textit{Id.} at 1052, \textit{citing} Louisiana v. United States, 380 U.S. 145 (1965).

\textsuperscript{195} \textit{Asbestos Workers Local 53 v. Vogler}, 407 F.2d at 1051-55.

\textsuperscript{196} \textit{Id.} at 1054. A modified version of this order was upheld in \textit{Vogler v. McCarthy}, Inc., 451 F.2d 1236 (5th Cir. 1971), despite the charge that it unfairly disadvantaged incumbent white employees by eliminating their work opportunities during a business slump. \textit{See} text accompanying notes 151-56 \textit{supra}."

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\textsuperscript{191} \textit{Id.} at 12723 (1964).

\textsuperscript{192} 407 F.2d 1047 (5th Cir. 1969); see Comment, \textit{The Hiring Preference Order as a Remedy for Employment Discrimination}, \textit{supra} note 188, at 308-13.

\textsuperscript{193} 407 F.2d at 1051.

\textsuperscript{194} \textit{Id.} at 1052, \textit{citing} Louisiana v. United States, 380 U.S. 145 (1965).

\textsuperscript{195} \textit{Asbestos Workers Local 53 v. Vogler}, 407 F.2d at 1051-55.

\textsuperscript{196} \textit{Id.} at 1054. A modified version of this order was upheld in \textit{Vogler v. McCarthy}, Inc., 451 F.2d 1236 (5th Cir. 1971), despite the charge that it unfairly disadvantaged incumbent white employees by eliminating their work opportunities during a business slump. \textit{See} text accompanying notes 151-56 \textit{supra}."
v. Local 38, IBEW. 197 There, the district court had entered a prohibitory injunction but had refused affirmative relief to end the effect of prior discriminatory practices. The appellate court reversed, stating that section 703(j) "must be read in conjunction with the fundamental purposes of the statute . . . and in conjunction with the section providing for affirmative relief." 198 Judge Edwards, speaking for the court, added that any other interpretation "would allow a complete nullification of the stated purposes" of the Act. 199 The court appreciably narrowed the ambit of section 703(j) by refusing to consider the limits that it might impose without a concurrent consideration of both the purposes of Title VII and the scope of the court's remedial powers under section 706(g). 200

In United States v. Metal Lathers Local 46, 201 the Second Circuit affirmed an order requiring the union to issue 100 work permits immediately to minority applicants and thereafter to issue 250 permits annually, on a one-to-one black-white basis, until 1975. 202 Noting that section 703(j) constitutes the sole limitation on the broad remedial powers granted by section 706(g), the court concluded: "While quotas merely to attain racial balance are forbidden, quotas to correct past discriminatory practices are not." 203

198. Id. at 149.
199. Id. at 149-50; see United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971). There the court affirmed a comprehensive decree which included immediate referrals to qualified individuals and the establishment of a special apprentice program for unskilled blacks. A claim that such relief violated section 703(j) was rejected, the court noting that "[w]ithout such powers [granted in section 706(g)] the district court would be unable to effectuate the desire of Congress to eliminate all forms of discrimination." Id. at 553; see Note, Constitutionality of Remedial Minority Preferences in Employment, supra note 162, at 857-60.
200. Support for this view is found in the 1972 amendments to Title VII. Senator Ervin had introduced a number of proposals expressly designed to bar reverse discrimination. Ervin noted caustically, "Some officials . . . were apparently illiterate or educated way past their intelligence, and they could not understand the plain and unambiguous words of Congress which were designed to prevent what is probably known as discrimination in reverse." 118 CONG. REC. 1663 (1972) (remarks of Senator Ervin). Senator Javits led the opposition, noting that their purpose was to "torpedo orders of courts seeking to correct a history of unjust discrimination in employment" by denying courts the power to order "specific measures which could assign specific percentages of minorities that had to be hired." Id. at 7675 (remarks of Senator Javits). The proposals were soundly defeated. Id. at 1676, 4919.
202. Id. at 411-13. The lower court had incorporated these recommendations, made by an administrator appointed pursuant to a settlement agreement, into its order.
203. Id. at 420, citing Louisiana v. United States, 380 U.S. 145 (1965); see United States v. Masonry Contractors Ass'n, 497 F.2d 871 (6th Cir. 1974).
Sweeping relief was justified, the court noted, by the union's post-Act discriminatory practices.\(^{204}\)

In *Rios v. Steamfitters Local 638*,\(^{205}\) the Second Circuit directly addressed the limits imposed on remedial preferences by section 703(j). Though it remanded, for recalculation, a decree ordering the union to achieve a 30 percent nonwhite membership goal,\(^{206}\) it affirmed the power of the federal courts to issue orders imposing specific hiring and recruitment goals, adding that a total of eight circuits had construed section 706(g) to authorize the establishment of numerical and percentage goals to redress the effects of prior discriminatory conduct.\(^{207}\)

While a literal reading of section 703(j) might lead one to conclude that all remedial preferences are barred, the court rejected such a restrictive interpretation:

> [T]hat language was intended to bar preferential quota hiring as a means of changing a racial imbalance attributable to causes other than unlawful discriminatory conduct. It does not prohibit the use of goals "to eradicate the effects of past discriminatory practices."\(^{208}\)

The court found that section 703(j) simply forbids the imposition of some racial goal or percentage quota where an imbalance in minority representation on a work force is unrelated to discrimination. But if past discrimination is found,

> No longer are we dealing with an "imbalance" attributable to nondiscriminatory causes. The effects of such past violation of the minority's rights cannot be eliminated merely by prohibiting future discrimination, since this would be illusory and inadequate as a remedy. Affirmative action is essential.\(^{209}\)

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\(^{204}\) 471 F.2d at 414.
\(^{205}\) 501 F.2d 622 (2d Cir. 1974).
\(^{206}\) *Id.* at 633-34.
\(^{207}\) *Id.* at 629 and cases cited.
\(^{208}\) *Id.* at 630.
\(^{209}\) *Id.* at 633. The court also rejected an argument which would limit the use of such goals to the field of public employment, noting that private violations of civil rights have been remediable at least since the passage of the Civil Rights Act of 1866, 42 U.S.C. § 1931 (1970). "Since the harm caused by private violations can be at least as serious as that resulting from conduct of public bodies or officials, the relief must be commensurate with the injury to be remedied.” 501 F.2d at 631.

The problem posed by *DeFunis v. Odegaard*, 416 U.S. 312 (1974), was distinguished, the court stating that it did not involve the use of quotas to eradicate the effects of past discrimination. That conclusion is highly questionable. *See* Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. Chi. L. Rev. 723 (1974). A more telling distinction, perhaps, is found in the court's observation that, unlike a law school entering class, a union does not have a set or maximum number of
The courts have not allowed section 703(j) to prevent them from imposing hiring quotas to remedy past discriminatory refusals to hire. In *Carter v. Gallagher*,210 an action filed before Title VII was amended to cover state and local government employees,211 the trial court had found the employment procedures for determining qualifications of firefighter applicants in violation of the fourteenth amendment and section 1981.212 The district judge entered a complex decree which included an order providing for an absolute minority preference—the next twenty firefighters hired were to come from qualified minority applicants regardless of whether whites scored higher on qualifying exams.213 A panel of the Eighth Circuit affirmed all elements of the decree except the absolute preference, which was held to infringe upon the constitutional rights of white applicants with higher scores on the challenged qualification mechanisms.214 Judge Van Oosterhout specifically rejected the idea that admitted past discrimination can justify a remedy infringing on the rights of current members of the white majority.215

The Eighth Circuit, sitting en banc, modified the panel’s decision and allowed a limited preference.216 Recognizing that earlier referral cases like *Vogler* and *Ironworkers Local 86* were far more limited than the district court order here, the full bench agreed that the absolute preference order violated the equal protection rights of the better qualified white applicants.217 Nonetheless, the court realized that some affirmative relief was required to erase the effects of past discrimination, even though no attempt had been made to

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210. 452 F.2d 315 (8th Cir. 1972).
213. Id. at 318.
214. Id. at 324-25. “We believe that section 1931 and the Fourteenth Amendment proscribe any discrimination in employment based on race, whether the discrimination be against Whites or Blacks.” Id. at 325.
215. Id. at 324-25. Apparently, the panel adhered to the notion that the Constitution, specifically the equal protection clause, bars color-conscious relief.
216. Id. at 327.
217. Id. at 328.
prove that the plaintiffs had themselves been specific victims.\textsuperscript{218} The absolute preference appeared to implement one constitutional right by the "outright denial" of another; the court compromised by imposing a hiring ratio to be used for a limited period or until minority representation in the department achieved a "fair approximation" of the area's population mix.\textsuperscript{219} Judge Gibbons, writing for the full court, recognized that a remedy must guarantee a real representation to insure the elimination of the effects of past discrimination, adding: "For these reasons we believe the trial court is possessed of the authority to order the hiring of 20 qualified minority persons, but this should be done without denying the constitutional rights of others by granting an absolute preference."\textsuperscript{220} Since the court thought it proper for a final decree to order that one of every three persons hired be a minority applicant, it may be inferred that such a limited preference would not amount to a denial of the white majority's constitutional rights. In other words, the court seemed to find that it had the power to modify the rights of the majority so long as it did not totally eliminate them.

More recent cases have adopted, often without detailed analysis of constitutional issues,\textsuperscript{221} the limited type of preferential relief

\textsuperscript{218} Id. at 328-30. The court cited a number of opinions, including Vogler, Ironworkers Local 86, and Sheet Metal Workers Local 36, for the proposition that "the presence of identified persons who have been discriminated against is not a necessary prerequisite to ordering affirmative relief in order to eliminate the present effects of past discrimination." Id. at 330.

\textsuperscript{219} Id.

\textsuperscript{220} Id. at 331.

\textsuperscript{221} Although a detailed examination of the constitutionality of color-conscious relief is beyond the scope of the present study, a few summary comments are in order.

The Supreme Court has never adopted Justice Harlan's Plessy v. Ferguson, 163 U.S. 537 (1896), color-blind rule, but rather has applied strict scrutiny to racial classifications deemed suspect under traditional fourteenth amendment analysis. Unless the governmental interest in the class can be labeled a compelling one, the classification will be found unconstitutional. \textit{See} Loving v. Virginia, 388 U.S. 1 (1966).

Obviously, congressional passage of Title VII as part of the Civil Rights Act of 1964 indicates an abiding governmental interest in guaranteeing equal employment opportunity to all citizens. A number of courts have adopted color-conscious remedial orders as a means of implementing this congressional purpose by eliminating the effects of past discrimination. Though it is not entirely clear that Congress has accepted these techniques as the proper vehicle for carrying out its intent, one can infer from the Senate's rejection of Senator Ervin's "reverse discrimination" proposals that the Congress has ratified at least some use of these remedial procedures. \textit{See} 118 Cong. Rec. 1676, 4919 (1972).

Whether the Supreme Court would uphold such classifications as serving a sufficiently compelling governmental interest is open to question. \textit{See} DeFunis v. Odegard, 416 U.S. 312 (1974). It should be understood, however, that such remedies are imposed to correct the specific effects of past discrimination, not to meet
afforded in *Carter*. The distinction drawn by the Eighth Circuit in *Carter* has also had its impact on decisions ruling on the impact of section 703(j) on quota-preference remedies. For example, in *Boston Chapter N.A.A.C.P., Inc. v. Beecher*, the First Circuit affirmed an order establishing a hiring preference ratio of limited duration. After rejecting an argument that the use of color-conscious relief was unconstitutional, the court addressed the claim that section 703(j) bars the use of such relief where the past discriminatory practice was unintentional. Relying on *Rios*, the court found section 703(j) to be applicable only where the imbalance has arisen "completely without regard to the actions of the employer."

Unlike the segregated plant cases, the cases involving quota-preference decrees reflect a far more expansive view of the purposes of Title VII and the powers that legislation has conferred on the judiciary. To eliminate the "perpetuating" effects of past discrimination, the courts have moved beyond a mere "parroting" of the Act's prohibitions to fashion decrees which, going beyond "mere tokenism," are designed to eradicate the effects of decades of majority preferences. The antipreferential provision, section 703(j), has posed no barrier; the powers granted by section 706(g), read in conjunction with the purpose of the Act, have been taken as a clear indication that section 703(j) cannot be construed to prevent

some "social engineering" concept of racial balance. The High Court's approval of orders employing percentage goals to achieve integration in the public schools suggests that the Court might view these remedies favorably. See, e.g., *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1 (1971). However, the mooring of *DeFunis* indicates that a different judicial reaction may be anticipated when the award of a preferential remedy to one group necessarily implies that some members of other groups will be deprived of some scarce resource. The limited, one-time hiring preference of *Carter* merely delays the award of a job to qualified whites. A decree which eliminates seniority as the primary determinant of layoff order would deprive some whites of a scarce resource—jobs—solely on the basis of race. See *Ely, The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); *Comment, Race Quotas*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 128 (1973); *Note, Carter v. Gallagher: From Benign Classification to Reverse Discrimination*, 56 U. PIT. L. REV. 128 (1973).


223. 504 F.2d 1017 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975).


necessary affirmative relief.\textsuperscript{227} Rather, that section has been relegated to barring relief only where an imbalance had come about without regard to the employer's actions.\textsuperscript{228} Neither the detrimental impact on white employees nor the fact that the chief beneficiaries of the orders are not themselves identified as the victims of prior discrimination has deterred the courts from following their duty, as mandated by the Congress in Title VII and by the Supreme Court in \textit{Griggs}, to fashion remedies for those who have been discriminatorily excluded from equal employment opportunity.\textsuperscript{229}

### III. Title VII and Disproportionate Layoffs—An Analysis

In the economically prosperous mid-1960's, there was little concern about a serious economic slump. In the area of equal employment opportunity, the question was how to insure that racial minorities and women would get an adequate number of the jobs then available. Consequently, the case law under Title VII is distinctly colored with the unstated presumption that the courts must concern themselves with insuring minority group entry into jobs.

The recent economic downturn and unemployment has, perforce, shifted the focus to merely maintaining minority group positions in the work force. Unfortunately, much of the dicta of earlier cases, useful in its time to support judicial activism, has backfired. Apparently harmless when written, the decisions of the mid-1960's have become a major impediment to protecting the employment that they were used to create.

The analytical errors in prior decisions, particularly where the errors are in dicta, need not vitiate the achievements made under Title VII. The problem created by seniority layoffs can readily be remedied by the courts without going beyond the language and history of Title VII. As the prior decisions read the statute in light of the pressing need to eliminate discriminatory effects in promotion and transfer, so this part of the article looks at the language, as well as the judicial and legislative history of Title VII, in light of the


\textsuperscript{229} Vogler v. McCarthy, Inc., 451 F.2d 1236 (5th Cir. 1971).
need to protect, rather than to create, equal employment opportunity.

A. The Language and History of Title VII

The principle question to be resolved in an analysis of Title VII's language and history is whether the provisions of Title VII are receptive to a finding of remediable discrimination in the exclusionary hiring situation. A literal reading of Title VII of the Civil Rights Act of 1964 compels the conclusion that disproportionate layoffs of minority employees only recently hired by formerly all-white employers is in violation of Title VII. Section 703(a)(1) prohibits employer discrimination "against any individual with respect to his . . . terms, conditions, or privileges of employment" on grounds of race or sex.230 Section 703(c)(1) prohibits union actions with like effects.231 Section 703(a)(2) bars actions by employers which "limit, segregate or classify" their employees "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee" because of race or sex.232 The congressional choice of such phrases as "in any way," "tend to deprive," and "otherwise adversely affect" evidence an intent to define discrimination as broadly as possible. As Cooper and Sogal have suggested:

If the application of seniority rules to the disadvantage of a previously-excluded black employee is not discrimination in "terms or conditions of employment" because of race, within the meaning of sections 703(a)(1) and 703(c)(1), it would still seem to classify him "in a way" that "would deprive or tend to deprive [him] of employment opportunities or otherwise adversely affect his status as an employee" because of race within the meaning of sections 703(a)(2) and 703(c)(2).233

The use of a facially neutral "last hired" layoff order where, due to prior discrimination, minority persons have only recently obtained relevant employment would "deprive or tend to deprive" them of employment opportunities because of that discriminatory exclusion. Simply stated, "but for" prior discrimination some minority workers would have been employed long enough to with-

231. Id. § 2000e-2(c)(1).
232. Id. § 2000e-2(a)(2). Similarly, section 703(c)(2) of the Civil Rights Act of 1964 prohibits unions from engaging in such activities with respect to members or applicants for membership. Id. § 2000e-2(c)(2).
233. Cooper & Sobol 1612.
stand the layoffs. Absent the proviso contained in section 703(h), it is clear that such seniority rules could be modified to prevent the elimination of disproportionate numbers of such minority employees during work force reductions. Because of section 703(h), however, the question is not whether "last hired" layoffs violate Title VII but, rather, whether such discrimination is remediable discrimination where the adverse effect on minorities results from prior exclusionary hiring.

As noted earlier, section 703(h) was added by the Mansfield-Dirksen amendments to assure the Senate that the Act would not require the destruction of then-established seniority rights. The April 8 statements of Senators Clark and Case had pointed out, even before the introduction of the substitute, that the Act would not require the revision of seniority rights established before the effective date of the Title in plants from which minorities had been excluded. The Clark-Case memorandum interpreted Title VII as having no effect on established seniority rights. "Its effect is prospective and not retrospective." Senator Clark added that the "last hired" principle could still be applied to lay off recently hired minority workers after the passage of the Act. The Justice Department, in addressing the problem, concluded, "Title VII would have no effect on seniority rights existing at the time it takes effect." The "last hired" rule survived the Act, in the Department's opinion, "even in the case where, owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes." Where seniority rights had been built up during a long period of exclusionary hiring, "these rights would not be set aside by the taking effect of Title VII."


235. See notes 69-81 supra and accompanying text.

236. The courts and some commentators have interpreted these statements as referring only to plants from which minority persons have been totally excluded. See Papermakers Local 189 v. United States, 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970); Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968); A. BLUMROSEN, BLACK EMPLOYMENT AND THE LAW 178-90 (1971). But see Cooper & Sobol 1613. Throughout the debates, however, the Senate never appeared to recognize the different problems presented by discriminatory job assignments and total exclusion from employment. Cf. id. at 1608-15.

237. 110 Cong. Rec. 7213 (1964) (Clark-Case Interpretive Memorandum of Title VII).

238. Id. at 7217.

239. Id. at 7207 (Justice Dep't Summary Statement).

240. Id.

241. Id.
The Act's effect on seniority rights, at least in exclusionary settings, was to be prospective only. Note, however, that the only discriminatory act to which these excerpts relate is the invidious exclusion of minority job applicants in hiring.\textsuperscript{242} Furthermore, the statements do not imply that the employer was free from all responsibility for the effects of this pre-Act exclusion. Congress decided that the rights acquired by white incumbents were not to be modified. The Clark-Case memorandum clearly stated that the employer was not permitted to fire whites in order to hire blacks, or prefer blacks for future vacancies, or give blacks special seniority rights at the expense of earlier-hired whites. As long as the seniority credits of white employees were not made less valuable, employers could be required to take steps to remedy the continuing effects of pre-Act hiring exclusion. For example, it is consistent with the tenor of these statements to conclude that employers could be required to alleviate the effects of pre-Act hiring discrimination which result in disproportionate layoffs by reinstating minority workers without displacing whites or by offering some monetary compensation to the "first fired" minority workers.

Conversely, the April 8 statements refer only to rights predating the effective date of the Act. The sponsors clearly did not want to oust or harm incumbent white employees who were only tangentially responsible for discrimination in hiring before the Act's approval. The legislative history fails, however, to evidence a similar concern for seniority rights established after the effective date of Title VII. The continuation of exclusionary hiring practices arguably taints the seniority rights thus acquired since they are the fruits of a violation of Title VII and are only acquired at the expense of the rights of the excluded minorities. If this legislative history is taken at face value, seniority acquired during a period of post-Act hiring discrimination is not immutable, and may be revised under the Act's remedial provisions.\textsuperscript{243}

Since section 703(h) was introduced and passed after the April 8 statements, it may appear to cast a slight shadow on the foregoing

\textsuperscript{242} For example, the Justice Department memo stated, "[I]n the ordinary case, assuming that seniority rights were built up over a period of time during which Negroes were not hired, these rights would not be set aside by the taking effect of title VII." \textit{Id}. Since the statements have been interpreted to apply only to exclusionary situations, it seems that the seniority rights of incumbent whites in formerly segregated departments were to be subject to modification. Of course, the courts were quick to seize this distinction. See, e.g., Papermakers Local 189 v. United States, 416 F.2d 980 (5th Cir. 1969), \textit{cert. denied}, 397 U.S. 919 (1970); Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968).

analysis. A closer study of section 703(h), however, shows that it is quite compatible with those statements. The provision exempts "bona fide" seniority systems only if the differences in the "terms, conditions, or privileges of employment" which arise under such systems are "not the result of an intention to discriminate" because of race or sex. The language disqualifies a system where intent results in differences; it does not limit the disqualification to intent existing in the establishment of the seniority system. Nor does the language in any way distinguish among various types of seniority systems. A seniority system is free from interference under section 703(h) only as long as the differences which it fosters among employees are not the result of a discriminatory intent somehow manifesting itself in the process.

The test to be applied in determining whether the prohibited intent is present has been clearly and forcefully mandated by the Supreme Court in \textit{Griggs}. The test does not look to the subjective motivation of the employer. Rather, it requires that the court look to the consequences of the practice. Where the consequences are unequal treatment of minority group workers, the intent is established.\footnote{See Cooper \& Sobol 1613.} The differences in accumulated seniority time which result in the layoffs of minority workers only recently hired into formerly all-white units ahead of white employees who began work after July 2, 1965, would not, under such an analysis, be exempted by section 703(h). The layoffs would disproportionately impact on minority workers, thereby establishing the forbidden intent, and the rights affected would be post-Act rights, so that the Act would not be applied retrospectively.

The pre-Act, post-Act distinction need not rest solely on the time during which seniority rights were acquired. Although this distinction is of significance in that it restricts the extent to which remedies may affect such rights, the analysis is also applicable in determining whether a remedy may be granted at all. In making such a determination, the question of whether the discriminatory hiring practices were adhered to in the pre- or post-Act period could be considered determinative of whether Title VII can apply at all. In either case, "but for" the practices more minority workers would have accumulated seniority sufficient to withstand the layoffs. But, arguably, to penalize white workers even in their post-Act rights for the pre-Act discrimination of their employers would amount to the prohibited retrospective application of the Act. The situation is, however, much clearer if the exclusionary hiring pattern has per-
sisted after the effective date of Title VII, since such differences are
the result of an “intention to discriminate” in hiring during a time
when such actions are clearly unlawful. There is no prospectiveness
involved in applying existing law to existing violations. Since
the disproportionate layoff of minority workers is a consequence of
the employer’s post-Act hiring discrimination, adherence to a strict
“last hired, first fired” layoff principle, though facially neutral, has
disparate impact on the previously excluded and only recently
hired minority worker and is an unfair employment practice in vi-
olation of sections 703(a)(1) and 703(a)(2).

The keystone of this interpretation is the assumption that a dis-
criminatory hiring practice disqualifies a seniority system from the
treatment otherwise afforded a bona fide system. As noted earlier,
the scope of that exemption has been set in terms of the proviso
to section 703(h): A bona fide system is one not based on an intent
to discriminate.245 The argument is straightforward: a seniority
system based on length of service with an employer, regardless of its
facial neutrality, clearly is not neutral in effect where prior exclusion-
ary hiring patterns have prevented minority persons from accumu-
lating working time necessary to secure seniority credits. Such a
system, then, clearly perpetuates the past discriminatory exclusion of
minorities.

Cooper and Sobol, the chief proponents of a more liberal inter-
pretation of the Act and its history, have concluded that past dis-
crimination is perpetuated in violation of Title VII where the senior-
ity rules established in any exclusionary situation are applied,
without modification, after minority persons are admitted to a for-
merly all-white unit.246 The early segregated-plant and craft-union
cases, according to Cooper and Sobol, provide the principle for
applying the Act to any seniority system: “[I]f a system, though
stated in nonracial terms and adopted without discriminatory intent,
incorporates racial differences in status and systematically prefers
whites to blacks without business justification, it is racially discrimi-
natory.”247 They make no attempt to distinguish between pre- and
post-Act exclusion, as the April 8 statements would seem to require.
Rather, they avoid the conflict by suggesting that the statements do
not correctly reflect the intent of the Act on the seniority issue.248

245. Papermakers Local 189 v. United States, 416 F.2d 980 (5th Cir. 1969),
        (E.D. Va. 1968).
246. Cooper & Sobol 1603-04.
247. Id. at 1626.
248. Id. at 1611-14.
Their interpretation of the statutory language is undoubtedly correct. The Act does, in the broadest possible terms, forbid discrimination in employment; further, the "bona fide" exemption is denied whenever the differences in treatment caused by seniority systems are the result of an intent to discriminate somewhere in the process. Their attempt to dismiss the April 8 statements, however, does not square with comments offered by proponents after the introduction of the Mansfield-Dirksen substitute and with their subsequent judicial use. Senator Humphrey, for example, who had not spoken previously on the seniority issue, declared that the addition of section 703(h) did not narrow the scope of the Title but simply clarified "its present intent and effect."\(^\text{249}\) The courts have been unanimous in adopting the Quarles view that these statements should be employed to determine Congress' intent in adopting the bona fide exemption. The logical consistency of the Cooper-Sobol view of the legislative history is further weakened by their refusal to consider the removal of white incumbents from positions acquired during the exclusionary hiring period. The failure to extend their analysis beyond the award of benefits to the denial of benefits that occur in the layoff situation may also weaken their interpretation, particularly since they admitted that the legislative history's emphasis on nonretroactivity deserved attention in such cases.\(^\text{250}\)

The interpretation suggested in this study—that seniority rights acquired in exclusionary systems after July 2, 1965, are subject to remedial modification, particularly where discriminating practices continue after that date—is more consistent with the statutory language and the obvious congressional concern for nonretroactive application of Title VII. Further, it finds support in the initial court adoption and more recent applications of the "rightful-place" theory as a remedy in discriminatory assignment cases. Judge Butzner, adopting that remedy in Quarles, noted that its use would not require the ouster of white incumbents, with less total employment seniority, from jobs which they had acquired under discriminatory assignment procedures in effect before 1966.\(^\text{251}\) Implied in his decision to follow the rightful-place idea, while rejecting the "freedom now" approach, was a recognition that employment expectations established prior to the effective date of the Act were to be treated with some care; the acquisition of a job under the old dis-

\(^{249}\) 110 Cong. Rec. 12723 (1964) (remarks of Senator Humphrey). Senator Dirksen denied that any attempt had been made to change or "water down" the bill. Id. at 11936 (remarks of Senator Dirksen).

\(^{250}\) Cooper & Sobol 1606 n.21.

criminatory system was a closed transaction and not to be disturbed, despite the admitted fact that pre-Act discrimination had prevented incumbent blacks from competing for such positions.

More recent discriminatory assignment cases, however, have modified the rightful-place notion. Starting around 1972, the courts recognized that continued application of "neutral" seniority principles caused minority workers who were the victims of the discriminatory job assignments to continue to suffer the effects of race discrimination long after Congress had forbidden discriminatory practices. A number of courts, faced with continued post-Act discriminatory assignment patterns, have determined that an adequate remedy requires that minority employees be awarded seniority sufficient to secure and maintain their rightful place. Thus, the discriminatees are given seniority in their new jobs from the dates on which they qualified for transfer, often without judicial consideration of whether positions were available on these dates or whether the beneficiaries would have transferred if given the opportunity. The courts apparently have recognized that more recent actions taken pursuant to a discriminatory seniority procedure constitute a present illegality not saved by the "prospective only" statements in the legislative history and thus are far less reluctant to disturb the expectations of incumbent whites based on seniority which has been accumulated since the passage of Title VII.

B. The Propriety of Relief

A determination that disproportionate layoffs of recently-hired female and minority employees constitute an unlawful employment practice forbidden by sections 703(a) and 703(c) and not exempted by section 703(h) does not lead one directly to an examination of the types of relief appropriate to deal with this problem. Rather, as noted earlier, the limitations imposed by section 703(j), the anti-preference provision, must be examined. Section 703(j) states

252. Rowe v. General Motors Corp., 457 F.2d 348, 358 (5th Cir. 1972).
255. See text accompanying notes 141-62 supra.
that employers and unions may not be required to "grant prefer-
ential treatment to any individual or to any group" because of an
imbalance which may exist between the number or percentage of
any racial or sexual group represented on a work force "in compar-
ison with the total number of percentage of persons" of such race or
sex in the surrounding community. Judge Wisdom referred to this
 provision in Papermakers Local 189 when he stated that fictional
seniority could not be granted since it would constitute preferential
treatment. The more recent cases, however, indicate that section
703(j) does not prevent color- or sex-conscious remedial efforts when
dealing with the effects of current seniority layoffs.

Both the courts and the Congress have accepted the need for
Title VII relief which does more than merely guarantee equal treat-
ment in the future; the cases reflect a growing recognition that the
past effects of discrimination must also be purged. Beginning with
the Fifth Circuit's remedy in Asbestos Workers Local 53 v. Vogler
and continuing through Carter v. Gallagher and Rios, invitations
to shape "forceful but formless" remedies have been consistently
rejected while decrees designed to eliminate the lingering effects of
past discrimination have consistently been fashioned. Especially in
recent years, when discriminatory practices have persisted long past
the effective date of the Act, orders have been issued which require
immediate, color-conscious affirmative action.

The sole statutory limitation on the availability of affirmative re-
lief, once prohibited discrimination has been found, is section 703(j).
The courts have had little difficulty in concluding that it does not pre-
clude relief. Even the notion that section 703(j) limits the powers
granted under section 706(g) has been firmly rejected, one judge
noting that the courts must do more than simply parrot the Act's
prohibitions. The prevailing view was expressed by the Sixth
Circuit in United States v. Local 38, IBEW. Reversing a district
court's refusal to require affirmative relief, Judge Edwards concluded
that section 703(j) could not be viewed as barring the imposition
of remedies necessary to prevent the "continuation of effects of past
discrimination" resulting from present, facially neutral practices, not-

257. Papermakers Local 189 v. United States, 416 F.2d 980, 995 (5th Cir. 1969),
259. 452 F.2d 315 (8th Cir. 1971).
ing that a more restrictive reading "would allow a complete nullification of the stated purposes of the Civil Rights Act of 1964.\textsuperscript{263}"

The present understanding of section 703(j)'s role was expressed by the Second Circuit in \textit{Rios} where the court found that preferential quotas were barred only where a racial imbalance in a work force was "attributable to causes other than unlawful discriminatory conduct."\textsuperscript{264} The 1972 Senate rejection of proposed amendments to Title VII designed to prohibit "discrimination in reverse," that is, the use of color-conscious remedial orders, confirms the view expressed in these cases.\textsuperscript{265} Congress, at least now, intends to permit effective affirmative action to remedy the present effects of previous discrimination.

If further support is needed to establish the propriety of remedial quotas in the current exclusionary layoff cases, it may be found in the "consequence" test for discrimination adopted by the Supreme Court in \textit{Griggs}.\textsuperscript{266} The Court made quite clear that the basic purpose of Title VII is the elimination of the consequences of employment practices which have tended in the past to establish a discriminatory preference for white employees. Prior exclusionary hiring practices have prevented women and members of racial minorities from obtaining a full and equal opportunity to accumulate relevant seniority. The current spate of disproportionate layoffs is no less than a direct consequence of those exclusionary practices. Under the Supreme Court's interpretation of the Act, illegal discrimination is thus established and remedies are appropriate.

It is perhaps possible to construe \textit{Griggs} as barring affirmative relief which would result in the displacement or reduction of the working hours of incumbent whites with greater total seniority. Before proposing the consequence test, the Chief Justice suggested, in dicta, the Court's view on the preference question:

\begin{quote}
In short 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. Discriminatory preference for any group, majority or minority, is precisely and only what Congress has proscribed.\textsuperscript{267}
\end{quote}

\textsuperscript{263} \textit{Id.} at 149-50.


\textsuperscript{265} 118 \textit{Cong. Rec.} 1676, 4919 (1972).

\textsuperscript{266} \textit{See} notes 181-84 \textit{supra} and accompanying text.

Read literally, this statement could be interpreted as reflecting a belief that Title VII merely requires present "equal treatment" for minorities without regard to the "perpetuating effects" of past discrimination. Yet such a reading is totally out of keeping with the meaning imposed by the context on the phrase "discriminatory preference." In an earlier part of the opinion, Chief Justice Burger had stated that facially neutral procedures could not be maintained if they served to "freeze" the status quo resulting from prior discriminatory employment practices. In the paragraph following his remark on preferences, the Chief Justice noted that "[t]he Act prescribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." In determining what would not be discriminatory in the face of disproportionate impact, the Chief Justice admitted of only one limitation: "The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." More importantly, the Court held that facially neutral testing and diploma requirements, even if adopted without discriminatory motive, could not be maintained absent a showing of a "manifest relationship" to job performance, where, as a consequence of those procedures, minority people either were not hired or were forced to remain in less desirable positions. Read in the context of the entire decision, the Chief Justice's use of the phrase "discriminatory preference" indicates a far more limited definition than "any color-conscious relief." Rather, the remark regarding preferences can only mean that the Act does not require employers to hire or retain unqualified minority persons.

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268. Id. at 430.
269. Id. at 431.
270. Id. The employer may avoid the illegality of the disproportionate impact of his practices only by meeting the stringent requirements of the business-necessity doctrine. That doctrine, however, should pose no barrier to a court which decides that some remedial decree is required in a layoff case. Since minority employees were hired and were not fired due to lack of ability, it can be presumed that these individuals are qualified to do the remaining work in a competent manner. The Court stressed in Griggs that the Act "does not guarantee a job to every person regardless of qualifications." Id. at 430. If an employer is able to demonstrate that the minority workers have not been employed long enough to acquire the experience and skills needed to perform available jobs in a safe and efficient manner, the test would be satisfied and reinstatement would be an inappropriate remedy. In such a situation, the business purpose would be sufficiently compelling to override the disparate impact of the layoffs. See Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971); Note, Business Necessity Under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach, 84 YALE L.J. 90 (1974). Of course, such cases will be quite rare, for the "last hired" rule normally displaces the worker with the least seniority, regardless of his or her past performance and job qualifications.
Nonetheless, Chief Justice Burger's statement is troubling because it touches upon a difficult aspect of the current layoff problem. Is it appropriate to grant relief, in the form of reinstatement via constructive seniority, to laid-off minority employees who were not themselves the victims of the earlier discriminatory exclusion? In short, does Title VII provide a class remedy for members of minority groups merely based on their group affiliation?

The circuit and district courts have had little difficulty with this question. Beginning with *Asbestos Workers Local 53 v. Vogler* and continuing through *Rios v. Steamfitters Local 638*, remedial decrees have been affirmed which require racially exclusionary craft unions to admit and to refer, often on a preferential-ratio basis, qualified members of minority groups without regard to whether the individuals to be benefited had themselves suffered from the discriminatory practices. Unfortunately, the courts have failed to state specifically the reasons favoring such color-conscious group remedies. One court noted, almost in passing, that if the rights of minority workers had not been violated in the past, many more "would enjoy those rights than presently do so and . . . the ratio of minority members enjoying such rights would be higher." This, however, is more of a factual speculation than a reasoned explanation. The Eighth Circuit proffered more in the way of explanation in *Carter v. Gallagher*. It justified its limited-preference hiring order on the grounds that it eliminated the present effect of prior discriminatory practices and that it was the only way to make "meaningful in the immediate future the constitutional guarantees against racial discrimination."

These decrees imply a judicial awareness that discrimination is imposed against a class and not just a few individuals; its effects can be redressed, in part, only by remedies which improve the employment status of members of that class. In adopting Title VII, Congress recognized that discrimination in employment was directed toward entire minority groups; specific individuals were hurt because of their group identification, not because of their personal lack of qualifications. When the "discrimination in reverse" amendments were rejected in 1972, the Senate exhibited a more refined understanding of the remedies including preferential quotas,

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271. 407 F.2d 1047 (5th Cir. 1969).
272. 501 F.2d 622 (2d Cir. 1974).
273. *Id.* at 631.
274. 452 F.2d 315 (8th Cir. 1971).
275. *Id.* at 331; see Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972).
276. See 118 CONG. REC. 1676, 4919 (1972).
that are necessary to improve the status of minorities in the work force.

Though the *Griggs* decision did not involve the review of a remedial order, the Supreme Court's adoption of the consequence test stands as a recognition that remedial decrees need not be limited solely to identifiable victims of past discrimination. The test underscores the evolving judicial recognition that antidiscrimination laws are "aimed at vindicating the group interests of the victims of discrimination."\(^{277}\) By ending the diploma and testing requirements the Court helped not only minority workers who had suffered directly by being frozen into menial positions, but also those other group members who would subsequently seek employment in the future. The remedy was not tailored only to the needs of the past victims of the discriminatory practices, for at least those who had retired or moved on to different work would never benefit from it. Rather, its benefits were designed to be used by other members of the group who would thereby effectuate its underlying purpose—upgrading the employment status of the group as a whole.

If Congress had intended that the remedial benefits of Title VII be limited to those workers who had been the direct victims of discrimination, there would be little need for remedial measures beyond compensatory damages such as back pay and possibly punitive or exemplary damages. After all, it is quite common for our laws to depend primarily, if not solely, on monetary damage awards for both penalties and deterrence. This is perhaps most often true where the purpose of a law is the protection of individuals as opposed to the implementation of social change. And, of course, where societal interests and goals are paramount, the law forsakes the compensatory approach entirely and imposes criminal sanctions. Between the goal of personal protection and the goal of social change is a large area in which the law seeks both to protect individual interests and to pursue societal goals. Quite often the remedies here are drawn from the powers of courts of equity; primarily, the law will authorize the use of injunctions which provide immediate relief to the victim and prevent injury to those who might otherwise suffer in the future were the illegal acts not stopped.

The remedies authorized by Title VII quite clearly indicate that the law is affirmatively seeking to foster the societal goal of equal employment opportunity as well as compensating the victims of discrimination. The law quite explicitly reinforces its mandate for reform by pointing out that the remedial powers to enjoin and grant

\(^{277}\) Blumrosen, *supra* note 264, at 682-83.
affirmative relief are not limited to compensatory remedies protecting
only the individual, such as reinstatement, hiring, and awards of back
pay.\textsuperscript{278} Remedies like those employed in \textit{Carter} and \textit{Rios}, that are
directed toward improving the employment prospects of unidentified
minority group members, are understandable only in terms of the
group and the societal interests present. As a consequence of the
prior exclusionary practices, members of the minority groups have
been deprived of meaningful employment opportunities in certain
jobs and professions, a practice harming not only the excluded group
but, as Congress well recognized, all Americans.\textsuperscript{279} The group and
societal interests in eliminating the consequences of employment
discrimination demand that the remedy go to a member of the ex-
cluded group, even though the benefited individual may not have
suffered personally. It must be realized that the goal of Title VII—
full equal employment opportunity—is not accomplished solely through
making past victims whole. All that such limited relief accomplishes
is to provide employment for a few specific individuals. To fully
accomplish the great change mandated by Congress through Title
VII the courts must provide and preserve full opportunity for the
group. In preserving minority employment during economic
slumps, courts must be vigilant lest the goal of equal employment
opportunity be thwarted.

C. \textit{"Such Affirmative Relief as May Be Appropriate"}

This study's primary concern is the availability of Title VII relief
for recently hired minority employees who have been, or may be,
laid off under the seniority layoff rules. Despite Professor Blum-
rosen's rather flippant dismissal of the claims of "reverse discrimi-
nation" in preferential relief as a "red herring,"\textsuperscript{280} probably the
most difficult aspect of the current disproportionate layoff cases is
the development of remedies which eliminate, as far as possible,
the consequences of prior exclusionary hiring practices without un-
duly burdening incumbent white employees who, in most cases, have
not been responsible, at least directly, for the previous discrimina-
tion.

Though it is clear that seniority systems embodying the "last
hired" principle are not immutable, still it is quite difficult to pro-
pose a solution which would, in effect, visit the employer's sins on
individuals whose sole indiscretion was their decision to accept jobs

\begin{thebibliography}{99}
\bibitem{278}42 U.S.C. § 2000e-5(g) (Supp. II, 1972); see Robinson v. Lorillard Corp.,
444 F.2d 791, 802 (4th Cir. 1971).
\bibitem{279}110 CONG. REC. 6563-64 (1964) (remarks of Senator Kuchel).
\bibitem{280}A. BLUMROSEN, BLACK EMPLOYMENT AND THE LAW 247-49 (1971).
\end{thebibliography}
with a company which refused to hire blacks or women. It is easier to say, in a discriminatory assignment case where minority employees are accorded their "rightful place," that white incumbents "suffer no inequity by being deprived only of that which they received as a consequence of discrimination, even though that discrimination may have been on the part of [the employer]." Limited-preference hiring orders for public employees are also easier to impose, for at most they involve delays in hiring white applicants who are not yet on the job. And in craft-union cases like Asbestos Workers Local 53 v. Vogler, where the remedial order effectively displaced incumbent whites during an economic slump, the courts can more readily ignore the detrimental effects on the white workers because they had a direct hand, through their union activities, in shaping the exclusionary policies.

In the most recent cases, however, the employees' bargaining representative has merely insisted on seniority rules embodying the "last hired" doctrine. To require, in such instances, that the incumbent workers bear the brunt of remedies for disproportionate layoffs seems both unfair and misdirected. If the burden of a remedy in these cases is to be justly placed, it should involve, to a large degree, the employer. After all, it is the company's discriminatory activities which brought about the exclusion in the first place, and therefore only fair that the company share at least part of the burden which accompanies the remedial efforts.

Where the employer has engaged in discriminatory refusals to hire after the effective date of the Act, courts could require that it retain and pay all white and minority employees hired since that time, even if there is insufficient work to keep all fully occupied. Conversely, if the company has retained minority employees while laying off more senior whites, the employer could be ordered to pay

283. In Stamps v. Detroit Edison Co., 365 F. Supp. 87, 124 (E.D. Mich. 1973), rev'd sub nom., EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975), petitions for cert. filed, 44 U.S.L.W. 3106 (U.S. Aug. 26, 1975) (No. 75-239), 44 U.S.L.W. 3150 (U.S. Sept. 23, 1975) (No. 75-393), Judge Keith ordered both the company and one union to pay punitive damages to the plaintiff class because the defendants had been "extremely obdurate and intransient in their determination to implement and perpetuate racial discrimination in employment at Detroit Edison." The Sixth Circuit reversed, however, on the grounds that Title VII only authorized equitable remedies and not legal remedies like punitive damages. Id. at 308-09.
284. Indeed, this was the procedure adopted in the remedial decree in Watkins v. Steelworkers Local 2369, 364 F. Supp. 1221 (E.D. La. 1974), rev'd, 516 F.2d 41 (5th Cir. 1975).
to those who are displaced part of the wages they would have received if still employed.\textsuperscript{285} Even where exclusionary hiring practices have been confined to the pre-Act period, the employer could be required to reinstate or compensate at least some of the minority workers, as long as such relief would not interfere with the seniority credits acquired by white incumbents before July 2, 1965.

Remedies which require payments to those who don't work encounter the very real problem that, rather than fostering equal employment, the resultant financial drain in hard times is in effect a death sentence for the company. A more realistic response could require that the company contribute to a retraining fund for its displaced workers who would probably not be recalled for steady employment in the near future.\textsuperscript{286} If the strict "last hired" rule is upheld, these retraining funds would be made available only to minority persons. However, if it is determined that the burden of reverse-seniority reductions should be allocated, those whites who are laid off despite their greater seniority would be eligible to share in the retraining funds. Where the union is found to be partly responsible for the exclusionary hiring pattern, it, too, could be ordered to contribute to the fund. An administrator named by the court could receive and disburse the retraining monies as well as assist displaced workers in selecting training programs and securing positions in fields where openings are available.

The propriety of ordering the establishment of such retraining funds under Title VII is not altogether certain. The commentators have divided on the question of monetary relief. Some have concluded, without a detailed examination of the statute and its legislative history, that such awards are appropriate.\textsuperscript{287} But at least one writer has found that the legislative history, which indicates that relief is to be patterned after section 10 of the National Labor Relations Act, cannot support such a remedy.\textsuperscript{288} That same article, however, found no real need for such compensatory relief, noting that work-related monetary injuries would fall under the back-pay provision of section 706(g).\textsuperscript{289} The courts, too, are split. Some have found

\begin{itemize}
\item \textsuperscript{285} See Walker, \textit{Title VII: Complaint and Enforcement Procedures and Relief and Remedies}, 7 B.C. IND. & COM. L. REV. 495, 519 (1966).
\item \textsuperscript{286} See BLUMROSEN, \textit{supra} note 280, at 208-10. \textit{But see} Blumrosen, \textit{Layoff or Work Sharing: The Civil Rights Act of 1964 and the Recession of 1975}, CIV. RIGHTS DIG., Spring, 1975, at 35.
\item \textsuperscript{287} See BLUMROSEN, \textit{supra} note 280, at 208-10; Cooper & Sobol 519-20; Walker, \textit{supra} note 285, at 519-20; Note, \textit{Title VII and the Incumbent Negro} 1281.
\item \textsuperscript{288} \textit{Developments—Title VII} 1258.
\item \textsuperscript{289} \textit{Id.} at 1259. The author also concluded that punitive damages would be
\end{itemize}
punitive but not compensatory damages appropriate; others have determined that the Act permits only the awarding of back pay and equitable relief. 290

Even assuming that the creation of a retraining fund or similar compensatory award is proper under the Act (either because such relief is work-related, thus falling within the back-pay provision, or because such compensatory remedies constitute "appropriate" affirmative action), additional actions that more directly affect the employment status of whites may have to be ordered. In such situations, incumbent whites with greater seniority may have to be laid off or have their working hours or salaries reduced to alleviate the disparate consequences of reverse-seniority layoffs. For example, force reductions among employees hired after July 2, 1965, could be made according to the individual's chronological age. This would cause only minor disruption of the seniority system and would protect some of the same values most important to such systems, in particular, preference for the older employees. 291 Layoffs could be rotated among the more recently hired workers, thus permitting all affected employees to earn more than they would by collecting unemployment compensation. Perhaps the most acceptable solution would be to establish a work-sharing procedure in which all employees worked a 3- or 4-day week or a 6-hour shift. 292 During the recent economic slump, similar arrangements were used by a number of employee organizations to avoid massive layoffs and so would not be quite so experimental or alien. 293

appropriate. Id. at 1261-65. Contra EEOC v. Detroit Edison Co., 515 F.2d 301, 308-09 (6th Cir. 1975).


291. Cooper & Sobol 1635-36.


293. Local 134 of IBEW (Chicago) agreed to a four-day workweek with a cut in pay. 88 L.R.R.M. 109 (Feb. 3, 1975). The editorial and business employees of the Washington (D.C.) Star-News accepted a four-day week at four days pay to avoid layoffs. 87 L.R.R.M. 351 (Dec. 10, 1974).
In any event, the courts should avoid becoming involved in determining the exact procedures to be followed in these disproportionate layoff situations. Rather, a remedial goal should be set, and the parties, including plaintiff, employer and union, directed to work out the details required to meet that goal.\textsuperscript{294} It has been suggested that the National Labor Relations Board could play an important role in the resolution of these problems by requiring employers and unions to develop nondiscriminatory work allocation plans.\textsuperscript{295} Such NLRB procedures could be effective in forcing revision of seniority provisions in future bargaining sessions. But the immediacy of the problem created by the present high unemployment rate demands that layoff procedures be altered now, before the existing contracts become due for renegotiation. Only a court order can provide the impetus necessary to bring about immediate changes in a manner that will both limit the harm to recently hired minority workers and, at the same time, protect the legitimate interests of the employer and incumbent whites in the established seniority system.

It is not necessary that courts only require some form of reinstatement for those laid off. The law mandates the use of affirmative relief. Courts, after balancing the interests of the parties, can be creative in fashioning remedies that can protect the measure of equal employment achieved in the last decade. Unfortunately, however, such has not been the case.

\section*{IV. The Reverse Seniority Layoff Cases—The Analysis Applied}

Four circuit courts of appeal have recently been faced with the problems raised by "last hired, first fired" seniority systems which cause disproportionate layoffs of female and minority group employees. Three of these courts have refused to recognize that the present discriminatory effects of prior exclusionary hiring are as prohibited by Title VII as are the present discriminatory effects of past discrimination in job assignments. The hallmark of these three decisions...
sions has been their strained attempts to read into the bona fide seniority system exemption a distinction between plant- or employment- and job- or departmental-seniority systems. Although in some of these cases the result reached is at least arguably equitable, the reasoning in each is open to question in three respects.

First, the decisions continue to misread the April 8 statements made in Congress by proponents of Title VII. Secondly, in order to sustain the plant- versus departmental-seniority system distinction, these decisions adopt the result-oriented dicta of Judge Wisdom in *Papermakers Local 189*. In doing so, they gloss over the obvious conflicts which exist between their reasoning and that applied to the craft-union as well as the departmental seniority cases. Thirdly, the decisions skirt the clear conflict between the sanctioned objective effects of the "last hired, first fired" systems and the objective "consequence test" laid down by the Supreme Court in *Griggs* as the standard for ascertaining discriminatory intent.

The Seventh Circuit had occasion to pass on the validity of the "last hired" principle under Title VII in *Waters v. Wisconsin Steel Works of International Harvester Co.*296 Waters had charged the company with discrimination as a result of his layoff under procedures established by a collective bargaining agreement. He claimed that the seniority layoff rule perpetuated the company's discriminatory hiring practices.297 He applied for employment as a bricklayer in 1957, but was only hired in July 1964. Before completion of his 90-day probationary period, he was laid off as part of a general force reduction. In March, 1967, he was recalled according to company policy rather than a contractual right of recall since his seniority rights had not been established by completion of the probationary work period. Two months later he was laid off again; he refused a subsequent recall offer.298 After the earlier layoff, which also affected eight white employees with five to six years seniority, the company and union negotiated a severance agreement for those white individuals only, permitting them to elect to retain contractual seniority rights or receive $996 in severance pay. All eight chose the pay and thus forfeited contractual rights to recall. The company, however, had underestimated its needs and so began to recall some bricklayers. When this process began in 1966, the company believed an injustice had been done to those eight; an amendment to the ear-

297. *Id.* at 1312.
298. *Id.* at 1313.
lier agreement restored their contractual seniority rights and three of the eight returned to work without reapplying for employment. The coplaintiff Samuels had never worked for the company but had applied for a job prior to the amendment restoring the white workers' seniority.

Plaintiffs claimed that the amendatory agreement was discriminatory since, by restoring contractual seniority, it advanced the three whites ahead of Waters and Samuels on the hiring and recall roster. The defendant responded that those three would have been recalled earlier because, as a matter of company policy, former employees without contractual rights were offered reemployment according to their prior length of service.

The district court found for the plaintiffs, holding, inter alia, that the 1964 and 1967 layoffs of Waters according to the "last hired" rule violated Title VII and that the rights of both plaintiffs were harmed by the amendatory agreement. The court ordered the company to offer employment to both Waters and Samuels and directed the union and company to share in making back pay awards of $5,000 to each plaintiff.

On appeal, the plaintiffs argued that the seniority layoff procedure perpetuated pre-1964 hiring discrimination because blacks were laid off before and recalled after certain whites who, but for that hiring discrimination, might not have had seniority with the employer. The defendant, noting the racial neutrality of its layoff and recall system, argued that striking down such a procedure would "countenance reverse discrimination." The company argued that its employment seniority system, unlike departmental or job seniority devices, granted equal credit to minorities and whites for actual length of service.

Writing for the court, Judge Swygert asserted that the defendant's seniority system, with the "last hired" principle, was not discriminatory and did not perpetuate prior discrimination in violation of the Act, adding, "to that end we find the legislative history of Title VII supportive of the claim that an employment seniority system is a 'bona fide' seniority system under the Act." After quoting the April 8 statements verbatim, he concluded that fictional seniority awards were not permissible. Further, he distinguished,

299. Id. at 1313-14.
300. Id. at 1311.
301. Id. at 1314.
302. Id.
303. Id. at 1317.
304. Id. at 1318.
for the purposes of Title VII, employment seniority systems from job or departmental seniority procedures. The transfer restrictions maintained in the latter, he reasoned, created unearned preferences in favor of white incumbents with fewer total years of service then minority group employees. An employment seniority system, on the other hand, "preserves only the earned expectations of long-service employees." Judge Swygert concluded,

An employment seniority system embodying the "last hired, first fired" principle does not of itself perpetuate past discrimination. To hold otherwise would be tantamount to shackling white employees with a burden created not by them but by their employer.

Noting that it had drawn a "fine line between the plaintiffs' claim of discrimination and defendants' countercharge of reverse discrimination," the court urged employers to be "discrete" in devising such employment seniority systems.

Judge Swygert then focused on the problem directly before the court. With respect to the amendatory agreement, he held that the reinstatement of contractual seniority rights to the three whites was discriminatory as to Waters but not Samuels. His effort to identify a basis for this determination, however, is a bit strained. Judge Swygert stated that the company's prior hiring discrimination and its "implementation of an employment seniority system," although bona fide, put the defendant in a "racially precarious position . . . at the brink of present discrimination." The amendatory agreement to that system that benefited only displaced whites pushed the company over the brink and "into the realm of presently perpetuating the racial discrimination of the past." The case was remanded for recomputation of the back pay and attorneys' fees awards.

*Waters* is a difficult decision to criticize, mainly because the court's analysis is less than clear. The confusion is the result of the court's failure to grant relief to Samuels. Arguably, the company policy was not at all discriminatory. But assuming that it was, why was it discriminatory only as to one plaintiff? The only significant distinction between the two plaintiffs is that one had been employed by the company while the other had only applied for employment. Apparently, the court thought that the company could not give contractual rights to white workers ahead of black workers. But the

305. Id. at 1319-20.
306. Id. at 1320.
307. Id. at 1321.
308. Id.
309. Id. at 1322.
court implied that the company could, merely as a matter of policy, prefer whites who had severed their relations with the company to black job applicants and could do so on its own initiative. Both plaintiffs had been injured by the company policy; both had been deprived of the opportunity for employment. By accepting the severance pay option, the white employees had sold their rights to job preference under the supposedly bona fide seniority system. Thus when the rights were reinstated in June 1966, the three whites were moved ahead of Samuels as well as Waters, since Samuels had priority as an applicant. They were made the beneficiaries of a discriminatory preference. The only reason given for this preference was a discretionary company policy. But even that justification is weak in light of the facts. Samuels had applied for employment before this agreement became effective. The policy did not appear to give the white employees preference immediately after severance but rather at some later date when the company decided to hire them back ahead of senior applicants. Objectively, Samuels was as much a victim of the preference as Waters and should have been accorded a relief similar to Waters'.

The court's analysis of the legislative history and the analogous case law, although not surprising, is nonetheless disturbing. In spite of confronting a problem of first impression—seniority rights and exclusionary hiring—the court chose to rely on prior but dissimilar cases rather than engage in the complex analysis that the unique facts of the case required.

The court did not even recognize, let alone endorse, the suggestion that the April 8 statements exempt all pre-Act seniority rights from remedial modification. Rather, Judge Swygert asserted, without any real examination of their language, that Senator Clark and the other proponents of Title VII intended to grant bona fide status only to employment, as opposed to departmental- or job-seniority systems. As he noted, the invidious discriminatory potential of job and departmental procedures is great, as such devices often prefer whites over more senior minority workers who have been discriminatorily assigned. However, nowhere in the April 8 statements, or anywhere else in the congressional debates on the bill, does Congress tie the scope of Title VII to distinctions among the different types of seniority procedures and the different discriminatory consequences they create. The examples used in those statements simply refer to exclusion of minority persons from seniority units without regard to the manner of exclusion; the exemptions mentioned there cannot possibly be read as a blanket grant of bona fide status to all employment seniority systems. Congress simply
did not address that question in its deliberations. Judge Swygert reveals his own doubts about his interpretation of the exemption through his suggestion that employers be "discrete" in devising such systems and by his observation that the company's use of an employment seniority system, coupled with its prior discrimination, had placed it in a "racially precarious position." Surely, if employment seniority systems were so clearly protected, they would neither require such caution and circumspection nor involve such potential dangers.

Judge Swygert relied heavily on Judge Wisdom's dicta in Papermakers Local 189\textsuperscript{310} in finding constructive seniority an inappropriate remedy under Title VII. As has been noted, these statements were the product of Judge Wisdom's need to place some interpretation on section 703(h) that would not require him to deny relief in the departmental seniority case before him.\textsuperscript{311} Furthermore, Judge Wisdom did not consider the interpretation of that section which most squares with the April 8 statements, \textit{i.e.}, that rights acquired prior to the effective date of the Act were the only rights to be protected, at least where the discriminatory practices occurred after the effective date of Title VII. Rather, he spoke only in general terms of fictional seniority and reverse discrimination, articulating a theory that was totally ignored in the craft-union cases.\textsuperscript{312}

Needless to say, the court should not have based its decision on an employee-applicant distinction. If rehiring the three white employees was discriminatory, it was discriminatory as to both Waters and Samuels. It occurred after the effective date of Title VII. The white employees had no pre-Act seniority rights as they had forfeited them in exchange for severance pay. Had the court used a pre-Act, post-Act interpretation of section 703(h) and its legislative history, it would have had to provide a remedy to neither or to both, but it certainly would not have been free to deny only Samuels the benefits of Title VII.

The Third Circuit found two grounds for holding that disproportionate layoffs did not violate Title VII's provisions in \textit{Jersey Central Power & Light Co. v. Local Unions, IBEW.}\textsuperscript{313} After a charge of discrimination not related to the instant case had been lodged with the EEOC, a conciliation agreement had been signed by the

\textsuperscript{310} Papermakers Local 189 v. United States, 416 F.2d 980, 994-95 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970).

\textsuperscript{311} See text accompanying notes 115-30 supra.

\textsuperscript{312} See, e.g., Vogler v. McCarthy, Inc., 451 F.2d 1236 (5th Cir. 1971).

company, the unions, and the EEOC. The agreement provided in part that the company would make reasonable efforts to recruit females and minority group persons to fill vacant craft positions.\textsuperscript{314} That section of the agreement concluded, "The wages, benefits, other conditions of employment and seniority date of such employee shall be determined in accordance with the provisions of the Collective Bargaining Agreement."\textsuperscript{315} The conciliation agreement also included a special promotion and transfer program and a five-year "Affirmative Action" project to increase the percentage representation of minority group employees. Prior to the execution of the conciliation agreement, the company and unions signed a new collective bargaining agreement, continuing the use of plant-wide seniority to determine layoffs, \textit{i.e.}, "last hired, first fired."\textsuperscript{316}

Faced with the need to reduce the size of its work force, the company sought a declaratory judgment to determine which of the agreements should govern the layoff procedure. The district court ordered the company to disregard the collective bargaining agreement to prevent a reduction in the percentage of female and minority employees.\textsuperscript{317} District Judge Biunno held that the labor contract could not be permitted to frustrate the basic purpose of the conciliation agreement which was to increase the percentage representation of females and minority persons on the work force; where they were in conflict, the conciliation agreement was to control. Layoffs were to be apportioned to maintain the same female and minority group ratios that existed one month prior to the commencement of the layoffs.\textsuperscript{318}

The Third Circuit first considered what it called the "Contract Theory" and concluded that, with respect to layoffs, the two agreements did not conflict. The conciliation pact was designed to increase the percentage representation of females and minority persons by instituting an affirmative hiring program, "not by resort to a system of 'artificial seniority'."\textsuperscript{319} Writing for the majority, Judge Garth suggested it was important that the EEOC agreement, neither expressly nor by implication, affect the layoff provisions of the collective bargaining agreement.\textsuperscript{320} He then turned to consider whether

\begin{itemize}
  \item \textsuperscript{314} Id. at 694-95.
  \item \textsuperscript{315} Id. at 695.
  \item \textsuperscript{316} Id. at 695-96.
  \item \textsuperscript{317} 8 CCH FAIR EMPL. PRAC. CASES \textsection{} 9759 (D.N.J. 1974).
  \item \textsuperscript{318} Jersey Cent. Power & Light Co. v. Local Unions, IBEW, 508 F.2d 687, 693 (3d Cir. 1975).
  \item \textsuperscript{319} Id. at 700-01.
  \item \textsuperscript{320} We regard the conciliation agreement as unambiguous in its requirements that an increased proportion of females and minority group persons
\end{itemize}
"a seniority clause providing for layoffs based on seniority must be modified as being contrary to public policy and welfare." The congressional view of public policy, as expressed in Title VII, controlled; the court's reading of the Act revealed "no statutory pro-
scription of plant-wide seniority systems." Congress did not in-
tend "per se" violations be found whenever minority group persons are disadvantaged by seniority layoffs.

Going beyond the record, the court considered the effect that evidence of discrimination would have upon the propriety of judicially modifying seniority layoff procedures. Judge Garth concluded that Congress had barred evidence concerning the perpetuating ef-
fects of plant-wide systems because it regarded such systems as bona fide. The only competent proof in a challenge to a plant-
wide procedure, he reasoned, related to its bona fide character, "evidence directed either to the neutrality of the seniority system or ... to ascertaining an intent or design to disguise discrimina-
tion." Apparently, Judge Garth did not think that the objective evidence of discriminatory effect was probative of discriminatory intent. The fact that the system perpetuates past hiring discrimi-
nation was not fatal; "this result was recognized and left undis-
turbed by Congress in its enactment of § 703(h) and (j)." Judge Garth then quoted the now-familiar parts of the April 8 statements to support his view of congressional intent; Waters and Papermakers Local 189 were cited as well. The court's conclusion is impor-
tant:

We thus conclude in light of the legislative history that on balance a facially neutral company-wide seniority sys-
tem, without more, is a bona fide seniority system and will be sustained even though it may operate to the disad-
vantage of females and minority groups as a result of past employment practices. If a remedy is to be provided al-
leviating the effects of past discrimination perpetuated by layoffs in reverse order of seniority, we believe such remedy

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be hired, but that once hired, workers in these classes be controlled by the terms and conditions of employment as set forth in the collective bargain-
ing agreement. Accordingly, we read the conciliation agreement as not modifying the promotion, transfer or layoff practices established by the collective bargaining agreement once females and minority group persons have been employed.

Id. at 702.  
321. Id. at 704.  
322. Id. at 705.  
323. Id. at 706.  
324. Id.  
325. Id. at 707.  
326. Id. at 707-09.
must be prescribed by the legislature and not by judicial decree.  

Judge Garth recognized the peculiar nature of this decision, noting again that no proof had been offered to challenge the "bona fide" nature of the seniority system.  

In a separate concurring opinion, Judge Van Dusen expressed disagreement with the majority's interpretation of the legislative history of, and public policy represented by, Title VII. He noted that systems "neutral on their face, and even neutral in terms of intent" had been struck down in a number of earlier cases to prevent "locking in" the effects of prior discrimination. Their rationale, he felt, applied "equally to plant-wide seniority systems where the plant formerly hired on a 'whites only' basis." Judge Van Dusen quite rightly pointed out that the court's distinction between plant-wide and departmental or job seniority was based only on its view of the legislative history, with which he disagreed, and not on a conclusion that the elements which required modification were different in those systems. He also caught the court's error in refusing to apply the objective consequence or effect test of Griggs in ascertaining the discriminatory intent of a seniority system.

The Third Circuit fell prey to the trap set by the Seventh Circuit in Waters: especially where there is some proof of post-Act discrimination, there simply is no indication of a congressional exemption of all plant-wide seniority systems in the April 8 statements or anywhere else in the legislative history of Title VII. Judge Garth quoted those statements but failed to refer specifically to any language which would support his conclusion. He could not, of course, since Congress did not address that question. Papermakers Local 189 likewise was not concerned with plant-wide seniority; Judge Wisdom's hypothetical was offered in the context of a classic segregated-plant case. Rather than deal with these problems, Judge Garth followed blindly the trail marked in Papermakers Local 189 and followed in Waters, replacing analysis of the Act and its legislative history with quotation and citation.

More importantly, the court's attempt to prevent the "chaotic consequences" that would follow the disruption of plant-wide procedures by devising a two-tiered evidentiary process for challenging such systems finds no support in either section 703(h) itself or the

327. Id. at 710.
328. Id.
329. Id. at 711-12, citing Cooper & Sobol 1629.
330. Id. at 712.
331. Id.
legislative history. Beginning with Quarles, the cases consistently have held that a seniority system is not bona fide, and thus is subject to modification, if the section 703(h) proviso is violated by an intention to discriminate in the establishment of the system or in the hiring practices which fill it. No court before Waters found exemptions for plant-wide seniority systems; none before Jersey Central found that different standards of proof were required to challenge such systems, particularly with respect to defining discriminatory intent as a question of subjective intent in the face of the objective “consequence” test mandated by the Supreme Court in Griggs. In the April 8 statements, Congress merely said that seniority rights acquired during pre-Act exclusionary hiring periods were not to be modified; it did not say that the systems themselves under which such rights were acquired were to be per se bona fide and so exempt from external modification regardless of the extent to which the goals of the Act were thwarted. Protecting the then-established rights of the individual white employees was the sole focus of those memoranda.

The Third Circuit was not altogether comfortable with its own analysis, as the wording of its conclusion shows. “[O]n balance, a facially neutral company-wide seniority system, without more, is a bona fide seniority system.” Whether the “more” would be present where the elements of the Griggs “consequence” test are present or whether a subjective intent to deprive minorities of equal employment opportunity is required was not decided by the court. It is clear, however, that the required “more” was missing in the record here; no proof of discrimination in hiring was taken by the district court.

There is an almost tragic anomaly in Jersey Central. By following Papermakers Local 189 and narrowly construing the consent decree, the court successfully vitiated the gains that had been made only after governmental intervention. What Title VII gave Jersey Power's employees was not equal opportunity but merely a short-term lease on a job subject to termination at any downturn in Jersey Power's business. It seems doubtful that the remedial purposes of Title VII are served by giving women and racial minorities such uncertain equal opportunity merely because they were previously denied employment altogether. Had the court used a pre-Act, post-Act distinction, the burden of economic recession could have been equally divided.

The Fifth Circuit's most recent statement regarding the effect of Title VII on reverse-seniority layoff systems is Watkins v. Steelworkers Local 2369. In that case, the company's plant hired only two blacks (both during World War II) prior to 1965. Some were hired after that time; during 1971, 50 of the company's 400 hourly employees were black. By April 1973, substantial cutbacks in employment left only 152 hourly employees. Layoffs made according to a collectively bargained "last hired, first fired" rule reached workers hired as early as 1951; the necessary result was that, with the exception of the two blacks hired during the war, the remaining work force was all-white. Since recalls were to be made in the reverse order of the layoffs, the first 138 persons on the recall list were white.

The district court concluded that if the layoff procedures were valid, "the Company could not be expected to employ another black man for many years." The procedures were found to perpetuate the effects of the prior exclusionary hiring practices and therefore to constitute unlawful discrimination. The judge drew a single principle from precedent cases involving discriminatory job assignments and union work referral procedures: "[E]mployment preferences cannot be allocated on the basis of length of service or seniority, where blacks were, by virtue of prior discrimination, prevented from accumulating relevant seniority." The company was ordered to reinstate sufficient blacks from a recall list to achieve the same percentage of minority representation on the work force as had existed on the last hiring date, without displacing incumbent white workers. Future layoffs, if necessary, were to be allocated between white and black employees in accordance with their respective percentage of the work force at that time.

The Fifth Circuit reversed. The problem with the decision is not, however, the result. Given that Congress intended to leave undisturbed all seniority rights acquired prior to the effective date of Title VII, the district court was without authority, by virtue of section 703(h), to require that blacks be retained in preference to whites whose rights to employment were based on seniority acquired prior to July 1964. Since the layoffs had reached employees hired as early

336. Id. at 1224.
337. Id. at 1226.
338. Id.
339. Id. at 1232.
as 1951, the courts could not interfere with the recall of those whites who had been employed from 1951 to 1964. Therefore, the sweeping preference for black workers over these senior white employees was far too broad to be sustained.

The problem with the decision is that the court grounded its reasoning in Judge Wisdom's dicta in Papermakers Local 189, that plant-wide seniority systems are exempted by section 703(h). The plant seniority-departmental seniority distinction is not needed to decide the issues in this case. The perpetuation of this questionable distinction in this context is unfortunate. Indeed, the court itself seemed to be aware of this in that it actually narrowed its holding to something far less broad than the blanket validation of plant-wide systems. Although the court spoke at great length on the prudence of Judge Wisdom's dicta, it held, in essence, that the employees did not have standing since "[t]he individual employees who suffer layoff under the system have not themselves been the subject of prior discrimination."  

Despite the apparent popularity of the plant-departmental distinction there are courts that have not embraced the Fifth Circuit's view of the meaning of section 703(h). In Meadows v. Ford Motor Co. the Sixth Circuit, while acknowledging the difficulties inherent in reconciling the section with remedies directed at plant-wide seniority systems, explicitly refused to adopt Judge Wisdom's dicta. The case involved a Ford plant which had been opened in 1969 with over 900 men but no women employees. The plaintiff had applied for work but received no reply. The district court had found Ford guilty of discrimination and required, in part, that the plaintiff and thirty-one class members be placed in a priority job pool "in the order of the dates of their original application for production employment." The court, however, refused to award retroactive seniority and back pay.  

The Sixth Circuit did not attempt to resolve the issue of a court's power to modify plant-wide seniority systems. Instead, Judge Edwards, writing for the court, impliedly sanctioned some modification by laying down guidelines for the trial court to follow in fashioning an appropriate remedy:

There is, however, no prohibition to be found in the statute we construe in this case which prohibits retroactive seniority and, of course, the remedy for the wrong of discrimi-
natory refusal to hire lies in the first instance with the District Judge. For his guidance on this issue we observe, however, that a grant of retroactive seniority would not depend solely upon the existence of a record sufficient to justify back pay under the standards of the Back Pay section of this opinion. The Court would, in dealing with job seniority, need also consider the interests of the workers who might be displaced as well as the interests of the employer in retaining an experienced work force.\footnote{345}

The opinion does not attempt to distinguish between pre- and post-Act seniority rights. This, however, is not necessarily attributable to a rejection of such an interpretation of section 703(h). In fact, the decision is completely compatible with such an interpretation since the court approved the use of remedies modifying seniority rights, after appropriate interest-balancing, in a situation where all seniority rights and discriminatory practices occurred in the post-Act period. The court clearly recognized that minority group employers should not be required to endure continued disadvantages as a result of exclusionary hiring, at least where no pre-Act rights are involved. More recently, the United States District Court for the Eastern District of Michigan chose to follow the thrust of the \textit{Meadows} decision while explicitly rejecting the \textit{Papermakers Local 189} line of cases. In \textit{Schaefer v. Tannian}\footnote{346} the court was confronted with a "last hired, first fired" layoff system which disproportionately impacted upon women hired by the Detroit Police Department pursuant to a 1974 court order that had been issued to remedy prior discrimination.\footnote{347} After a lengthy discussion of \textit{Papermakers Local 189}, \textit{Jersey Central}, and \textit{Waters}, and an analysis of the \textit{Meadows} decision, the court concluded that it should follow the \textit{Meadows} case in that "some measure of relief is available and should be accorded to the class of women in this case whose layoffs were mandated in great part because they were not able to accumulate sufficient seniority due to prior sex discrimination practiced by their employer."\footnote{348}

As in the \textit{Meadows} case, the \textit{Schaefer} court did not appear to be faced with infringement of pre-Act seniority rights. The constraints to which the court thought itself subject were not the theoretical distinctions between plant and departmental seniority but rather the very practical considerations of maintaining a sufficient number of ex-

\footnote{345} Id. at 949.
\footnote{347} Id. at 898-99.
\footnote{348} Id. at 908.
experienced police officers on the force while at the same time assuring a significant number of female officers.\textsuperscript{349} As a result, the court was able to reach an equitable result where all lost a little but, at the same time, all the interests were served. Furthermore, since neither pre-Act seniority rights nor pre-Act discrimination was involved, the prospective rule of Title VII and section 703(h) was not violated.

The foregoing cases suggest an irreconcilable split among the circuits. And, indeed, if one looks only to the dicta and reasoning, such is the situation. To the extent that the Meadows and Schaefer cases involve only post-Act seniority rights, while Waters, Jersey Power, and particularly Watkins concerned a significant number of pre-Act rights, the cases may be reconciled. If one concentrates only on these facts and disregards the lengthy discussions of types of seniority systems, they may even be seen as a single line of cases. This is, admittedly, a rather strained approach to otherwise inconsistent decisions. The Supreme Court however, may attempt to resolve these problems in \textit{Franks v. Bowman Transportation Co.}\textsuperscript{350} The case comes to the court from the Fifth Circuit where the court refused to grant seniority from date of application to an employee who had been excluded from a job because of his race.

The case involves two plaintiffs, each with different claims of discrimination. Plaintiff Franks charged the company, on behalf of his class, with discriminatory refusal to promote and discriminatory discharge. The district court found Frank's claim meritorious but barred by the statute of limitations. The Fifth Circuit reversed on the statute of limitations and remanded for consideration of a laches issue and possible judgment for Franks.\textsuperscript{351} These issues were not raised in the petition for certiorari which the court has granted.\textsuperscript{352}

Plaintiff Lee claimed, on behalf of other classes of black job-holders and applicants, that the defendant had engaged in discriminatory refusals to hire as well as discriminatory discharges.\textsuperscript{353} Lee had applied for an over-the-road driving job in 1970.\textsuperscript{354} Although he had seven years experience as a truck driver and an excellent driving record, his application was rejected. He filed a charge with the EEOC and, shortly thereafter, was hired as one of the company's

\textsuperscript{349} \textit{Id.} at 908-09.
\textsuperscript{350} 495 F.2d 398 (5th Cir. 1974), \textit{cert. granted}, 420 U.S. 989 (1975) (No. 74-728).
\textsuperscript{351} \textit{Id.} at 422-23.
\textsuperscript{354} \textit{Id.} at 406-07.
first black over-the-road truck drivers.\textsuperscript{355} His subsequent discharge led to a contractual arbitration proceeding which, in turn, resulted in an order for reinstatement and one month's back pay. When Bowman refused to give more back pay, Lee refused reinstatement and filed suit in federal district court. The trial court upheld Lee's refusal-to-hire claim but rejected the discriminatory discharge claim. The court found that the company's departmental seniority system perpetuated the effects of past discrimination. As a remedy, certain class members were permitted to use company seniority for promotion purposes and some discriminatees were afforded priority for future employment vacancies.\textsuperscript{356} But the court refused to award constructive seniority to black applicants who had been refused employment due to their race.\textsuperscript{357}

The issues raised on the petition for certiorari arise primarily from the district court's refusal to grant certain forms of affirmative relief to Lee and his class members.\textsuperscript{358} The Fifth Circuit examined Bowman's departmental structure with some care; in most aspects, including its strict pre-1968 segregation, it closely resembled those found in the discriminatory assignment cases already discussed.\textsuperscript{359} Until September 1970, the company refused to hire blacks for the prestigious over-the-road (OTR) driving positions. Further, the company actively discouraged transfers by black employees into more desirable jobs and hired no minority applicants into clerical vacancies.\textsuperscript{360} After reviewing a number of segregated-plant cases, the appellate court, per Judge Thornberry, concluded that full implementation of the "rightful place" remedy would require that minority employees who had been the victims of discriminatory assignments be permitted to use full company seniority for transfer and all purposes within new departments. The court stressed that the "locking-in" effect on prior discriminatees did not end when the hiring discrimination ceased. The same rationale was applied to black employees who sought transfer to OTR positions; those found qualified were to be allowed to bid for such jobs on the basis of full company seniority, which also would carry over to their new assignments.\textsuperscript{361} This conclusion is, of course, not surprising. It is the remedy long used in cases involving job assignment discrimination.

\textsuperscript{355} Id. at 406.
\textsuperscript{356} Id. at 402.
\textsuperscript{357} Id. at 414.
\textsuperscript{359} See notes 98-140 supra and accompanying text.
\textsuperscript{360} Franks v. Bowman Transp. Co., 495 F.2d at 411-12.
\textsuperscript{361} Id. at 416-17.
The Fifth Circuit, however, failed to consider that post-Act hiring discrimination could permit the extension of constructive seniority to specific applicants who were refused employment on racial grounds. The court followed the path marked by Judge Wisdom's remarks in *Papermakers Local 189* and concluded that section 703(h) barred such a remedy. "The discrimination which has taken place in a refusal to hire does not affect the bona fides of the seniority system." The criticisms which have been made of this approach elsewhere in this article in reference to other cases are no less applicable here and the court's reliance on *Papermakers Local 189* for this proposition no less misplaced.

At the risk of repetition, the efficacy of Judge Wisdom's dicta in the *Franks* setting is subject to three criticisms. First, *Papermakers Local 189* did not, on its facts, concern plant seniority systems. Rather, the court was seeking to justify a remedy which modified seniority rights acquired under a discriminatory assignment system before the effective date of the Act. Secondly, Judge Wisdom did not address the issue of whether hiring discrimination would affect a seniority system's ability to qualify for the "bona fide" exemption. Thirdly, the *Papermakers Local 189* decision relied heavily on the analysis of *Quarles*, which expressly rejected the defendant's claim of exemption under section 703(h) for the specific reason that hiring discrimination had accompanied the establishment of the seniority system.

The reasoning and conclusion in *Franks*, as in *Waters* and *Jersey Central*, results in reading into the Act a restriction which is at odds with the plain statutory language and clear thrust and meaning of the legislative history. If Congress intended that only discrimination in the establishment of a seniority system would affect its "bona fides," it could have said so quite simply. But not only did Congress fail to limit intent explicitly, the legislative history only sets forth examples referring to discrimination in hiring. Furthermore, the examples indicate that the taint from such discrimination is not to be imputed only where seniority rights were established before the effective date of Title VII.

A refusal to award constructive seniority credits because discrimination "in a refusal to hire does not affect the bona fides of the seniority system" conflicts with the underlying rationale of the Fifth Circuit's leading cases that have heavily emphasized the development of remedies intended, as far as possible, to make victims of

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362. *Id.* at 417.

prior discrimination whole. The plaintiffs' request for constructive seniority for specific discriminatees represents no more than an attempt to secure his "rightful place" in the seniority structure. Indeed, the Fifth Circuit approved a similar attempt in Bing v. Roadway Express, Inc., where the court awarded transferees to OTR positions constructive seniority from their date of qualification. The sole factual difference between the two cases—that the plaintiff-beneficiaries in Bing were then employed by the defendant—is not sufficient to warrant the complete denial of the remedy necessary to make whole the identified victims of the far more vicious discrimination which has totally denied them the right to work.

The circumstances which have arisen in earlier cases which would have made constructive seniority awards somewhat unfair are not found in the Franks case. The court fails in its opinion to reconcile its decision that the seniority system is bona fide—which, under section 703(h), means that it is not the result of an intent to discriminate—with the Supreme Court's "consequence" test for intent as set forth in Griggs. The effect of the seniority system in Franks is to deny minority group workers the opportunity to earn a living because earlier discriminatory practices deprived them of the chance to acquire rights necessary to earn a living. As a practical matter, but for the earlier discrimination, the layoff system would not disproportionately impact on minority workers. It would therefore seem that the present loss of work, by operation of the seniority system, is a consequence of the earlier discrimination. The Griggs test for intent, therefore, is satisfied. To hold otherwise would threaten to introduce a purely subjective test into Title VII analysis, a result apparently proscribed by Griggs.

The problems posed by cases involving remedies which benefit unidentified members of a minority group certainly present in Watkins are not present in Franks; those seeking constructive seniority in this case are themselves the direct victims of post-Act discriminatory exclusion from employment. The implicit reluctance of some courts to upset the seniority expectations of innocent white employees is negated in Franks by the company's assertion that its exclusionary hiring policy for OTR positions was prompted, to some degree, by the unwillingness of white drivers to "ride double" with blacks and to share bunk and shower facilities. Indeed, if fairness is the arbiter, constructive seniority will make whole the vic-

364. See, e.g., Bing v. Roadway Express, Inc., 485 F.2d 441 (5th Cir. 1973).
365. Id.
tims at the expense of the instigators of the harm, a result that is fair and just, as well as the result mandated by the law.

V. Conclusion

If the goal of the Mansfield-Dirksen substitute bill, that injected the bona fide seniority provision into Title VII, was to vitiate the force of the legislation, it failed. Equal employment opportunity, through the imagination of the federal courts, has made great progress in the past decade. This has been due in large measure to the courts' aggressively striking down many forms of discrimination and many devices which have threatened to lock minority groups into prior patterns of discrimination. There are few, if any, examples so dramatic as those found in cases striking down seniority systems based on discriminatory job assignments.

If the goal of the Mansfield-Dirksen substitute was to introduce confusion into the judicial treatment of Title VII issues, it has been magnificently successful. Many of the same courts which so vigorously enforced the rights of minority-group employees to transfer to better jobs and improve their employment status within a plant have refused to recognize the rights of those same minorities to keep the jobs from which they were previously excluded. Section 703(h) has been used to create the anomalous situation in which those who gave some employment to minorities are subject to far more judicial intervention than those who refused to hire minority groups altogether.

The sad epilogue is that the confusion need not have resulted at all. The legislative history of Title VII and its plain meaning indicate that the law was meant to operate prospectively. But the prospectivity was not meant to begin again from the point of each and every subsequent litigation. Rather, the law was to operate only on those rights which accrued, and perhaps practices which occurred, after July 2, 1965, the effective date of the Act. This distinction, pre-Act and post-Act, is neither difficult to understand nor difficult to apply. In the area of seniority rights, it draws a clear line between those rights which judicial remedies can modify and those rights which have been exempted. And those rights which are exempt need not depend for protection on the subtle distinctions of legalistic logic and the always-uncertain status of precedent.

In *Franks v. Bowman Transportation Co.* the Supreme Court has the opportunity to relegate the plant-departmental distinction to the past. It has the opportunity to draw the line mandated by section 703(h) clearly and brightly. As the Court recognized in *Griggs*,

such clarity is necessary when the employment rights of citizens are at stake. It is to be hoped that the confusion now reigning in the area of seniority rights and equal employment opportunity may once and for all be dispelled.