

The Unfinished Mission of Title VII: Black Parity in the American Workforce

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The construct of Title VII as a law primarily redressing intentional discrimination only first became established with the Supreme Court’s 1977 decision, *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). But before that, both in its history and subsequent judicial construction, Title VII was conceived no less as *economic* legislation, meant to remedy black unemployment and poverty. In this objective, Title VII in its early years (1965–76) proved a robust and adaptive tool, with courts making wholesale changes to the workplace to promote employment opportunities for black workers. Employers were obliged to prove a strict “business necessity” to justify barriers to black hiring and advancement, even for the most sacred of practices, seniority. As late as 1975, the Supreme Court observed that “Title VII is not concerned with the employer’s ‘good intent or absence of discriminatory intent.’” *Albemarle Paper v. Moody*, 422 U.S. 405, 422–23 (1975) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971)). Yet, the economic goal of black parity was eclipsed by the advent of *Teamsters*, which bisected disparate “treatment” and “impact” into separate theories. The Title VII statute remains intact, though, and the goal of black parity in employment—no less urgent today than it was in 1964—stands ready to be reactivated by a new generation of scholars, lawyers, and judges.

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* Counsel, Outten & Golden LLP, Chicago, Illinois. The author gratefully thanks his firm for the time and resources to complete this work. He dedicates this article to the pioneers on the bench and in the bar, many still with us and too numerous to name, who litigated the first generation of Title VII cases and strove to make our nation live up to its ideals.

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I. INTRODUCTION

Today one thinks of Title VII of the Civil Rights Act of 1964¹ mainly as an anti-discrimination law, meant to rid the American workplace of racial and other types of prejudice. Yet, those standing at the dawn of Title VII saw it as transformative *economic* legislation as well. Congress entrusted federal courts and the private bar with the mission of integrating black Americans, suffering disproportionately high rates of poverty and unemployment, into the United States workforce.² This project meant uprooting even facially

¹ 42 U.S.C. §§ 2000e–2000e-17 (2012).

² Although Title VII covers race, color, national origin, religion, and sex, the predominant focus of the legislative process and the early years of litigation was discrimination against black Americans. *See, e.g.*, 1964 U.S.C.C.A.N. 2391, 2393 (quoting H.R. REP. 88-914 (1963)) (“In various regions of the country there is discrimination against some minority groups. Most glaring, however, is the discrimination against Negroes which exists throughout our Nation.”); *Local 186, Int’l Pulp, Sulphite, and Paper Mill Workers v. Minn. Mining & Mfg. Co.*, 304 F. Supp. 1284, 1287 (N.D. Ind. 1969) (“The great majority of cases involving Title VII suits have concerned allegations of racial discrimination, and all of which involved Negro plaintiffs.”); H.R. REP. NO. 88-914 (1963), *as reprinted in* 1964 U.S.C.C.A.N. 2391, 2393 (“In various regions of the country there is discrimination against some minority groups. Most glaring, however, is the discrimination against Negroes which exists throughout our Nation.”); Thomas O. McGarity, Note, *Civil Rights—Employment—National Origin Discrimination and Aliens*, 51 TEX. L.

neutral workplace policies that had the effect of causing discrimination against blacks.

Consistent with this mission, Congress set a low bar for liability under Title VII's section 703(a).³ That provision, which bans discrimination and segregation in employment, includes no intent requirement.⁴ While Congress did in fact seek to attack "intentional" discrimination, this designation of "intent" was only meant in the modest sense, proscribing actions that were not "inadvertent or accidental."⁵ Such policies might even be based in pre-Act discrimination, as perpetuated by seniority and other practices. Rather than include it in the liability sections, Congress tucked "intent" into ancillary provisions for exemptions and remedies.⁶ Over half a century and many amendments later, this remains the case today.

REV. 128, 128 (1972) ("Because the Civil Rights Act of 1964 focused primarily on racial discrimination, nearly all of the early Title VII cases involved employment practices affecting blacks."); *Developments in the Law—Comment, Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1113 (1971) (footnotes omitted) ("Chief among the complex of motives underlying the equal employment opportunity provisions of the Civil Rights Act of 1964 was doubtless a desire to enhance the relative social and economic position of the American black community.").

³ See 42 U.S.C. § 2000e-2(a) (2012) ("It shall be an unlawful employment practice for an employer— (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."). There are parallel provisions in the same section regarding unions, employment agencies, and joint labor-management committees, which all contain no state-of-mind requirement.

⁴ *Id.*

⁵ 110 CONG. REC. 12723–24 (1964) (statement of Sen. Hubert H. Humphrey) ("Section 706(g) is amended to require a showing of intentional violation of the title in order to obtain relief. This is a clarifying change. Since the title bars only discrimination because of race, color, religion, sex, or natural origin it would seem already to require intent, and, thus, the proposed change does not involve any substantive change in the title. The express requirement of intent is designed to make it wholly clear that inadvertent or accidental discriminations will not violate the title or result in entry of court orders. It means simply that the respondent must have intended to discriminate.").

⁶ 42 U.S.C. § 2000e-2(h) (2012) (stating that exempt practices must not be "the result of an intention to discriminate because of race, color, religion, sex, or national origin"); 42 U.S.C. § 2000e-5(g) (2012) (requiring the court to find "that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice" to enjoin defendant). In the Civil Rights Act of 1991, "intentional discrimination" was added to the new legal remedies section, 42 U.S.C. § 1981a, and to two other incidental sections: 42 U.S.C. § 2000e-2(k)(2) ("business necessity" under the disparate impact section is not a defense to "intentional discrimination") and 42 U.S.C. § 2000e-2(k)(3) (noting that the barring of employment due to drug use/possession is an unlawful employment practice "only if such rule is adopted or applied with an intent to discriminate").

The Supreme Court and lower courts, at first, did not demand proof of intent or motive to obtain relief under Title VII. The Court's first two major opinions in this sphere, *Griggs v. Duke Power Co.*⁷ and *McDonnell Douglas Corp. v. Green*,⁸ if anything held otherwise. As late as 1975, the Court held that "Title VII is not concerned with the employer's 'good intent or absence of discriminatory intent' for 'Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.'"⁹

If intent and motive were not part of the original Title VII, then how did that requirement burrow its way into the Act? The answer may be traced to the Supreme Court's fateful 1977 opinion, *International Brotherhood of Teamsters v. United States*,¹⁰ a top candidate for the most consequential case in the development of Title VII law. There, for the first time, the Court declared two distinct theories of Title VII liability, "disparate treatment" and "disparate impact."¹¹ For disparate treatment, the main branch of Title VII, the Court announced that "[p]roof of discriminatory motive is critical."¹² For disparate impact only would "[p]roof of discriminatory motive . . . not [be] required."¹³ The Court also held that "an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination,"¹⁴ overruling virtually unanimous lower-court authority on that issue. *Teamsters* thus sealed the fate of Title VII: the Court in a stroke reconceived the Act primarily as an intentional-tort law. Disparate impact dropped to a secondary role in Title VII law, and the primary goal of delivering economic justice to blacks was essentially forgotten.

This Article pulls back the curtain on this early history of Title VII in the courts, from 1965 to 1977—revealing a legal landscape unknown to, or forgotten by, present-day lawyers. Section I recounts the original black employment goal that propelled the passage of Title VII. Section II summarizes the first seven years (1965–71) of lower-court decisional law, before the Supreme Court involved itself in shaping Title VII. Because Congress denied the newly-created federal Equal Employment Opportunity Commission ("EEOC") general enforcement authority, it left the business of Title VII

⁷ *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

⁸ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

⁹ *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 422–23 (1975) (emphasis added) (quoting *Griggs*, 401 U.S. at 432) (emphasis added).

¹⁰ *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977) [hereinafter *Teamsters*].

¹¹ See *id.* at 335, n.15.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 353–54.

interpretation wholly to the courts. Private litigants and the U.S. Attorney General used Title VII to knock down long-standing employment practices—and even newly minted ones—that blocked black job advancement. Section III discusses the first two significant Supreme Court decisions under Title VII, *Griggs* and *McDonnell Douglas*, to show that the Court originally imposed no intent requirement to state a claim under Title VII. Section IV returns us to the lower federal courts during 1972–76, applying the holdings of these landmark cases. Section V brings us to the 1976–77 Supreme Court decisions that confined Title VII primarily to intentional discrimination: *Teamsters*,¹⁵ the Equal Protection cases of *Washington v. Davis*¹⁶ and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*¹⁷ The Article closes with a few remarks about the pressing need to return to Title VII's unfinished mission.

II. THE PASSAGE OF TITLE VII TO IMPROVE BLACK JOB PROSPECTS (1964)

Congress' primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with "the plight of the Negro in our economy." . . . Congress feared that the goals of the Civil Rights Act—the integration of blacks into the mainstream of American society—could not be achieved unless this trend were reversed. And Congress recognized that that would not be possible unless blacks were able to secure jobs "which have a future."¹⁸

The campaign for jobs for black Americans began in earnest long before the passage of Title VII and has a rich history that is beyond the narrow scope of this Article. By the 1940s, a combination of labor organizing (*e.g.*, A. Phillip Randolph's anticipated March on Washington and the Southern Tenant Farmers Union¹⁹), federal government developments (*e.g.*, a ban on

¹⁵ *Teamsters*, 431 U.S. 324.

¹⁶ See *Washington v. Davis*, 426 U.S. 229, 229 (1976).

¹⁷ *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).

¹⁸ *United Steelworkers of America v. Weber*, 443 U.S. 193, 202–03 (1979) (quoting 110 CONG. REC. 6548 (1963) (remarks of Sen. Humphrey), and quoting *id.* at 7204 (remarks of Sen. Clark)).

¹⁹ See H.L. MITCHELL, *ROLL THE UNION ON: A PICTORIAL HISTORY OF THE SOUTHERN TENANT FARMERS UNION* (1987); CORNELIUS L. BYNUM, *A. PHILIP RANDOLPH AND THE STRUGGLE FOR CIVIL RIGHTS*, 157–85 (2010).

discrimination in the federal civil service²⁰ and in military service²¹), federal court litigation (*e.g.*, duty-of-fair-representation cases,²² suits by the federal Civil Rights Division and NAACP²³), and wartime exigencies (*e.g.*, Executive Order No. 8802²⁴) punched cracks in the wall of white resistance to black advancement.²⁵ The first laws to combat race discrimination in the private sector, beyond government contractors, appeared at the state and local level in 1945, with the passage of “fair employment practices” laws in New York and elsewhere in the North and West.²⁶ The demand for black jobs also served as a major theme of the Civil Rights Movement, even if this has been

²⁰ See Ramspeck Act of 1940, 5 U.S.C. § 631a (1940) (“In carrying out the provisions of this title, and the provisions of the Classification Act of 1923, as amended, there shall be no discrimination against any person, or with respect to the position held by any person, on account of race, creed, or color”).

²¹ Executive Order 9981, July 26, 1948; General Records of the United States Government; Record Group 11; National Archives, <https://www.ourdocuments.gov/doc.php?flash=true&doc=84> [<https://perma.cc/NUL6-7C2H>] (last visited Jan. 7, 2020).

²² See, *e.g.*, *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944).

²³ See Risa Lauren Goluboff, “Let Economic Equality Take Care of Itself”: The NAACP, Labor Litigation, and the Making of Civil Rights in the 1940s, 52 *UCLA L. REV.* 1393, 1442 (2005); Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 *DUKE L.J.* 1609, 1647–68 (2001) (discussing role of U.S. DOJ Civil Rights Division).

²⁴ Exec. Order No. 8802, 6 Fed. Reg. 3109 (June 25, 1941), <https://www.archives.gov/historical-docs/todays-doc/?dod-date=625> [<https://perma.cc/F87P-DU92>] (“prohibiting discrimination in the employment of workers in defense industries or government because of race, creed, color, or national origin.”). The executive order created a five-member Fair Employment Practice Committee: a federal office answerable to the President specifically charged with enforcing the order. *Id.* (“The Committee shall receive and investigate complaints of discrimination in violation of the provisions of this order and shall take appropriate steps to redress grievances which it finds to be valid.”). After this agency became moribund, President Franklin Roosevelt reactivated it and extended its jurisdiction to all government contractors. Exec. Order No. 9346, 8 Fed. Reg. 7183–84 (May 27, 1943). See generally *Contractors Ass’n v. Shultz*, 442 F.2d 159, 168–69 (3rd Cir. 1971) (dealing with the history of defense-industry executive orders and nondiscrimination contract provisions).

²⁵ Noteworthy histories of the pre-1950s era of agitation for black employment rights include THOMAS J. SUGRUE, *SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH* 114–29, 357–67 (2008); RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 13 (2007); MICHAEL K. HONEY, *SOUTHERN LABOR AND BLACK CIVIL RIGHTS: ORGANIZING MEMPHIS WORKERS* 18 (1993); Rachel A. Spector, “*Dignified Jobs at Decent Wages*”: *Revising an Economic Equity Model of Employment Discrimination Law*, 36 *BERKELEY J. EMP. & LAB. L.* 123, 131 (2015); Sean Farhang & Ira Katznelson, *The Southern Imposition: Congress and Labor in the New Deal and Fair Deal*, 19 *STUD. AM. POL. DEV.* 1, 2 (2005); Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 *YALE L.J.* 256, 353 (2005).

²⁶ See Anthony S. Chen, Working Paper, *The Passage of State Fair Employment Legislation, 1945–1964: An Event-History Analysis with Time-Varying and Time-Constant Covariates*, Inst. for Res. on Lab. and Emp’t, Working Paper No. #79-01 (2001), <https://www.irl.berkeley.edu/files/2001/The-Passage-of-State-Fair-Employment-Legislation-1945-1964.pdf> [<https://perma.cc/2NV5-RLNK>]. By the time of the passage of the Civil Rights Act of 1964, over half the states already had laws in place banning employment discrimination. U.S. EQUAL EMP’T COMM’N, *LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964*, at 5–6 (1966).

overshadowed in popular memory by the fight for integration.²⁷ The immortal 1963 civil rights rally on the National Mall was, after all, called the “March on Washington For *Jobs* and Freedom.”²⁸

Furthermore, jobs were also a principal force behind the passage of Title VII. A 1961 report of the U.S. Civil Rights Commission noted that the “twin problems” of unemployment and lack of skilled workers “are magnified for minority groups that are subject to discrimination,” and stressed the unemployment statistics of non-white workers.²⁹ President John F. Kennedy assured that a fair employment practices law “would help set a standard for all the Nation and close existing gaps . . .” for black people in the workplace.³⁰ Members of Congress, the Administration, and witnesses often cited statistics that non-white unemployment was double and growing to that of their white counterparts,³¹ and that blacks who were employed endured lower

²⁷ Equal Employment Opportunity: *Hearing on S. 773S. 1210, S. 1211, and S. 1937 Before the S. Subcomm. on Emp't and Manpower of the Comm. On Labor and Pub. Welfare*, 88th Cong. 171 (1963) [hereinafter *Equal Employment Opportunity*] (statement of A. Philip Randolph, President, Negro American Labor Council, President, Brotherhood of Sleeping Car Porters, and Vice President, AFL-CIO) (“A superficial look at the national scene might indicate that the civil rights struggle has recently begun to move from the area of intellectual needs—such as education and status in public accommodations—to economic needs: jobs and a decent standard of living. In actual fact, large masses of Negroes were first involved almost spontaneously in a political struggle for their own rights more than 20 years ago in the initial drive for FEPC. Economic and civil rights are inseparable.”).

²⁸ *Official Program for the March on Washington*, WWW.OURDOCUMENTS.GOV (1963), <https://www.ourdocuments.gov/doc.php?flash=false&doc=96> [https://perma.cc/WDU3-KLL5] (last visited Jan. 7, 2020) (emphasis added).

²⁹ U.S. COMM’N ON CIVIL RIGHTS, EMPLOYMENT, BOOK 3 (1961).

³⁰ EQUAL ACCOMMODATIONS IN PUBLIC FACILITIES, PUB. PAPERS 491 (June 19, 1963). *See also* REPORT TO THE AMERICAN PEOPLE ON CIVIL RIGHTS, PUB. PAPERS 468–69 (June 11, 1963) (“The Negro baby born in America today, regardless of the section of the Nation in which he is born, has about . . . one-third as much chance of becoming a professional man, twice as much chance of becoming unemployed, about one-seventh as much chance of earning \$10,000 a year, a life expectancy which is 7 years shorter, and the prospects of earning only half as much.”). Contemporary observers noted the centrality of black employment to the Act. *See* Alfred W. Blumrosen, *The Duty of Fair Recruitment Under the Civil Rights Act of 1964*, 22 RUTGERS L. REV. 465, 465–66, 509–27 (1968) (noting that black unemployment was a primary motivation for passage of Title VII); Comment, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1116 (1971) (“The central objective of Title VII was to improve minority employment by requiring employers to use colorblind standards in their hiring and promoting decisions.”).

³¹ H.R. REP. NO. 88-914, at 27 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 2391, 2513 (additional views of Rep. McCulloch, et al.) (“In 1962, nonwhites made up 11 percent of the civilian labor force, but 22 percent of the unemployed.”); 110 CONG. REC. 6547 (1964) (remarks of Sen. Humphrey) (“In 1947 the nonwhite unemployment rate was only 64 percent higher than the white rate; in 1962 it was 124 percent higher.”); *Civil Rights: Hearing Before Subcomm. No. 5 of the H. Comm. of the Judiciary*, 88th Cong. 938 (1963) (statement of Rep. John V. Lindsay) (“The unemployment rate for nonwhites is at least twice as great as for whites.”); *id.* at 1790

wages and inferior conditions of employment.³² A union witness noted that the Civil Rights Act was essential to the “massive attack upon America’s No. 1 problem—unemployment.”³³ A congressman forthrightly noted that “it is

(statement of George Meany, President of AFL-CIO) (citing unemployment); *id.* at 2055 (statement of Sidney Zagri, Legislative Counsel for the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America) (“The nonwhite unemployment rate was 60 percent higher than for whites in the period 1947–49. It has been consistently twice as high in each of the years 1954–62.”); *id.* at 2143 (statement of Roy Wilkins, Executive Director, National Association for the Advancement of Colored People) (“Unemployment among nonwhites is 2 to 2 ½ times that among whites, the average wage of nonwhites is about 60 percent of whites and the gap is steadily increasing.”); *Civil Rights: Hearing on H.R. 7152 Before the H. Comm. on Rules, Part II*, 88th Cong. 462 (1963) (statement of Rep. James Roosevelt) (noting the importance of fair employment in combatting racial discrimination); *Civil Rights—The President’s Program, 1963: Hearing Before the S. Comm. on the Judiciary*, 88th Cong. 105 (1963) (statement of Attorney General Robert F. Kennedy) (“The unemployment rate for nonwhites is 10.3 percent as compared with 5 percent for whites.”); *Equal Employment Opportunity: Hearing on S. 773, S. 6, 1210, S. 1211, and S. 193 Before the Subcomm. on Emp’t and Manpower of the S. Comm. on Labor and Pub. Welfare*, 88th Cong. 95 (1963) (statement of Sen. Joseph S. Clark) (“The unemployment rate among Negroes is more than twice as high as that for the country as a whole.”); *id.* at 97 (statement of John F. Henning, Under Secretary of Labor) (“Among married men with family responsibilities, the difference is even wider, 8 percent compared with 3 percent.”).

³² H.R. REP. NO. 88-914, at 27 (1964), reprinted in 1964 U.S.C.C.A.N. 2391, 2513 (describing additional views of Rep. McColloch, et al.) (“Moreover, among Negroes who are employed, their jobs are largely concentrated among the semiskilled and unskilled occupations. This has the effect of severely retarding the economic standards of the Negro population. Likewise, concentration at the lower levels of employment heightens the chances of early and long duration layoffs.”); 110 CONG. REC. 6490, 7204 (1964) (statement of Sen. Clark) (“The Negro has been condemned to poverty because of lack of equal job opportunities. This poverty has kept the Negro out of the mainstream of American life.”); *id.* at 7379 (statement of Sen. Edward M. Kennedy) (“Title VII is directed toward what, in my judgment, American Negroes need most to increase their health and happiness . . . [T]o be deprived of the chance to make a decent living and of the income needed to bring up children is a family tragedy.”); *id.* at 6562 (statement of Sen. Thomas Kuchel) (“If a member of a so-called minority group believes that no matter how hard he studies, he will be confronted with a life of unskilled and menial labor, then a loss has occurred, not only for a human being, but also for our Nation.”); *Hearings on S. 773, S. 6, 1210, S. 1211, and S. 193 Before the S. Subcomm. on Emp’t and Manpower of the S. Comm. on Labor and Pub. Welfare*, 88th Cong. 97 (1963) (statement of John F. Henning, Under Secretary of Labor) (“The Negro’s disadvantage is especially severe when it comes to the better paying, more desirable types of jobs.”); *id.* at 138 (statement of Sen. Humphrey) (“The simple truth is that the Negro worker in relation to his white counterpart has been either falling behind or barely staying even as a result of [labor] developments.”); *Hearings Before Subcomm. No. 5 of the Comm. of the Judiciary, Part II*, 88th Cong. 976 (1963) (statement of Rep. William Fitts Ryan) (“Negroes . . . comprise 10.5 percent of the total population but 30.5 percent of the unskilled farm and factory labor force, to the automation of routine work processes.”); *Hearings Before Subcomm. No. 5 of the Comm. of the Judiciary, Pt. III*, 88th Cong. 2055 (1963) (Sidney Zagri, Legislative Counsel for the National Brotherhood of Teamsters) (“Income-wise, the Negro family earns an average of \$3,223 as compared with \$5,835 for white, a gap of 45 percent. Since 1952 the gap has increased by 3 percent.”).

³³ *Hearings Before Subcomm. No. 5 of the Comm. of the Judiciary, Part III*, 88th Cong. 2052 (1963) (Sidney Zagri, Legislative Counsel for the National Brotherhood of Teamsters). See also *Hearings on H.R. 7152 Before the H. Comm. on Rules, Part IV*, 88th Cong. 2660 (1963) (statement of

the employment and unemployment of the minority race that is presenting its biggest problem.”³⁴ One Republican party chairman testified, “[v]oting is nice, very important, but after all, we need jobs and housing, these are the things that people really want. Nothing is more important to a low economic group, as the Negroes are in many areas, due to deprivation in other areas.”³⁵ As shown, black employment insecurity and injustice was a theme throughout the hearings.

The topic of employment also dominated the drafting of the Civil Rights Act itself. Though Title VII is just one article of the eleven included in the Act, Title VII alone makes up half of the Act’s entire length.³⁶ In the primary liability section of Title VII, section 703(a), Congress described the wide range of covered actions:

Employer practices

It shall be an unlawful employment practice for an employer—

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

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment

Attorney General Kennedy) (“The availability of jobs and of equal economic opportunity in general, without respect to artificial barriers imposed because of race, color, religion, or national origin, is essential to any meaningful resolution of the [civil rights] problem.”); 110 CONG. REC. 6490, 6548 (1964) (statement of Sen. Humphrey) (“The crux of the problem” Congress sought to address was “to open employment opportunities for Negroes in occupations which have been traditionally closed to them.”).

³⁴ *Hearings Before Subcomm. No. 5 of the Comm. of the Judiciary, Part II*, 88th Cong. 2056 (1963) (statement of Rep. Byron G. Rogers). *See also id.* at 993 (statement of Rep. Glenn Cunningham) (“The serious unemployment in minority groups is responsible for much of the unrest, juvenile crime, family breakdown, and other problems which we face.”); *Hearings on S. 773, S. 6, 1210, S. 1211, and S. 193 Before the Subcomm. on Emp’t and Manpower of the S. Comm. on Labor and Pub. Welfare*, 88th Cong. 173 (1963) (statement of A. Phillip Randolph, President, Brotherhood of Sleeping Car Porters, AFL-CIO) (stating cycle of poverty among blacks “must be broken at its start with the right to a decent livelihood”).

³⁵ *Hearings Before Subcomm. No. 5 of the Comm. of the Judiciary, Part II*, 88th Cong. 1183 (1963) (Carl Shipley, Chairman, Republican Party of the District of Columbia).

³⁶ Civil Rights Act of 1964, Pub. L. No. 88-352, § 701–716, 78 Stat. 241, 253–66 (1964) (current version at 42 U.S.C. §§ 2000e–2000e–16 (2012)).

opportunities or otherwise adversely affect his status as an employee, *because of* such individual's race, color, religion, sex, or national origin.³⁷

It left “discrimination,” “terms, conditions, or privileges,” and even “race” undefined.

These prohibitory sections are notably silent on intent, willfulness, or motive. In the final push to passage, the Dirksen-Mansfield substitute³⁸ amended the *remedial* section of the Act, section 706(g),³⁹ to require a finding that “the respondent has intentionally engaged in or is intentionally engaged in an unlawful employment practice” to support equitable relief.⁴⁰ The intent language, though, was said by the sponsors to be purely for “clarification,”⁴¹ not a change in substance. As noted later, courts gave this language a narrowing construction that rendered it unthreatening, at least for a while. While Title VII disclaimed the use of strictly-numeric racial preferences in employment,⁴² courts were otherwise granted a wide range of equitable powers and remedies to carry out Title VII under section 706(g), including the award of back pay and injunctive relief.⁴³

³⁷ 42 U.S.C. § 2000e-2(a) (2012) (emphasis added).

³⁸ Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 446–56 (1966) (describing the legislative history of the substitute).

³⁹ 42 U.S.C. § 2000e-5(g) (2012).

⁴⁰ *Id.*

⁴¹ 110 CONG. REC. 12724 (June 4, 1964) (statement of Sen. Humphrey). *See also* George Cooper & Richard B. Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1674 (1969) (“This provision does not require an ‘intent to discriminate,’ in the sense of specific intent.”). Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education*, 68 COLUM. L. REV. 691, 713 (1968) (finding an unpassed version of the amendment used “willfully” instead of “intentionally”).

⁴² *See* 42 U.S.C. § 2000e-2(j) (2012) (prohibiting “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 which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin”). A few courts cited this section to limit Title VII remedies. *See, e.g.,* *Dobbins v. Local 212, IBEW*, 292 F. Supp. 413, 444 (S.D. Ohio 1968) (“Title VII shall not be construed so as to require a labor union to grant preferential treatment to any group based on race or color.”); *Griggs v. Duke Power Co.*, 292 F. Supp. 243, 27 (M.D.N.C. 1968) (“Any discriminatory employment practices occurring before the effective date of the Act, July 2, 1965, are not remedial under the Act.”), *rev’d in part*, 420 F.2d 1225 (5th Cir. 1970), *rev’d*, 401 U.S. 424 (1971); *Culpepper v. Reynolds Metals Co.*, 296 F. Supp. 1232, 1238 (N.D. Ga. 1968) (“The Act specifically negates any requirement of affirmative correction of a statistical racial imbalance.”).

⁴³ *See* 42 U.S.C. § 2000e-5(g) (2012). *See also* *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 219 n.4 (2002) (finding back pay was the only form of monetary relief, apart

Another important facet to Title VII was Congress's decision to vest primary interpretative and enforcement authority in the courts, rather than a government agency. In a departure from the major New Deal labor statutes, such as the Fair Labor Standards Act ("FLSA")⁴⁴ enforced by the Department of Labor and the National Labor Relations Act ("NLRA")⁴⁵ enforced by the National Labor Relations Board, Congress decided to grant no enforcement powers to the EEOC.⁴⁶ This decision was also part of the Dirksen-Mansfield substitute.⁴⁷ Instead, the EEOC's role was limited to the investigation and conciliation of employee charges,⁴⁸ and the filing of Commissioner charges to investigate industry practices.⁴⁹ The EEOC was thus meant to serve mainly as a clearinghouse for complaints. Employees would file their EEOC charge within ninety (later, 180 or 300) days of the adverse action, to allow the agency to investigate and conciliate.⁵⁰ Conciliation was meant to be a first-resort, in the hope that a prompt, inexpensive resolution

from attorney's fees and costs, allowed under the original Act and it was treated as equitable, thus awarded by a court). Courts also recognized front pay as a substitute remedy for reinstatement. *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 849–50 (2001). In the Civil Rights Act of 1991, Congress added provisions for Title VII legal relief through compensatory and punitive damages. 42 U.S.C. §§ 1981a(a)(1)–(b)(1) (1991). These provisions also included limited injunctive relief (with no monetary relief, other than attorney's fees and costs) when the employer proves that it "would have taken the same action in the absence of the impermissible motivating factor." *Id.* § 2000e-(g)(2)(B). Legal relief was capped by the size of the employer. *Id.* § 1981a(b)(3). Section 1981a also provided a jury trial for the award of legal relief. *Id.* § 1981a(c).

⁴⁴ 29 U.S.C. §§ 201–219 (1966).

⁴⁵ 29 U.S.C. §§ 151–169 (1966).

⁴⁶ See 42 U.S.C. § 2000e-4 (1966). See also *Watson v. Limbach Co.*, 333 F. Supp. 754, 760 (S.D. Ohio 1971) ("The original version of Title VII, H.R. 405, would have created a powerful fair employment practices commission with broad investigatory and enforcement powers. H.R. 405 was amended and substituted by H.R. 7152 which removed the commission's enforcement powers but allowed it to file civil suits in behalf of aggrieved persons. When the bill reached the Senate, it was amended to its present form and the right to bring civil enforcement actions was lodged exclusively with private litigants in those cases where the aggrieved person instituted proceedings by filing a charge." *Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998, 1005 (5th Cir. 1969) ("Unlike so many Governmental structures in administrative law, EEOC is an administrative agency without the power of enforcement."); *Developments in the Law*, *supra* note 30 ("The reasons suggested for the change were: the belief that a de novo court action would facilitate more rapid and more frequent settlements, the belief that a court would be a fairer forum for the employer or union to establish innocence, and the fear that the EEOC would impose forced racial balance according to rigid mathematical formulae.").

⁴⁷ See Vaas, *supra* note 36, at 452–53; Eric S. Dreiband, *Celebration of Title VII at Forty*, 36 U. MEM. L. REV. 5, 13 (2005).

⁴⁸ 42 U.S.C. § 2000e-4(g)(4), 5(a) (1966).

⁴⁹ *Id.* at § 2000e-5(b)–5(d).

⁵⁰ *Id.* at § 2000e-5(e).

might be possible,⁵¹ though understaffing at the EEOC often thwarted this path.⁵² If unsuccessful in conciliation, the EEOC would issue a right-to-sue notice, and upon receipt the employee had thirty (later, ninety) days to sue.⁵³

It was not until 1972 that the EEOC won litigation authority from Congress.⁵⁴ Even with that amendment, as the Supreme Court noted in *Alexander v. Gardner-Denver Co.*,⁵⁵ “Title VII does not provide the Commission with direct powers of enforcement. The Commission cannot adjudicate claims or impose administrative sanctions. Rather, final responsibility for enforcement

⁵¹ See *Waters v. Wis. Steel Works of Int'l Harvester Co.*, 427 F.2d 476, 486 (7th Cir. 1970) (“By establishing the EEOC Congress provided an inexpensive and uncomplicated remedy for aggrieved parties, most of whom were poor and unsophisticated.”). An early commentator noted the possible benefits of this approach: “The respondent may be able to explain and justify or rectify his action without the public condemnation entailed in a more formal proceeding. The agency’s attempt to conciliate will generally be less disruptive and less expensive than a court trial or full agency hearing. And, perhaps most important, the absence of direct coercion by the government may help lessen the antagonism between the parties and encourage reasonable settlement.” Note, *Discrimination in Employment and in Housing: Private Enforcement Provisions of the Civil Rights Acts of 1964 and 1968*, 82 HARV. L. REV. 834, 846 (1969).

⁵² See, e.g., *Johnson v. Seaboard Air Line R.R. Co.*, 405 F.2d 645, 649 n.6 (4th Cir. 1968) (noting that in the face of thousands of charges, “the Commission had fewer than 20 full time investigators and only two full time conciliators”); *Miller v. Int'l Paper Co.*, 408 F.2d 283, 288 n.22 (5th Cir. 1969) (“The reason given by the EEOC for its failure to attempt conciliation is that it was not staffed and financed sufficiently to cope with the volume of complaints which it has received.”); *Johnson v. ITT-Thompson Indus., Inc.*, 323 F. Supp. 1258, 1260 (N.D. Miss. 1971) (“Although conciliation is certainly a favored policy of the entire Title VII scheme, it is also well known that EEOC is an understaffed and overworked agency which often is unable within the 60-day limit to assist the parties in seeking a conciliation.”); *Fore v. S. Bell Tel. & Tel. Co.*, 293 F. Supp. 587, 589 (W.D.N.C. 1968) (“It is widely suspected in the land, and it must have been known to Congress, that Federal agencies, including courts, do not always keep up with their work.”); *Edwards v. N. Am. Rockwell Corp.*, 291 F. Supp. 199, 211 (C.D. Cal. 1968) (“It is fairly evident that the EEOC, for one reason or another, has been unable both to comply with the time limitations imposed by Title VII and to fulfill its obligation under the Act to determine reasonable cause and to attempt conciliation.”); *Wheeler v. Bohn Aluminum & Brass Co.*, No. 7, 1968 WL 133, at *3 (W.D. Mich. June 12, 1968) (“[T]o deprive the plaintiffs of their right to relief because of the crowded condition of the docket of the commission would be a travesty on [sic] justice.”); *Evenson v. Nw. Airlines, Inc.*, 268 F. Supp. 29, 31 (E.D. Va. 1967) (“E.E.O.C. admits that its case load and lack of trained employees prevented it from a formal scheduling for conciliation proceedings within sixty days from receipt of the plaintiff’s complaint.”). See also Stuart A. Morse, Comment, *The Scope of Judicial Relief Under Title VII of the Civil Rights Act of 1964*, 46 TEX. L. REV. 516, 516 (1968) (noting that “[c]onciliation, however, has become increasingly less effective, and the percentage of successful efforts at conciliation has decreased steadily each year”).

⁵³ 42 U.S.C. § 2000e-5(e) (1966).

⁵⁴ The Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972). See Note, *Work Environment Injury Under Title VII*, 82 YALE L. J. 1695, 1697 (1973) (“The 1972 amendments conferred power to bring suit, but the EEOC has been handicapped by small appropriations and by political restraints.”) (footnotes omitted).

⁵⁵ *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

of Title VII is vested with federal courts.”⁵⁶ Congress also denied the EEOC substantive “rulemaking or adjudicatory” authority, routinely granted to federal agencies.⁵⁷ Its powers under Title VII were and are today limited to making “*procedural* regulations to carry out the provisions of this subchapter.”⁵⁸

Because Congress deprived the EEOC of ordinary administrative powers and gave only limited authority to the Attorney General to commence pattern-or-practice cases,⁵⁹ the bulk of responsibility to implement Title VII fell to the workers themselves, to the private bar, and to federal judges.⁶⁰ As the Supreme Court noted, “[w]hen the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing

⁵⁶ *Id.* at 44. Nonetheless, in 1972 Congress added § 717, 42 U.S.C. § 2000e-16 (1972), which did give the EEOC power to adjudicate federal-sector Title VII claims, and for federal sector employees to bring their claims to court after administrative exhaustion. *See Hackley v. Roudebush*, 520 F.2d 108, 116–56 (D.C. Cir. 1975) (describing the history).

⁵⁷ *See, e.g.*, Fair Labor Standards Act, 29 U.S.C. §§ 213(a)(1), (a)(15) (1972) (authorizing) (Secretary of Labor to “define[] and delimit[]” exemptions from the minimum wage and maximum hour requirements); National Labor Relations Act, 29 U.S.C. § 160 (1972) (granting National Labor Relations Board power to adjudicate and issue orders to enforce NLRA).

⁵⁸ 42 U.S.C. § 2000e-12(a) (2012) (emphasis added). Notably, the EEOC does have substantive regulatory authority for other statutes that it enforces. *See, e.g.*, Age Discrimination in Employment Act, 29 U.S.C. § 628 (2012); Americans with Disabilities Act, 42 U.S.C. § 12116 (2012); Genetic Information Nondiscrimination Act, 42 U.S.C. § 2000ff-10 (2012).

⁵⁹ *See* 42 U.S.C. § 2000e-6 (1966). At that time, the Attorney General was limited to seeking injunctive relief. The Attorney General filed numerous pattern-or-practice cases in the early years of Title VII. *See, e.g.*, *United States v. Jacksonville Terminal Co.*, 451 F.2d 418, 422–23 (5th Cir. 1971); *United States v. Ironworkers Local 86*, 443 F.2d 544, 548 (9th Cir. 1971), *cert. denied*, 404 U.S. 984 (1971); *United States v. Hayes Int’l Corp.*, 415 F.2d 1038, 1044 (5th Cir. 1969); *United States v. Ga. Power Co.*, No. 11723, 1971 WL 162, at *25–26 (N.D. Ga. June 30, 1971); *United States v. Bethlehem Steel Corp.*, 312 F. Supp. 977, 980 (W.D.N.Y. 1970); *United States v. Local 189, United Papermakers*, 282 F. Supp. 39, 42 (E.D. La. 1968) (finding employer as “actively engaged, prior to January 1966, in a pervasive pattern of discrimination against the Negro employees at Crown’s Bogalusa paper mill with respect to employment opportunities of promotion, demotion and selection for training”). When Congress granted litigation authority to the EEOC in the 1972 amendments, it retained the Attorney General’s authority to bring pattern-or-practice suits against state and local government entities. *See* 42 U.S.C. §§ 2000e-5(f)(1), 6 (1972).

⁶⁰ 42 U.S.C. § 2000e-5 (2012). H.R. REP. NO. 914, *reprinted in* 1964 U.S.C.C.A.N. 2391, 2515 (additional views of Rep. McCulloch, *et al.*) (“A substantial number of committee members . . . preferred that the ultimate determination of discrimination rest with the Federal Judiciary.”). *See also Alexander*, 415 U.S. at 45 (“[F]ederal courts have been assigned plenary powers to secure compliance with Title VII.”); *Williamson v. Bethlehem Steel Corp.*, 468 F.2d 1201, 1204 (2d Cir. 1972) (“Under Title VII since its inception, moreover, the individual has played a significant role in its enforcement.”); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 460 (5th Cir. 1970) (noting “the crucial role played by the private litigant in the statutory scheme”).

broad compliance with the law.”⁶¹ This was the “private attorney general” model of enforcement—private litigation of issues in the public interest.⁶²

III. THE EXPLORATORY YEARS IN THE LOWER FEDERAL COURTS (1965–71)

During the exploratory years of Title VII, the bar and judiciary confronted an unprecedented statute and struggled to give it definition. As one court (under)stated, the complexities of the Act were “to some extent the product of the ambiguous structure of the enforcement provisions of Title VII resulting from its somewhat chaotic legislative history.”⁶³ Quite literally, the courts had never seen anything like it before.⁶⁴

A. Courts Reject an Intent Requirement for Title VII Liability

Intention may be inferred from conduct considering all the surrounding circumstances. It is not necessary to prove that an intention to discriminate existed at the time of the conduct. To prove intention all that need be demonstrated is that the conduct is not accidental, inadvertent or heedless, or arises from mistake.⁶⁵

There was early judicial indecisiveness about what, if any, kind of “intent” a district court must find under Title VII. An early case on the subject

⁶¹ *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 401 (1968). *See also* *Jenkins v. United Gas Corp.*, 400 F.2d 28, 33 (5th Cir. 1968) (noting that Title VII has “heavy overtones of public interest”); *Clark v. Am. Marine Corp.*, 320 F. Supp. 709, 711 (E.D. La. 1970) (“Title VII suitors . . . are acting as agents of the national policy that seeks to eliminate racial and other unlawful discrimination in employment.”).

⁶² *Piggie Park*, 390 U.S. at 402. It is here that I wish to acknowledge a powerful counterstatement of the history of Title VII, presented in Chuck Henson, *Title VII Works—That’s Why We Don’t Like It*, 2 U. MIAMI RACE & SOC. JUST. L. REV. 41 (2012). The author surveys the legislative history of Title VII and concludes that the final bill did not seek to end discrimination in the workplace except in its most conspicuous manifestations. *See also* *Developments in the Law*, *supra* note 30, at 1114 (“The Act’s effectiveness in promoting minority employment was limited by the principle of color blindness.”). It is a matter of record that the final version of Title VII was greatly watered down from its earliest drafts. The main purpose of this article, though, is to see what litigants and judges made of the Act once actual cases hit the courts.

⁶³ *Hall v. Werthan Bag Corp.*, 251 F. Supp. 184, 187–88 (M.D. Tenn. 1966). *See also* *Voutsis v. Union Carbide Corp.*, 452 F.2d 889, 891 (2d Cir. 1971) (acknowledging the legislative history of Title VII as a “stormy Senate debate”); *Miller v. Int’l Paper Co.*, 408 F.2d 283, 286 n.13 (5th Cir. 1969) (discussing “Title VII’s torrid conception, its turbulent gestation, and its frenzied birth[.]”).

⁶⁴ *Hall*, 251 F. Supp. at 187 (noting “split personality” of Title VII and its procedures).

⁶⁵ *United States v. Bethlehem Steel Corp.*, 312 F. Supp. 977, 993 (W.D.N.Y. 1970).

was *Dobbins v. Local 212, International Brotherhood of Electrical Workers*.⁶⁶ While conducting a bench trial, the court considered whether it could admit evidence of pre-Act discrimination by the defendant as proof of liability. The record established that the union had few black journeymen and almost never referred them for jobs. The court held that pre-Act evidence was admissible to prove intent, because “[s]uch past conduct may illuminate the purpose and effect of present policies and activities and show that policies which appear neutral are in fact designed to presently discriminate.”⁶⁷

Another early opinion was *Dewey v. Reynolds Metals Co.*, a Title VII religious discrimination case involving a worker whose refusal to work on Sundays put him in conflict with both the employer’s overtime requirements and the collective bargaining agreement.⁶⁸ The employer urged that the court had to “find specific intent or purpose to discriminate against Mr. Dewey” to award relief.⁶⁹ The district court, though, held that this argument misapprehended Title VII’s relief provision. Under the Act, the district court held, it was enough for the worker to show simply that the employer “*intentionally and purposely discharged* Mr. Dewey for failure to work on Sundays or find a replacement.”⁷⁰ In other words, what was material was that the termination decision *itself* was knowing, not that it was made in knowing violation of the worker’s Title VII rights. This interpretation was consistent with other early decisions.⁷¹

⁶⁶ *Dobbins v. Local 212, Int’l Bhd. of Elec. Workers*, 292 F. Supp. 413 (S.D. Ohio 1968).

⁶⁷ *Id.* at 443. Other district courts held that violations of Title VII had to be by design, intentional or purposeful. *See also Barnes v. Lerner Shops of Tex., Inc.*, 323 F. Supp. 617, 623 (S.D. Tex. 1971) (adopting stricter standard of proof); *Andres v. Sw. Pipe, Inc.*, 321 F. Supp. 895, 898 (W.D. La. 1971) (“burden is upon the plaintiff to show that his employer intentionally discriminated against him on account of his race”); *United States v. Jacksonville Terminal Co.*, 316 F. Supp. 567, 578 (M.D. Fla. 1970) (“the Government has failed to show any intent by the Company to engage in racial discrimination in employment or any factual basis from which to infer such intent”), *rev’d*, 451 F.2d 418 (5th Cir. 1971); *United States v. Int’l Bhd. of Elec. Workers, Local No. 309, No. 69-10*, 1969 WL 151, at *3 (E.D. Ill. July 3, 1969) (following *Dobbins*, 292 F. Supp. 413); *Richards v. Griffith Rubber Mills*, 300 F. Supp. 338, 341 (D. Or. 1969) (violation must be committed “wilfully and knowingly”).

⁶⁸ *Dewey v. Reynolds Metals Co.*, 304 F. Supp. 1116, 1121 (W.D. Mich. 1969), *rev’d*, 429 F.2d 324 (6th Cir. 1970), *aff’d by an equally divided Court*, 402 U.S. 689 (1971).

⁶⁹ *Id.* at 1120.

⁷⁰ *Id.* at 1121 (emphasis added).

⁷¹ *See, e.g.*, *United States v. Jacksonville Terminal Co.*, 451 F.2d 418, 443 (5th Cir. 1971) (“Manifestly every hiring, promotion, or transfer decision consummated after the Act’s effective date is a specific intentional act.”); *Mabin v. Lear Siegler, Inc.*, 4 Fair Empl. Prac. Cas. (BNA), No. 6071, 1971 WL 214, at *6 (W.D. Mich. May 2, 1971) (“[D]efendant is presumed to intend the probable consequences of its conduct.”); *Robinson v. Lorillard Corp.*, 319 F. Supp. 835, 842 (M.D.N.C. 1970) (“[P]arties defendant, acting with intimate knowledge of the full effect which departmental seniority had upon past hiring practices, cannot be said to have not intended the result.”), *aff’d in relevant part*, 444 F.2d 791 (4th Cir. 1971); *Gregory v. Litton Sys., Inc.*, 316 F. Supp. 401, 403 (C.D. Cal. 1970) (stating “an intent to discriminate is not required” as long as decision “is not accidental or inadvertent”).

The Sixth Circuit eventually reversed the district court's finding of intent as clearly erroneous, though the reversal drew a dissent.⁷² The majority held that a court must find an employer "intentionally engaged in an unlawful employment practice before the court may award relief,"⁷³ and that the employer's failure to accommodate the plaintiff's religious beliefs was not intentional. "It can hardly be said that Reynolds intentionally violated the Act when no discrimination was found by either the Michigan Civil Rights Commission, the Office of Federal Contract Compliance, the arbitrator chosen by agreement of the parties, or the Regional Director of the EEOC in Cleveland."⁷⁴

As the dust settled, though, the U.S. Courts of Appeals concluded across the board that no proof of a defendant's intent to discriminate was necessary to establish Title VII liability. As Judge John Minor Wisdom wrote in the bellwether decision *Local 189, United Papermakers & Paperworkers v. United States*, "the statute, read literally, requires only that the defendant meant to do what he did, that is, his employment practice was not accidental."⁷⁵ To the extent that intent was relevant, such a finding went to remedy, not liability.⁷⁶ The Sixth Circuit itself, without cross-citing its earlier *Dewey* case, later

⁷² *Dewey, v. Reynolds Metals Co.*, 429 F.2d 324, 332–33 (Combs, J., dissenting); *id.* at 333 (McCree, J., dissenting from denial of rehearing).

⁷³ *Id.* at 331.

⁷⁴ *Id.*

⁷⁵ *Local 189, United Papermakers v. United States*, 416 F.2d 980, 996 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); *accord* *Peters v. Missouri-Pacific R. Co.*, No. 1325, 1970 WL 95, at *5 (E.D. Tex. Feb. 17, 1970) ("Even after defendant had been served with notice of the nature of the charges filed with the EEOC, it persisted in its conduct[.]"). Intent could be inferred from a defendant's conduct. *See, e.g., King v. Laborers Int'l Union of North Am., Union Local No. 818*, 443 F.2d 273, 278 (6th Cir. 1971) (finding that intent may be inferred from the totality of the Union's conduct); *Anderson v. Methodist Evangelical Hosp., Inc.*, No. 6580, 1971 WL 150, at *5 (W.D. Ky. June 23, 1971) ("[I]t is not necessary to prove that intent to discriminate existed at the time of the allegedly discriminatory practice, such may be inferred from conduct considering all the surrounding circumstances."), *aff'd*, 464 F.2d 723 (6th Cir. 1972); *United Papermakers*, 416 F.2d at 997 (discussing that intent could even be inferred from defendant's "persist[ing] in the conduct after its racial implications had become known to them"). *See also* *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1201 (7th Cir. 1971) (joining courts that have "construed 'intentionally' in Section 706(g) as meaning the employment practice must be deliberate rather than accidental"); *Robinson v. Lorillard Corp.*, 444 F.2d 791, 796 (4th Cir. 1971) (plaintiffs need not "prove the existence of a discriminatory intent," simply that the "practice was not accidental"); *Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d 245, 250 (10th Cir. 1970) ("Although the company did not adopt the policy with the intention of discriminating, the practice was followed deliberately, not accidentally."); *Antonia H. Chayes et al., The University's Role in Promoting Minority Group Employment in the Construction Industry*, 119 U. PA. L. REV. 91, 120 (1970) (interpreting *Local 189* as "eschew[ing] a test based on the employer's state of mind").

⁷⁶ *See, e.g., LeBlanc v. Southern Bell Tel. & Tel. Co.*, 333 F. Supp. 602, 610–11 (E.D. La. 1971) (denying back pay where defendant was following state law, even though it was preempted by Title VII); *Ridinger v. Gen. Motors Corp.*, No. 3773, No. 3789, 1971 WL 236, at *1 (S.D. Ohio Sept. 2, 1971) (discussing the denial of back pay even when preempted by Title VII).

held in *King v. Laborers International Union of North America, Union Local No. 818* that “actual or implied intent to discriminate . . . is not expressly included as a pre-requisite to a private civil suit, 42 U.S.C. § 2000e-5(e)” and that intent is relevant only “in determining whether injunctive remedies are available.”⁷⁷

Under this interpretation of the Act, litigants drew from a panoply of evidence to prove that a practice or policy was discriminatory. They offered comparisons between similarly-situated black and white workers.⁷⁸ They noted when defendants were procedurally unfair to black workers.⁷⁹

⁷⁷ *King*, 443 F.2d at 278.

⁷⁸ See, e.g., *United States v. Sheet Metal Workers Int’l Ass’n, Local Union No. 36*, 416 F.2d 123, 128 n.8 (8th Cir. 1969) (“[A] qualified Negro electrician, who had been employed in the trade for five years doing work similar to that of white electricians, would . . . be placed in the lowest priority group.”); *Gates v. Georgia-Pacific Corp.*, 326 F. Supp. 397, 398 (D. Or. 1970) (comparing black applicant to three white applicants with inferior qualifications); *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505, 510 (E.D. Va. 1968) (comparing black and white workers at the same machines, earning different wages), *abrogated by Bernard v. Gulf Oil Corp.*, 841 F.2d 547 (5th Cir. 1988).

⁷⁹ See, e.g., *Culpepper v. Reynolds Metals Co.*, 442 F.2d 1078, 1081 (5th Cir. 1971) (finding defendant used pre-Act evaluation of plaintiff to determine eligibility for a job); *Gates*, 326 F. Supp. at 399 (determining employer did not search “employee rosters with as much energy before it advertised publicly for cost accountants” before plaintiff applied); *Baker v. Columbus Mun. Separate Sch. Dist.*, 329 F. Supp. 706, 720 (N.D. Miss. 1971) (finding that cut score was applied unevenly to blacks and whites); *Burks v. Denver and Rio Grande W. R.R. Co.*, No. C-11531970 WL 5402, at *3 (D. Colo. Aug. 17, 1970) (finding defendant in co-worker dispute relied on the white steward’s testimony).

Furthermore, litigants offered statistical⁸⁰ and pattern-or-practice⁸¹ evidence to aid in the battle as well. Subjective decision-making and standardless policies were deemed vehicles for discrimination.⁸²

⁸⁰ See, e.g., *Brown v. Gaston Cty. Dyeing Mach. Co.*, 457 F.2d 1377, 1381–82 (4th Cir.1972) (noting that “of the 45 job classifications, black workers are employed in only 11,” that “[s]lightly less than half of these employees are relegated to two positions, grinding and pickling, and industrial maintenance (janitors)”), *cert. denied*, 409 U.S. 982 (1972); *United States v. Jacksonville Terminal Co.*, 451 F.2d 418, 444 (5th Cir. 1971) (“[W]e rely primarily on post-Act employment statistics compiled by Terminal officials for the Post Office Compliance Officer, as well as pertinent testimony given at the trial.”); *United States v. Central Motor Lines, Inc.*, 338 F. Supp. 532, 556 (W.D.N.C. 1971) (finding that the company had never employed a black among its 287 over-the-road drivers); *EEOC v. United Ass’n of Journeymen, Local 189*, 311 F. Supp. 468, 471–73 (S.D. Ohio 1970) (finding that, while nine blacks possessed city plumbing licenses, none were hired), *rev’d on other grounds*, 438 F.2d 408 (6th Cir. 1971); *United States v. Sheet Metal Workers Int’l Ass’n, Local 36*, 280 F. Supp. 719, 721 (E.D. Mo. 1968) (“[O]n February 4, 1966, the date on which this lawsuit was filed, Local 36 had approximately 1,250 journeymen members, all of whom were white[.]”), *rev’d on other grounds*, 416 F.2d 123 (8th Cir. 1969). *But see* *Ochoa v. Monsanto Co.*, 335 F. Supp. 53, 59 (S.D. Tex. 1971) (rejecting hiring data statistical evidence as “conflicting, equivocal, and probative of nothing”); *Roberts v. St. Louis Sw. Ry. Co.*, 329 F. Supp. 973, 977 (E.D. Ark. 1971) (“Although the company’s discrimination practices of employment against blacks prior to 1965 furnishes a strong inference that Roberts may have been rejected for employment because of racial consideration, such a presumption is not conclusive.”); *United States v. United Bhd. of Carpenters, Local 169*, No. 70-167, 1971 WL 129, at *9 (E.D. Ill. Apr. 8, 1971) (rejecting government’s statistical proof where “one can also assume that the lack of blacks in Locals 169 and 480 might as properly be attributed to other factors—as to 480, there is according to the testimony less than 1/10th of 1% black in the region covered by the union and there were no applications made to join 480 by a black”), *rev’d*, 457 F.2d 210 (7th Cir. 1972).

⁸¹ See *Brown*, 457 F.2d at 1382 (“[W]e have found ‘error in limiting Title VII to present specific acts of racial discrimination,’ and it is now well established that courts must also examine statistics, patterns, practices and general policies to ascertain whether racial discrimination exists.”) (citation omitted), *cert. denied*, 409 U.S. 982 (1972); *Marquez v. Omaha Dist. Sales Office, Ford Div. of Ford Motor Co.*, 440 F.2d 1157, 1160 (8th Cir. 1971) (“While this case was not tried as a typical pattern discrimination case, the past record of Ford Motor Company’s actual experience in hiring members of a minority race in both the Omaha district and the region of which this district is a part may be considered in evaluating plaintiff’s claim of discrimination as to him.”); *United States v. Dillon Supply Co.*, 429 F.2d 800, 84 (4th Cir. 1970) (finding the district court erred “in limiting Title VII to present specific acts of racial discrimination,” holding that it “should have considered any past specific or general act, practice, policy or pattern of racial discrimination which the proof showed had any present discriminatory effect”).

⁸² See, e.g., *Rowe v. Gen. Motors Corp.*, 457 F.2d 348, 359 (5th Cir. 1972) (“Promotion/transfer procedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the immediate foreman are a ready mechanism for discrimination against blacks much of which can be covertly concealed and, for that matter, not really known to management.”); *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 655 (2d Cir. 1971) (identifying lack of “fixed or reasonably objective standards and procedures for hiring” as a discriminatory practice); *Sheet Metal Workers*, 416 F.2d at 135–36 (finding that journeyman examinations “are partially subjective in nature and are graded ‘pass’ or ‘fail,’ with no established standard for either grade”); *United States v. Wood, Wire and Metal Lathers Int’l Union, Local Union 46*, 328 F. Supp. 429, 440 (S.D.N.Y. 1971) (“It should be unnecessary to specify that subjective criteria—like estimates of ‘ability’ by union business agents or even ‘work

While plaintiffs often won these early cases, the cases that they lost are also illuminating. Summary judgments were uncommon in civil rights cases then, yet one district court granted such a motion where the plaintiff forfeited a response by failing to file affidavits *and* was so clearly unqualified as to dispel any racial cause:

This record demonstrates that plaintiff is so lacking in elementary financial prudence, candor, stability, meaningful interest in the business world, and definite career direction that no prudent insurance company could reasonably offer to employ him in a position of fiscal trust and the refusal of defendants to do so is in no way based on plaintiff's race.⁸³

Similarly, the plaintiff in another case was first fired for misconduct (reporting in sick, while actually playing hooky), then rehired, counseled seven times in the space of three months about poor performance, then fired again.⁸⁴ In yet another case, a plaintiff formerly employed at a deli counter was fired for refusing the customer's request to slice cold cuts from a particular ham, who said "[w]e have to sell this [ham] first," and then "slammed the ham back in the counter, abruptly turned her back and walked away"—the customer being none other than the manager's wife.⁸⁵ As illustrated above, plaintiffs did lose these cases under the old interpretation, but it took a lot for a plaintiff to lose.

experience' in terms other than purely temporal—should be eliminated entirely, or at least as nearly as possible."); *United States v. Local 86, Int'l Ass'n of Bridge, Structural, Ornamental, and Reinforcing Ironworkers*, 315 F. Supp. 1202, 1210 (W.D. Wash. 1970) (finding 50% of points for admission to apprenticeships "are based on subjective, nonreviewable determinations by the [Joint Apprenticeship Committee] for which there are no set standards"); *United States v. Med. Soc'y of S.C.*, 298 F. Supp. 145, 149 (D.S.C. 1969) (finding that "the subjective standards in existence" for hiring, assignment, and promotion "have resulted in the great majority of Negro employees, including those who have considerable length of service and satisfactory performance records, remaining in the least attractive and lowest paid jobs.").

⁸³ *Stebbins v. Ins. Co. of N. Am.*, No. 2848-69, 1970 WL 167, at *6 (D.D.C. June 30, 1970).

⁸⁴ *Richardson v. Ind. Bell Tele. Co.*, No. EV 69-C-59, 1970 WL 113, at *3 (S.D. Ind. July 2, 1970). *See also* *Sexton v. Training Corp. of Am.*, No. 16992-1, 1970 WL 101, at *1-2 (W.D. Mo. Apr. 28, 1970) (finding that not only did the plaintiff fail to adduce admissible evidence of alleged racial incidents and attitudes on staff, but there was clear evidence of a non-racial reason due to misconduct).

⁸⁵ *Forte v. S.S. Kresge Co.*, No. 2370, 1971 WL 209, at *1 (E.D.N.C. Mar. 26, 1971). *See also* *Walker v. Abex Corp.*, 351 F. Supp. 147, 148 (E.D. Mo. 1971) (showing a case involving an employee smacking his boss across the head with a crowbar); *Roberts*, 329 F. Supp. at 976-77 (showing a case involving a plaintiff that had disqualifying disability).

B. Attacking Barriers That Perpetuate Employment Discrimination

This Court has continuously given a wide scope to the act in order to remedy, as much as possible, the plight of persons who have suffered from discrimination in employment opportunities. We have described this as “one of the most deplorable forms of discrimination known to our society, for it deals not with just an individual's sharing in the ‘outer benefits’ of being an American citizen, but rather the ability to provide decently for one's family in a job or profession for which he qualifies or chooses.”⁸⁶

Courts carried out their broad equitable authority under Title VII to abolish or rewrite employment policies that caused discrimination against blacks.⁸⁷ Indeed, such relief for aggrieved workers was held to be mandatory on a finding of liability.⁸⁸ The Fifth Circuit noted that,

[t]o the federal courts alone is assigned the power to enforce compliance with section 703(a) [42 U.S.C. § 2000e-2(a)], and the burden of obtaining enforcement rests upon

⁸⁶ *Rowe*, 457 F.2d at 354 (quoting *Culpepper v. Reynolds Metals Co.*, 421 F.2d 888, 891 (5th Cir. 1970)). See also *Hutchings v. U.S. Indus., Inc.*, 428 F.2d 303, 311 (5th Cir. 1970) (“[t]he Trial judge in a Title VII case bears a special responsibility in the public interest to resolve the employment dispute, for once the judicial machinery has been set in train, the proceeding takes on a public character in which remedies are devised to vindicate the policies of the Act, not merely to afford private relief to the employee.”); *Culpepper*, 421 F.2d at 891 (highlighting the “duty of the courts to make sure that the Act works, and the intent of Congress is not hampered by a combination of a strict construction of the statute and a battle with semantics”); *Mack v. Gen. Elec. Co.*, 329 F. Supp. 72, 75–76 (E.D. Pa. 1971) (“Congress has taken giant strides to legislate bias out of our economy. Given the tools that Congress has now provided, courts would be remiss if they were not used to the fullest extent.”); *Grimm v. Westinghouse Elec. Corp.*, 300 F. Supp. 984, 988 (N.D. Cal. 1969) (finding that access to courts improved under Title VII by stating: “[t]he examples just cited of judicial enlargement of the narrow path to the courthouse demonstrate that wise application of Title VII requires judicious filling of gaps in the statute”).

⁸⁷ *Hutchings*, 428 F.2d at 312 (“[O]nce a violation has been found, the trial judge is invested with wide discretion in modeling his decree to ensure compliance with the Act.”); *United States v. Va. Elec. & Power Co.*, 327 F. Supp. 1034, 1042 (E.D. Va. 1971) (“[A]ny structural impediments which delay or bar the attainment by qualified blacks of jobs generally as good as those held by their white contemporaries, or which force blacks to pay a price for those opportunities, must by law be removed.”).

⁸⁸ *United States v. Hayes Int'l Corp.*, 415 F.2d 1038, 1045 (5th Cir. 1969) (“[W]here an employer has engaged in a pattern and practice of discrimination on account of race, etc., in order to insure the full enjoyment of the rights protected by Title VII of the 1964 Civil Rights Act, affirmative and mandatory preliminary relief is required.”); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 721 (7th Cir. 1969) (holding that district court erred by not ordering relief on finding of liability). *But see Parham v. Sw. Bell Tele. Co.*, 433 F.2d 421, 429 (8th Cir. 1970) (permitting no injunction where defendant took “impressive and salutary [sic]” steps to remedy discrimination).

the individual claiming to have been aggrieved by its violation . . . Confidence, to the extent that Congress was willing to dispense it, reposes finally with the federal courts.⁸⁹

The preference for systemic relief was also reflected in courts' embrace of class actions. Federal Rules of Civil Procedure Rule 23 class actions—an innovation adopted by the U.S. Supreme Court in 1966, specifically with civil rights litigation in mind⁹⁰—proved immediately popular in Title VII cases.⁹¹ Courts found that “[r]acial discrimination is by definition a class discrimination” and “applies throughout the class.”⁹² Class actions enabled courts to carry out a “full scale inquiry” into discriminatory employment practices.⁹³

A guiding principle, which originated in the Fifth Circuit, was that Title VII prohibited policies that perpetuated pre-Act inequality, despite that Title VII was only prospective in effect.⁹⁴ As the Fifth Circuit observed in a widely cited opinion:

⁸⁹ *Hutchings*, 428 F.2d at 310–11.

⁹⁰ The modern Rule 23 was adopted just one year after Title VII (1966), citing “various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration.” FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment.

⁹¹ From the very beginning, courts recognized that Title VII suits were well-suited for class action treatment. *See, e.g.*, *Logan v. Gen. Fireproofing Co.*, 309 F. Supp. 1096, 1101 (W.D.N.C. 1969) (“It appears Congress intended to permit class actions under Title VII of the Act”); *Bowe v. Colgate-Palmolive Co.*, 272 F. Supp. 332, 360 (S.D. Ind. 1967) (“The character of the rights sought to be enforced on behalf of the employees as a class is joint and common as relates to injunctive relief and separate and several as relates to money damages and reinstatement”), *rev’d on other grounds*, 416 F.2d 711 (7th Cir. 1969); *Morse*, *supra* note 52, at 523–26 (advocating class actions to enforce Title VII); Note, *Parties Plaintiff in Civil Rights Litigation*, 68 COLUM. L. REV. 893, 914 (1968) (“The very language of the federal fair employment law acknowledges the appropriateness of class relief in discrimination suits.”).

⁹² *Hall v. Werthan Bag Corp.*, 251 F. Supp. 184, 186 (M.D. Tenn. 1966). One court noted the “incongru[ity]” that would occur if a plaintiff could win relief for himself, but not for others: “if class-wide relief were not afforded expressly in any injunction or declaratory order issued in Employee’s behalf, the result would be the incongruous one of the Court—a Federal Court, no less—itsself being the instrument of racial discrimination” *Jenkins v. United Gas Corp.*, 400 F.2d 28, 34 (5th Cir. 1968).

⁹³ *See Bowe*, 416 F.2d at 715; *Jenkins*, 400 F.2d at 33.

⁹⁴ *See, e.g.*, *Taylor v. Armco Steel Corp.*, 429 F.2d 498, 499 (5th Cir. 1970); *United States v. Hayes Int’l Corp.*, 415 F.2d 1038, 1046 n.6 (5th Cir. 1969); *Local 53 of the Int’l Association of Heat and Frost Insulators v. Vogler*, 407 F.2d 1047, 1052–53 (5th Cir. 1969). Other Circuits promptly followed the Fifth Circuit’s lead. *See, e.g.*, *Marquez v. Omaha Dist. Sales Office, Ford Div. of Ford Motor Co.*, 440 F.2d 1157, 1159–60 (8th Cir. 1971); *Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d 245, 250 (10th Cir. 1970); *United States v. Int’l Bhd. of Elec. Workers, Local No. 38*, 428 F.2d 144, 149 (6th Cir. 1970); *Griggs v. Duke Power Co.*, 420 F.2d 1225, 1230 (4th Cir. 1970), *rev’d*, 401 U.S. 424 (1971); *United States v. Sheet Metal Workers Int’l Ass’n, Local 36*, 416 F.2d 123, 131 (8th Cir. 1969). *But see United States v. Nat’l Lead Co.*, 438 F.2d 935, 938 (8th Cir. 1971) (noting that while some “vestiges of past discrimination

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 *present* right not to be discriminated against on the ground of race. The crux of the problem is how far the employer must go to undo the effects of past discrimination.⁹⁵

In cases where a court found that a policy perpetuated pre-Act discrimination, the defendant could still defend the practice as a business necessity,⁹⁶ although the standard of proof of necessity was steep. As the Second Circuit held: “Necessity connotes an irresistible demand. To be preserved, the seniority and transfer system must not only directly foster safety and efficiency of a plant, but also be essential to those goals.”⁹⁷

Among the earliest challenges brought under Title VII concerned seniority policies, which—while neutral in form—were held to perpetuate past discrimination.⁹⁸ A variant on these cases were departmental seniority

seem preserved in National Lead’s transfer and promotion procedures,” preliminary relief denied where “actual impact of this discrimination upon black employees possessing pre-1963 seniority is unclear”).

⁹⁵ *Local 189, United Papermakers v. United States*, 416 F.2d 980, 998 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970) (emphasis added).

⁹⁶ *See, e.g., United States v. St. Louis-San Francisco Ry. Co.*, 464 F.2d 301, 308 (8th Cir. 1972) (“[N]eutral policy, which is inherently discriminatory, may be valid if it has overriding business justification.”); *Rowe v. Gen. Motors Corp.*, 457 F.2d 348, 355 (5th Cir. 1972) (“business necessity”); *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 664 (2d Cir. 1971) (“business necessity”); *Robinson v. Lorillard Corp.*, 444 F.2d 791, 797 (4th Cir. 1971) (“business necessity”); *Local 189*, 416 F.2d at 989 (“overriding legitimate, nonracial business purpose”), *cert. denied*, 397 U.S. 919 (1970); *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505, 518 (E.D. Va. 1968) (“business necessity”).

⁹⁷ *Bethlehem Steel Corp.*, 446 F.2d at 662. *See also St. Louis-San Francisco Ry. Co.*, 464 F.2d at 308 (“Although Frisco and UTU argue strenuously that the train porters should not be permitted to carry over their seniority in bidding on braking jobs for safety reasons, we are not convinced that this argument is necessarily valid.”); *Jones*, 431 F.2d at 248–49 (explaining that bad experiences with prior transfers, cost of training both a transferee and his replacement, grievances, and other problems which might arise because job categories were covered by different union contracts did not constitute “business necessity”); *Local 189*, 416 F.2d at 990 (defendant’s expert admitted that “seniority does not provide the only safe or efficient system for governing promotions” and “an alternative ‘job credit’ system that would give certain fractional seniority credit to victims of discrimination for the years in which they had been excluded from the white progression lines” would work as well).

⁹⁸ *See, e.g., Robinson v. Lorillard Corp.*, 319 F. Supp. 835, 840 (M.D.N.C. 1970) (using analogy of race cars starting from different places); *United States v. Local 189, United Papermakers*, 282 F. Supp. 39, 44 (E.D. La. 1968) (“Where a seniority system has the effect of perpetrating discrimination . . . that present result is prohibited, and a seniority system which operates to produce that present result must be replaced with another system.”), *aff’d*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); *Quarles*, 279 F. Supp. at 516 (“[C]ongress did not intent [sic] to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act.”). Scholars commented upon the pernicious role of seniority in

policies that effectively locked blacks into formerly segregated units, by forcing black employees to forfeit to transfer units.⁹⁹ Notably, Title VII itself insulated seniority policies from coverage. Title VII's sponsors, responding to claims that Title VII would destroy seniority,¹⁰⁰ agreed to the inclusion of section 703(h)¹⁰¹ to exclude from the Act's definition of "unlawful employment practice" any "different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system."¹⁰² That exclusion, though, came with its own carve-out of racial differences resulting from the defendant's "intention to discriminate." Courts seized on that exception to reach

race discrimination. *See, e.g.*, Howard F. Fine, *Plant Seniority and Minority Employees: Title VII's Effect on Layoffs*, 47 U. COLO. L. REV. 73, 77–92 (1975) (setting out early history of challenges to seniority systems); William B. Gould, *Employment Security, Seniority and Race: The Role of Title VII of the Civil Rights Act of 1964*, 13 HOWARD L. J. 1, 9 (1967) ("Past exclusion cannot be used as a 'grandfather clause' to stultify the present advance of minority employment."); Note, *Title VII, Seniority Discrimination and the Incumbent Negro*, 80 HARV. L. REV. 1260, 1274 (1967) ("[C]ontinued maintenance of the unequal relative positions of whites and Negroes established in the past will impose future economic losses on the Negro."). *But see* Heard v. Mueller Co., No. 6095, 1971 WL 227, at *2 (N.D. Tenn. Dec. 7, 1971) (finding no liability for disparity caused by seniority system), *aff'd*, 464 F.2d 190 (6th Cir. 1972).

⁹⁹ *See, e.g.*, United States v. Chesapeake & Ohio Ry. Co., 471 F.2d 582, 589 (4th Cir. 1972) ("[O]n remand the district court should enter a decree that will enable qualified Barney yard brakemen who were employed before the effective date of the Act to exercise their company seniority with respect to: (a) filling general yard vacancies, including those caused by furloughs, and (b) thereafter enjoying all other prerogatives dependent on seniority."); United States v. Hayes Int'l Corp., 456 F.2d 112, 117 (5th Cir. 1972) ("Current promotion practices and other rights granted employees, in so far as they may limit the transfer program by imposing barriers to the incumbent negroes' opportunity to achieve their rightful place consistent with their ability and plant seniority, are in themselves Title VII violations."); Bing v. Roadway Exp., Inc., 444 F.2d 687, 690 (5th Cir. 1971) (explaining that defendant "prohibited transfers from the road driver unit to the city driver unit as well as from the city unit to the road unit"); Hairston v. McLean Trucking Co., 62 F.R.D. 642, 665 (M.D.N.C. 1972) ("[R]estrictions . . . tend to prevent blacks from now obtaining positions from which they were formerly excluded."), *rev'd on other grounds*, 520 F.2d 226 (4th Cir. 1975).

¹⁰⁰ The centrality of seniority to the mid-century American workplace cannot be gainsaid. *See, e.g.*, Franks v. Bowman Transp. Co., Inc., 424 U.S. 747, 766 (1976) ("Seniority systems and the entitlements conferred by credits earned thereunder are of vast and increasing importance in the economic employment system of this Nation."); Humphrey v. Moore, 375 U.S. 335, 346–47 (1964) (discussing the "overriding importance" of seniority rights in nation's economy); United States v. Chesapeake & Ohio Ry. Co., No. 1469-NN, 1971 WL 167, at *9 (E.D. Va. Aug. 14, 1971) ("One hard fact upon which every witness in this case agreed . . . was that his seniority rights were the most important asset he owned 'next to God and his family.'"); Comment, *The Inevitable Interplay Of Title VII and The National Labor Relations Act: A New Role For The NLRB*, 123 U. PA. L. REV. 158, 162 (1974) (noting that seniority plans were "found in over ninety percent of all American collective bargaining agreements . . .").

¹⁰¹ 42 U.S.C. § 2000e-2(h) (2012).

¹⁰² *Id.* *See* 110 CONG. REC. 6992 (April 8, 1964) (discussing Title VII's effect on seniority, Senators Clark and Case stated: "Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business had 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.").

not only those seniority policies that were designed specifically to discriminate by race, but also those policies that perpetuated pre-Act discrimination. As an early decision underscored: “Present discrimination may be found in contractual provisions that appear fair upon their face, but which operate unfairly because of the historical discrimination that undergirds them.”¹⁰³

For example, in *Hicks v. Crown Zellerbach Corp.*, the court dismantled the plant’s seniority system “by which employees in a position to compete for promotion to vacant job slots in a particular line of progression are awarded promotions on the basis of ‘job seniority.’”¹⁰⁴ Because the rule perpetuated inequalities, the court ordered that the company switch to using “[t]otal plant seniority (i. e., the length of continuous service in the box plant) alone [to] determine who the ‘senior’ bidder or employee” was for promotions, and the changes were ordered to take place “within ten days from the entry of the order.”¹⁰⁵ Courts confronted the challenge of crediting workers with the seniority status and benefits that they would have earned, but for discrimination.¹⁰⁶

¹⁰³ *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505, 518 (E.D. Va. 1968). See also *Russell v. Am. Tobacco Co.*, 528 F.2d 357, 363 (4th Cir. 1975) (“Intentional segregation of the past that is perpetuated by a company’s seniority system precludes the company from claiming that its system is bona fide within the meaning of [§] 2000e-2(h).”); *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 659 (2nd Cir. 1971) (“[P]resent seniority and transfer provisions were based on past discriminatory classifications.”); *Robinson*, 444 F.2d at 795–96 (“Lorillard’s departmental seniority system has a continuing discriminatory impact on the class represented by the plaintiffs” because “the ‘white’ departments are the better paying ones, the whites hired into those departments under the discriminatory hiring policy are presently receiving higher rates of pay than Negroes hired at the same time into the other four departments.”); *United States v. Ga. Power Co.*, No. 12355, 1970 WL 162, at *6 (N.D. Ga. Sept. 22, 1970) (“[P]erpetuation of a pre-Act employment or promotion practice which presently penalizes a black employee as against a white employee constitutes discrimination under the Act.”). But see *United States v. H.K. Porter Co.*, 296 F. Supp. 40, 90 (N.D. Ala. 1968) (“[T]he court must properly find that this procedure is not a racial standard but is instead a standard which operates for the benefit of the employee, Negro or white, who first reaches a job.”); William B. Gould, *Seniority and the Black Worker: Reflections on Quarles And Its Implications*, 47 TEX. L. REV. 1039, 1047–51 (1969) (criticizing *Quarles*).

¹⁰⁴ *Hicks v. Crown Zellerbach Corp.*, 49 F.R.D. 184, 198 (E.D. La. 1968).

¹⁰⁵ *Id.* at 198–99. The same court directed merger of two formerly segregated union locals at Crown Zellerbach and promotion of black members into leadership. *Hicks v. Crown Zellerbach Corp.*, 310 F. Supp. 536, 538–39 (E.D. La. 1970).

¹⁰⁶ See, e.g., *Hicks v. Crown Zellerbach Corp.*, 321 F. Supp. 1241, 1242–45 (E.D. La. 1971). See *United States v. Sheet Metal Workers Int’l Ass’n, Local 36*, 416 F.2d 123, 133–34 and n.20 (8th Cir. 1969) (unions referral system resulted in “total” exclusion of black workers; court orders promotion of qualified black workers outside of system); *Irvin v. Mohawk Rubber Co.*, 308 F. Supp. 152, 161 (E.D. Ark. 1970) (“[A]ll Negroes employed by the company before September, 1966, who now work in the Janitorial Department 30 of Division ‘A’ and who work in Division ‘B’ shall be given an opportunity to transfer to the other Divisions ‘C’ and ‘D’ to fill vacancies as they exist, should they elect to transfer and are qualified for the jobs they seek.”). See also *Bethlehem Steel Corp.*, 446 F.2d at 665 (holding that district court erred by not ordering that (1) future black transferees from different departments be paid in their new

Another target for reform was union referral, apprenticeship, and membership policies, often used to hold back black workers. In *United States v. Sheet Metal Workers, International Association, Local 36*, it was uncontested that blacks were virtually barred from membership in two locals prior to the effective date of Title VII.¹⁰⁷ Although the union recruited black members and there was no record of invidious race discrimination in admission to the union after 1965, the referral system by which members obtained employment required a minimum five years' experience in the industry and three years of service under the collective bargaining agreement.¹⁰⁸ Owing to the pre-Act segregation, black craftsmen lacked the requisite experience and were thus denied employment.¹⁰⁹ The district court held that absent an intentional pattern or practice of discrimination, there was no liability.¹¹⁰

The Eighth Circuit reversed, holding that “[b]oth [locals’] plans effectively operate to deprive qualified Negroes of an equal opportunity for employment as journeymen electricians or as sheet metal workers. Because the plans carry forward the effects of former discriminatory practices, they result in present and future discrimination and are violative of Title VII of the Act.”¹¹¹ The court held that the alleged absence of current discrimination was immaterial; given the certainty that black craftsmen would not advance under the referral policy, “it is unreasonable to expect that any Negro tradesman working for a Negro contractor or a nonconstruction white employer would seek to use the referral systems or to join either Local.”¹¹² The court

jobs at a rate at least equal to their average hourly earnings in their former jobs, and (2) in their new jobs, the transferees should get the benefit of plant rather than unit or department seniority for all purposes); *Local 189, United Papermakers v. United States*, 416 F.2d 980, 985 (5th Cir. 1969) (affirming decree “order[ing] the abolition of job seniority in favor of mill seniority ‘in all circumstances in which one or more competing employees is a Negro employee hired prior to January 16, 1966’”), *cert. denied*, 397 U.S. 919 (1970); *United States v. Continental Can Co.*, 319 F. Supp. 161, 167–72 (E.D. Va. 1970) (ordering merger of lines of progressions and other relief to facilitate promotion of black workers); *Johnson v. Continental Can Co.*, No. 13959, 1970 WL 110, at *4–8 (W.D. La. June 16, 1970) (restructuring of transfer policies to alleviate impact of former segregation). Other decisions, while leaving seniority policies in place, ordered that black workers be allowed to bypass them. *Title VII, Seniority Discrimination and the Incumbent Negro*, *supra* note 96, at 1268 (proposing three remedial models: status quo, with white employees unaffected; rightful place, balancing interests; and freedom now, which would displace whites).

¹⁰⁷ *Sheet Metal Workers*, 416 F.2d at 131.

¹⁰⁸ This is not to say that there wasn't evidence of racial hostility. The formerly white unions boycotted the construction of the St. Louis Gateway Arch in 1965–66 “when Negro craftsmen belonging to an independent union were employed,” a boycott only brought to an end by a federal court injunction. *Id.* at 128–29 (citing *United States v. Bldg. & Const. Trade Council of St. Louis, Mo.*, 271 F. Supp. 447 (E.D. Mo. 1966)).

¹⁰⁹ *Sheet Metal Workers*, 416 F.2d at 131.

¹¹⁰ *Id.* at 126–27.

¹¹¹ *Id.* at 131.

¹¹² *See United States v. Sheet Metal Workers Int'l Ass'n, Local 36*, 416 F.2d 123, 132 (8th Cir. 1969).

ordered that black members be excused from the experience requirements.¹¹³

The Sixth Circuit also reversed an injunction that did not go far enough to dismantle a referral system that disadvantaged black members in *United States v. International Brotherhood of Electrical Workers, Local No. 38*.¹¹⁴ The district court found that the prior referral system, even in the two years after Title VII became effective, systematically excluded black workers: in the past year, the union “had referred 3,487 persons for work in the electrical trades through its hiring hall, of whom only two were Negroes.”¹¹⁵ The district court ordered no equitable relief.¹¹⁶ The Sixth Circuit reversed, holding that because the continuation of the policies perpetuated discrimination, denial of injunctive relief was an abuse of discretion. The Sixth Circuit remanded for a “more specific court order” to take steps to “eliminat[e the] ingrained discriminatory practices of past decades.”¹¹⁷ The court rejected an argument that such relief was blocked by section 703(j),¹¹⁸ reasoning that that this section “cannot be construed as a ban on affirmative relief against continuation of effects of past discrimination resulting from present practices,” or else it “would allow complete nullification of the stated purposes of the [Act].”¹¹⁹

¹¹³ *Id.* at 133.

¹¹⁴ *United States v. Int’l Bhd. of Elec. Workers, Local No. 38*, 428 F.2d 144 (6th Cir. 1970).

¹¹⁵ *Id.* at 151.

¹¹⁶ *Id.* at 146.

¹¹⁷ *Id.* at 151. *See also* *United States v. Ironworkers Local 86*, 443 F.2d 544, 553 (9th Cir. 1971) (finding that union committees must “select and indenture sufficient black applicants to overcome past discrimination”); *United States v. Local 86, Int’l Ass’n of Bridge, Structural, Ornamental and Reinforcing Iron Workers*, 315 F. Supp. 1202, 1237–52 (W.D. Wash. 1970) (ordering detailed reporting, job-posting, and notification requirements; special recruitment of black workers; elimination of requirement that applicants must provide names of union members who will vouch for them; out-of-order referral for black journeymen; and limitations on fees and pass scores), *aff’d*, 443 F.2d 544 (9th Cir. 1971); *United States v. United Ass’n of Journeymen, Plumbers Local 73*, 314 F. Supp. 160, 165 (S.D. Ind. 1969) (ordering local 73, “for the next two years, [to] refer all applicants for employment on a first-in first-out basis, regardless of union membership, or the passage of a union examination”). *But see* *United States v. Int’l Longshoremens’ Ass’n*, 319 F. Supp. 737, 744–45 (D. Md. 1970) (refusing to dismantle gang system where record showed that reforming team on daily basis hurt productivity and safety).

¹¹⁸ 42 U.S.C. § 2000e-2(j) (1964) (barring courts from ordering “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 [a numerical] imbalance”).

¹¹⁹ *Electrical Workers*, 428 F.2d at 149–50. *See also* *Ironworkers*, 443 F.2d at 553 (finding that under broad interpretation of § 703(j), “the district court would be unable to effectuate the desire of Congress to eliminate all forms of discrimination”).

Many cases were filed against unions.¹²⁰ Racially segregated locals, previously quite common, were struck down either as *per se* violations of Title VII¹²¹ or else as impairing members' terms and conditions of employment.¹²² Courts also attacked nepotism, *i.e.*, membership and referral policies based on family relationships or being sponsored by a current worker, which overwhelmingly favored whites.¹²³ In *Local 53 of the International Ass'n of Heat & Frost Insulators v. Vogler*, the union required that "applicants for membership obtain recommendations from present members and receive a favorable vote of a majority of its members" and "have had four years of experience as an 'improver' or 'helper' member of the union, but improver membership in the union is restricted to sons or close relatives living in the households of members."¹²⁴ The Fifth Circuit held that the policy violated Title VII because of its adverse impact on black and Latinx workers.¹²⁵ It affirmed an injunction against the use of "endorsements, family relationship or elections as criteria for membership"¹²⁶

¹²⁰ Charlotte Garden & Nancy Leong, "So Closely Intertwined": Labor and Racial Solidarity, 81 GEO. WASH. L. REV. 1135, 1165 (2013).

¹²¹ See *Longshoremen*, 319 F. Supp. at 741 ("[M]aintenance of locals whose membership is segregated by race is a per se violation of Section 703(c)(2) of the Act.").

¹²² *United States v. Int'l Longshoremen's Ass'n*, 334 F. Supp. 976, 980 (S.D. Tex. 1971) ("[M]any of the Negro longshoremen seeking work in the port of Brownsville were recruited from other ports, and the local longshoremen resisted their coming down to take their jobs."). See also *NLRB v. Mansion House Ctr Mgt. Corp.*, 473 F.2d 471, 477 (8th Cir. 1973) ("National Labor Relations Act cannot be available to a union which is unwilling to correct past practices of racial discrimination").

¹²³ *Local 53 of Int'l Ass'n of Heat & Frost Insulators v. Vogler*, 407 F.2d 1047, 1054 (5th Cir. 1969) ("While the nepotism requirement is applicable to black and white alike and is not on its face discriminatory, in a completely white union the present effect of its continued application is to forever deny to negroes and Mexican-Americans any real opportunity for membership.").

¹²⁴ *Id.* at 1050–54.

¹²⁵ *Id.* at 1054.

¹²⁶ *Id.* at 1051. See also *United States v. United Bhd. of Carpenters, Local 169*, 457 F.2d 210, 215 n.8 (7th Cir. 1972) ("[W]hen the union opens its door to a token number of blacks, nepotism applied evenly tends to solidify the minuscule percentage of blacks."), *cert. denied*, 409 U.S. 851 (1972); *United States v. Int'l Ass'n of Bridge, Structural and Ornamental Iron Workers, Local No. 1*, 438 F.2d 679, 683 (7th Cir. 1971) ("A union which has only white members can effectively preclude non-whites from membership by giving preference in admission to relatives of members."); *United States v. United Assoc. of Journeymen, Local No. 24*, 1971, No. E-7201, WL 11592, at *3–4 (D.N.J. Dec. 22, 1972) (noting sons of members were allowed to by-pass system); *Lea v. Cone Mills Corp.*, 301 F. Supp. 97, 102 (M.D.N.C. 1969) (enjoining practice "of granting initial hiring preference to former employees and close friends and relatives of its existing work force") *aff'd in relevant part*, 438 F.2d 86 (4th Cir. 1971). *But see* *United States v. Sheet Metal Workers Int'l Ass'n, Local Union 36*, 280 F. Supp. 719, 726 (E.D. Mo. 1968) (rejecting nepotism claim, finding no significant difference in success of applicants with family relationships).

As courts ordered an end to discriminatory policies, they also ordered defendants to advance blacks to where they would have been absent the past discrimination, sometimes even with specific numeric goals.¹²⁷ As one court observed, while upholding a voluntary affirmative action plan, “[t]he strength of any society is determined by its ability to open doors and make its economic opportunities available to all who can qualify[.]” and that it “is fundamental that civil rights, without economic rights, are mere shadows.”¹²⁸

C. Challenging New Employer Policies that Caused Discrimination

While the above decisions aimed to break a cycle of pre-Act discrimination, another branch of Title VII case law challenged new policies that obstructed black workers, even absent historical discrimination. Courts reviewed written tests (where white workers tended to outscore blacks) that were found to be unrelated to the job at hand.¹²⁹ While Title VII exempted

¹²⁷ See, e.g., *Carter v. Gallagher*, 452 F.2d 315, 331 (8th Cir. 1971) (requiring hiring of minority firefighters at one-to-two ratio with whites); *United States v. Central Motor Lines, Inc.*, 325 F. Supp. 478, 479 (W.D.N.C. 1970) (ordering that future drivers shall be hired in alternating ratio of one black to one white); *United States v. Local 86, Int’l Ass’n of Bridge Workers*, 315 F. Supp. 1202, 1247 (W.D. Wash. 1970) (ordering unions to recruit enough blacks to comprise 30% membership in apprenticeship programs).

¹²⁸ *Contractors Ass’n of E. Pa. v. Secretary of Labor Shultz*, 311 F. Supp. 1002, 1010 (E.D. Pa. 1970), *aff’d*, 442 F.2d 159 (3d Cir. 1971). See *S. Illinois Builders Ass’n v. Ogilvie*, 327 F. Supp. 1154, 1159 (S.D. Ill. 1971) (“... minimum ratios, where, de jure or de facto, based upon race are constitutional and valid when adopted for the purpose of implementing affirmative action to achieve equal employment opportunities.”); *Joyce v. McCrane*, 320 F. Supp. 1284, 1288 (D.N.J. 1970) (ordering defendants to employ thirty to thirty-seven percent of minority journeymen). Some employers avoided liability by adopting their own plans voluntarily. See also *United States v. Hayes Int’l Corp.*, No. 68-159, 1970 WL 161, at *6 (N.D. Ala. Nov. 24, 1970) (“[T]he company through affirmative action to recruit and hire Negro persons has effectively eliminated the effects of any past discrimination.”); *Logan v. Gen. Fireproofing Co.*, No. 3050, 1970 WL 129, at *5 (W.D.N.C. Sept. 10, 1970) (noting that hiring, pay and promotion records show equal commitment to black employees even before passage of Title VII), *rev’d on other grounds*, 521 F.2d 881 (4th Cir. 1971).

¹²⁹ See, e.g., *Hicks v. Crown Zellerbach Corp.*, 319 F. Supp. 314, 318–19 (E.D. La. 1970) (discussing the Wonderlic Personnel Test, Bennett Test of Mechanical Comprehension, Form AA, and SRA Non-Verbal Test); *Roberson v. Great Am. Ins. Co. of N.Y.*, No. 12182, 1969 WL 4774, at *1 (N.D. Ga. Mar. 31, 1969) (noting math and perception tests for file-clerk job); *United States v. H.K. Porter Co.*, 296 F. Supp. 40, 72–87 (N.D. Ala. 1968) (discussing aptitude and math tests). See generally *Cooper & Sobol*, *supra* note 34, at 1637–69 (discussing standardized employment tests).

“professionally developed ability test[s]” under section 703(h), courts made defendants prove job-relatedness¹³⁰ and validation for such examinations.¹³¹

Plaintiffs also challenged workplace policies that magnified social disadvantages suffered disproportionately by blacks. In *Gregory v. Litton Systems, Inc.*, the court struck down a policy of asking applicants for their arrest-record histories.¹³² This policy had “the foreseeable effect of denying black applicants an equal opportunity for employment. It is unlawful even if it appears, on its face, to be racially neutral and, in its implementation, has not been applied discriminatorily or unfairly as between applicants of different races.”¹³³ Other employment policies challenged on this basis included

¹³⁰ See, e.g., *Castro v. Beecher*, 334 F. Supp. 930, 943 (D. Mass. 1971) (“Inasmuch as the civil service examinations were not job related and were discriminatory against the plaintiffs, any state or city official, who innocently or otherwise, used the results of those examinations to deprive a plaintiff of a job opportunity deprived him of the equal protection of the laws guaranteed by the Fourteenth Amendment and violated 42 U.S.C. §§ 1981 and 1983.”), *rev’d on other grounds*, 459 F.2d 725 (1st Cir. 1972); *Penn v. Stumpf*, 308 F. Supp. 1238, 1242 (N.D. Cal. 1970) (“[P]laintiff alleges specifically that the tests in question have not been professionally developed or otherwise validated”); *Cooper v. Allen*, 1971, WL 205, at *4 (N.D. Ga. July 27, 1971) (challenging Otis-Lennon Mental Ability Test for golf-pro applicants under 42 U.S.C. § 1981; while a public employer “need not comply with the technical requirements of Title VII” in the face of negative impact on black applicants, defendant “must make a positive showing that the test used and the scores received adequately reflect the potential of the person tested to perform his particular job assignment”), *rev’d on other grounds*, 467 F.2d 836 (5th Cir. 1972); *Arrington v. Mass. Bay Transp. Auth.*, 306 F. Supp. 1355, 1358 (D. Mass. 1969) (“[I]f there is no demonstrated correlation between scores on an aptitude test and ability to perform well on a particular job, the use of the test in determining who or when one gets hired makes little business sense.”); *Dobbins v. Local 212, Int’l Bhd. of Elec. Workers*, 292 F. Supp. 413, 434 (S.D. Ohio 1968) (“The fair test of an individual’s qualifications to work in the electrician trade in this geographical area is the actual ability to work on the job in the trade for the average contractor operating in the trade.”). See generally *Developments in the Law*, *supra* note 30 (describing the history and early court interpretation of Title VII).

¹³¹ See, e.g., *H.K. Porter*, 296 F. Supp. at 74–79 (holding that intelligence tests must at least be job-related and validated); *Dobbins*, 292 F. Supp. at 433–34 (finding that journeyman examination violated Title VII where “56% of the questions related to specialized information that electricians working at the trade would not be required to know”).

¹³² *Gregory v. Litton Sys., Inc.*, 316 F. Supp. 403 (C.D. Cal. 1970), *modified*, 472 F.2d 631 (9th Cir. 1972).

¹³³ *Gregory*, 316 F. Supp. at 403. See generally George R. Bedell, Note, *Civil Rights—An Employment Policy of Disqualifying Frequently Arrested Applicants Unlawfully Discriminates Against Blacks Under Title VII of the Civil Rights Act of 1964.*, 85 HARV. L. REV. 1482 (1972). But see *Jimerson v. Kisco Co.*, 404 F. Supp. 338, 341–42 (E.D. Mo. 1975) (rejecting claim that blacks were excluded for falsifying arrest record history at a higher rate than whites).

asking applicants whether they had illegitimate children,¹³⁴ firing workers whose wages had been garnished,¹³⁵ and requiring high-school diplomas.¹³⁶

IV. THE SUPREME COURT'S PIONEERING TITLE VII CASES: GRIGGS AND MCDONNELL DOUGLAS (1971–73)

Although the United States Supreme Court had a prior brush with Title VII in *Phillips v. Martin Marietta Corp.*,¹³⁷ this was not its last. The first truly groundbreaking case to come before the justices was *Griggs*, addressing unsettled questions about intent and the defense of “business necessity.” Two terms later, in *McDonnell Douglas*, the court took up the question of what constitutes a *prima facie* case of discrimination.¹³⁸

A. Griggs: The Court Brings Title VII to Facially-Neutral Practices

While most courts applied Title VII to dismantle facially-neutral policies that excluded blacks, a minority of courts held that employers and unions had no duty under Title VII beyond avoiding present intentional discrimination.¹³⁹ The Act, they held, did not compel “affirmative action to relieve the

¹³⁴ *Davis v. Am. Nat. Bank*, No. 3-4512-B, 1971 WL 10796, at *2 (N.D. Tex. Dec. 14, 1971).

¹³⁵ *Johnson v. Pike Corp. of Am.*, 332 F. Supp. 490, 494–95 (C.D. Cal. 1971). See generally Recent Case, *Civil Rights—Employment Discrimination—Company Rule Calling for Discharge After Several Wage Garnishments Discriminates Against Black Employees in Violation of Title VII of the Civil Rights Act of 1964*. — *Johnson v. Pike Corp. of Am.*, 332 F. Supp. 490 (C.D. Calif. 1971), 85 HARV. L. REV. 1482 (1972) (describing the *Johnson* case).

¹³⁶ See *United States v. Va. Elec. & Power Co.*, 327 F. Supp. 1034, 1042–43 (E.D. Va. 1971) (“[I]t has not been shown that high school education and the testing requirements imposed are indicative of successful job performance.”); *Moody v. Albemarle Paper Co.*, No. 98941971, WL 10781, at *12 (E.D.N.C. Nov. 9, 1971) (finding high-school-diploma requirement and testing requirements “unlawful in that the personnel tests alone are adequate to measure the mental ability and reading skills required for job classifications”), *rev’d on other grounds*, 474 F.2d 134 (4th Cir. 1973), *rev’d on other grounds*, 422 U.S. 405 (1975).

¹³⁷ *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 547–48 (1971) (per curiam) (addressing whether requirement that female job applicants not have preschool age children might constitute a bona fide occupational qualification).

¹³⁸ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973).

¹³⁹ See *Parham v. Sw. Bell Tele. Co.*, 1969 WL 109, at *4, *9 (E.D. Ark. July 8, 1969) (rejecting theory that high-school diploma requirement and ban on “unwed mothers,” may violate Title VII because they may “bear[] more heavily on an underprivileged ethnic or racial group than it bears on members of race or group which is dominant in the society[.]” The court held that while the “argument may be interesting sociologically,” Title VII by its own terms did not demand that “an employer tailor his hiring requirements to meet the needs of deprived minorities”). See also *Colbert v. H-K Corp.*, No. 11599, 1970 WL 120, at *5 (N.D. Ga. July 6, 1970) (“If such principle is accepted in its ultimate so as to provide that any tests (other than mechanical ones) on which Negroes perform less well than whites because of a previous disadvantaged education may not be used as hiring or promotion criteria, then all educational, intelligence, personality, or general aptitude tests might be invalidated.”).

present[-]day result of pre-Act discrimination” and instead targeted only *active* discrimination.¹⁴⁰ Nor was it meant “to accord privileges to Negro employees in blind disregard of the seniority rights of others” or be “administered in disregard of the interest of employers in efficiency and ability.”¹⁴¹ Courts were also not aligned on the requirements of job-relatedness and business necessity.¹⁴²

This is the split that the Supreme Court faced in its first major encounter with Title VII, *Griggs v. Duke Power Co.*¹⁴³ In *Griggs*, the plaintiffs challenged two policies, both for themselves and on behalf of a class of black workers. The first policy was a high school diploma requirement, adopted before the enactment of Title VII, for all positions in its Dan River Steam Station other than the Labor Department that primarily provided custodial services.¹⁴⁴ “The effect of the policy was that no new employees would be hired without a high school education[—]except in the labor department[—]and no old employees without a high school education could transfer to a department other than the labor department.”¹⁴⁵ The second policy, adopted in 1965, imposed a written test requirement: a Revised Beta Test for initial employment in the labor department, the E.F. Wonderlic Personnel Test, and the Bennett Mechanical Comprehension Test for all other departments.¹⁴⁶ All fourteen black employees at the plant initially held low-paying labor department jobs, although three transferred out because they possessed diplomas. In contrast to the black workforce, whites without diplomas were more readily able to transfer to higher-paying departments. The district court found

¹⁴⁰ *Dobbins v. Local 212, Int'l Bhd. of Elec. Workers*, 292 F. Supp. 413, 444 (S.D. Ohio 1968). See also *id.* at 445 (“Discrimination requires some initiative either on the part of the person discriminating or on the part of the person discriminated against.”); *accord*, *United States v. Int'l Bhd. of Elec. Workers, Local 309*, Civil No. 69-10, 1969 WL 151, at *3 (E.D. Ill. July 3, 1969).

¹⁴¹ *United States v. Hayes Int'l Corp.*, 295 F. Supp. 803, 808 (N.D. Ala. 1968), *rev'd*, 415 F.2d 1038 (5th Cir. 1969). See *Taylor v. Armco Steel Corp.*, C.A. 68-H 129, 1969 WL 101, at *4–6 (S.D. Tex. June 9, 1969) (holding that there is no obligation under Title VII to correct past injustices), *rev'd*, 429 F.2d 498 (5th Cir. 1970); *United States v. Int'l Bhd. of Elec Workers, Local 38*, 1969 WL 91, at *3–4 (N.D. Ohio Mar. 13, 1969) (rejecting use of equitable power to remedy pre-Act discrimination), *rev'd*, 428 F.2d 144 (6th Cir. 1970); *United States v. Sheet Metal Workers Int'l Ass'n, Local 36*, 280 F. Supp. 719, 730 (E.D. Mo. 1968) (holding that the act does not address “sins prior to [its] effective date”).

¹⁴² See Note, *Employment Testing: The Aftermath of Griggs v. Duke Power Company*, 72 COLUM. L. REV. 900, 903–05 (1972) (discussing the split of authority on these issues).

¹⁴³ *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

¹⁴⁴ *Griggs v. Duke Power Co.*, 292 F. Supp. 243, 246–47 (M.D.N.C. 1968).

¹⁴⁵ *Id.* at 245.

¹⁴⁶ *Id.* at 245–46.

that the black workers were relegated to the Labor Department and not allowed to transfer owing to pre-Act discrimination by the company.¹⁴⁷

The district court nevertheless granted judgment for the defendant. It held that Duke Power complied with Title VII by purging itself of any pre-Act discriminatory policies.¹⁴⁸ It stressed that Congress meant the Act to apply prospectively only, and that the educational requirement was imposed “without any intention or design to discriminate against Negro employees.”¹⁴⁹ Despite the district court’s express finding that the policies were not job-related, it reasoned that Title VII did not bar an employer generally from improving its workforce.¹⁵⁰ It rejected the contention that Title VII might address “present consequences of past discrimination.”¹⁵¹ It also held that the use of written tests as a measure of general intelligence was allowed by section 703(h), and that defendants need not prove that they “utilize[d] only those tests which accurately measure the ability and skills required of a particular job or group of jobs.”¹⁵²

The Fourth Circuit in a split decision largely affirmed the district court’s order, though not its reasoning. It adopted the Fifth Circuit’s standard that Title VII “relief may be granted to remedy present and continuing effects of past discrimination.”¹⁵³ Thus, the panel majority held that the six plaintiffs hired *before* Duke Power adopted the challenged policies were entitled to a remedy, because the policies perpetuated past racial discrimination against them personally.¹⁵⁴ But for those hired *after* the policies were adopted, and who thus personally suffered no prior discrimination, the majority held there

¹⁴⁷ *Id.* at 247.

¹⁴⁸ *Id.* at 248.

¹⁴⁹ *Id.*

¹⁵⁰ *Griggs v. Duke Power Co.*, 292 F. Supp. 243, 250 (M.D.N.C. 1968) (“[t]he two tests used by the defendant were never intended to accurately measure the ability of an employee to perform the particular job available These qualities are general in nature and are not indicative of a person’s ability to perform a particular task. Nevertheless, they are qualities which the defendant would logically want to find in his employees.”).

¹⁵¹ *Id.* at 250. The court held that because Title VII was prospective only, it was limited to “the abolition of the policies of discrimination which *produced* the inequities,” not those that perpetuated pre-Act discrimination. *Id.* at 248 (emphasis added). The court also rejected *Quarles v. Philip Morris*, 279 F. Supp. 505 (1968): “[i]f the decision in *Quarles* may be interpreted to hold that present consequences of past discrimination are covered by the Act, this Court holds otherwise.” *Griggs*, 292 F. Supp. at 249.

¹⁵² *Griggs*, 292 F. Supp. at 250.

¹⁵³ *Griggs v. Duke Power Co.*, 420 F.2d 1225, 1230 (4th Cir. 1970).

¹⁵⁴ *Id.* at 1230–31. These plaintiffs returned to the federal district court judge for entry of injunctive relief. *Griggs v. Duke Power Co.*, 1970 WL 160, at *1–2 (M.D.N.C. Dec. 23, 1970) (ordering waiver of the education and testing requirements, preference for future openings, and a guarantee that wages would be held steady “until such time as [plaintiff] is assigned to a position paying an equivalent or greater wage rate”).

was no violation.¹⁵⁵ The court held that Title VII allowed educational and testing requirements provided that they had a “valid business purpose” and were not “merely used . . . to discriminate.”¹⁵⁶ The majority also upheld testing applied to the later-hired plaintiffs.¹⁵⁷ It rejected the EEOC’s interpretation of section 703(h) that tests must be “properly related to specific jobs and have been properly validated,” holding that this view was “clearly contrary to compelling legislative history.”¹⁵⁸

Judge Simon Sobeloff dissented. He led by noting that the panel majority created a split with the Fifth Circuit, and framed the issue in the appeal starkly:

Today we are faced with . . . the denial of jobs to Negroes who cannot meet educational requirements or pass standardized tests, but who quite possibly have the ability to perform the jobs in question. On this issue hangs the vitality of the employment provisions (Title VII) of the 1964 Civil Rights Act: whether the Act shall remain a potent tool for equalization of employment opportunity or shall be reduced to mellifluous but hollow rhetoric.¹⁵⁹

The dissent would have adopted the EEOC’s interpretation that a “professionally developed ability test” under section 703(h) must “fairly measure[] the knowledge or skills [sic] required by the particular job or class of jobs which the applicant seeks”¹⁶⁰ Because the district court found that the two polices were not job-related, “and that finding is the only one consistent with the evidence,” the dissent would have found liability.¹⁶¹ The dissent noted that the defendant’s state-of-mind was irrelevant by stating, “[t]he law will not tolerate unnecessarily harsh treatment of Negroes even though an employer does not plan this result. The use of criteria that are not backed by valid and corroborated business needs cannot be allowed, regardless of subjective intent.”¹⁶²

¹⁵⁵ *Griggs*, 420 F.2d at 1232.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 1233.

¹⁵⁸ *Id.* at 1233–34.

¹⁵⁹ *Griggs v. Duke Power Co.*, 420 F.2d 1225, 1237–38 (4th Cir. 1970). *Id.* (Sobeloff, J., concurring in part, dissenting in part).

¹⁶⁰ *Id.* at 1240–42.

¹⁶¹ *Id.* at 1244.

¹⁶² *Id.* at 1246.

The Supreme Court unanimously reversed in a brief opinion signed by Chief Justice Warren Burger.¹⁶³ The Court summarized the purpose of Title VII “to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.”¹⁶⁴ Under Title VII, practices “neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”¹⁶⁵ Congress required “the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.”¹⁶⁶

The Court adopted the “touchstone [of] business necessity” to measure job requirements that had the effect of screening out black employees, “the Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. 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.”¹⁶⁷ As in Judge Sobeloff’s dissent, the Court concluded that the defendant’s intent or good faith was irrelevant: “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.”¹⁶⁸ What mattered was how the policy operated, in particular whether it reliably measured or predicted performance: “[w]hat Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.”¹⁶⁹

¹⁶³ *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Justice Brennan recused himself, reportedly because he once represented Duke Power as a client. HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960-1972*, at 386 (1990).

¹⁶⁴ *Griggs*, 401 U.S. at 429–30.

¹⁶⁵ *Id.* at 430.

¹⁶⁶ *Id.* at 431.

¹⁶⁷ *Id.* See also *Nashville Gas Co. v. Satty*, 434 U.S. 136, 143 (1977) (“[S]ince there was no proof of any business necessity adduced with respect to the policies in question, that court was entitled to ‘assume no justification exists.’”) (quoting *Satty v. Nashville Gas Co.*, 384 F. Supp. 765, 771 (M.D. Tenn. 1974)).

¹⁶⁸ *Griggs*, 401 U.S. at 432 (“Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.”). Lower courts picked up on the “built-in headwinds” language. *Boston Chapter, NAACP, Inc. v. Beecher*, 504 F.2d 1017, 1021 (1st Cir. 1974) (“The question is whether the test denied applicants equal protection of the laws by creating ‘built-in headwinds’ for those who, although qualified to perform the job, cannot pass the test.”); *Peters v. Missouri- Pac R. Co.*, 483 F.2d 490, 498 (5th Cir. 1973) (footnotes omitted) (“Under the mandate of Title VII, . . . an employer must scrutinize even the steps he now takes with neutral or benevolent motives to determine if they operate as ‘built-in headwinds’ for minority groups and are unrelated to job performance.”).

¹⁶⁹ *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971).

The Court also rejected Duke Power's argument that section 703(h) endorsed the use of general intelligence tests by stating, "[f]rom the sum of the legislative history relevant in this case, the conclusion is inescapable that the EEOC's construction of § 703(h) to require that employment tests be job related comports with congressional intent."¹⁷⁰ The Court cited the EEOC's recent Uniform Guidelines on Employee Selection Procedures, the "Uniform Guidelines",¹⁷¹ which were entitled to "great deference" by the Court.¹⁷²

On the record presented, the Court held that "neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used."¹⁷³ If anything, the record showed that "employees who have not completed high school or taken the tests have continued to perform satisfactorily and make progress in departments for which the high school and test criteria are now used."¹⁷⁴

The significance of *Griggs* on the developing Title VII law cannot be understated. The Court did not adopt the Fourth Circuit's limitation that one had to be exposed to historical discrimination to challenge adverse impact.¹⁷⁵ While the Court recited the history of pre-Act discrimination,¹⁷⁶ it nowhere demanded *proof* of such discrimination to challenge facially neutral policies.¹⁷⁷ It was enough to show that the requirements caused discrimination against blacks and were not job-related.¹⁷⁸

¹⁷⁰ *Id.*

¹⁷¹ 29 C.F.R. § 1607 (1966).

¹⁷² *Griggs*, 401 U.S. at 433–34.

¹⁷³ *Id.* at 431.

¹⁷⁴ *Id.* at 431–32.

¹⁷⁵ See generally *Griggs v. Duke Power Co.*, 401 U.S. 424, 430–32 (1971) (making no mention of such a limitation).

¹⁷⁶ *Id.* at 426 ("[T]he jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites."); *id.* at 428 ("[W]hile the Company previously followed a policy of overt racial discrimination in a period prior to the Act, such conduct had ceased."); *id.* at 430 ("[P]ractices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.").

¹⁷⁷ See *id.* at 424. See, e.g., *Gregory v. Litton Sys., Inc.*, 472 F.2d 631, 632 (9th Cir. 1972) ("Historical discrimination need not be shown in order to obtain relief from discrimination in fact, regardless of its cause or motive.") (citing *Griggs*, 401 U.S. at 424).

¹⁷⁸ After *Griggs*, courts echoed that no intent was required to challenge a testing policy. See, e.g., *Spurlock v. United Airlines, Inc.*, 330 F. Supp. 228, 235 (D. Colo. 1971) (finding that "there is no affirmative showing of an intent on the part of United to discriminate," but "as

When Congress amended Title VII one year later, the final House report on the Act specifically cited to *Griggs* and reflected the priority of attacking seemingly neutral labor policies that screened black Americans and others from employment:

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 simply intentional wrongs.* The literature on the subject is replete with discussions of the mechanics of seniority and lines of progression, perpetuation of the present effects of earlier discriminatory practices through various institutional devices, and testing and validation requirements.¹⁷⁹

Griggs then represented the heart of Title VII, not just a secondary theory of liability.¹⁸⁰

B. McDonnell Douglas: *The Court Devises an Order of Proof for Title VII*

McDonnell Douglas v. Green is among the most widely cited and widely misunderstood cases in the Title VII canon.¹⁸¹ The function of the so-called “*McDonnell Douglas* test” is to guide a court’s examination of the record evidence: first, to determine whether there is *prima facie* evidence of discrimination, enough to trigger further judicial inquiry; second, to elicit “any legitimate, nondiscriminatory, nonpretextual justification for . . . differences in treatment” that a defendant might have; and finally, to assess the most likely

noted in *Griggs*, the test is not one of intent,” and the qualifications and testing for flight officers were fair and reasonable, job related, equally applied across races, and did not discriminate), *aff’d*, 475 F.2d 216 (10th Cir. 1972); *Colbert v. H-K Corp.*, No. 11599, 1971 WL 215, at *1–2 (N.D. Ga. July 28, 1971) (noting that “[s]pecific intent to discriminate is no longer an element in a Title VII suit involving testing or educational requirements under *Griggs*,” but that typing and dictation test did not discriminate). See also Herbert N. Bernhardt, *Griggs v. Duke Power Co.: The Implications for Private and Public Employers*, 50 TEX. L. REV. 901, 908 (1972) (“[U]nvalidated employment tests violated Title VII regardless of the company’s intent or the professional origin of the test.”).

¹⁷⁹ H.R. REP. NO. 92-238, at 8 (1972), as reprinted in 1972 U.S.C.C.A.N. 2137, 2144 (emphasis added). Several courts quoted that report. See *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 764 n.21 (1976); *Int’l Bhd. of Teamsters v. United States*, *supra* note 10, 431 U.S. 324, 391 (1977) (Marshall, J., dissenting in part); *Motorola, Inc. v. McLain*, 484 F.2d 1339, 1344 (7th Cir. 1973); *Carter v. Newsday, Inc.*, 76 F.R.D. 9, 13 (E.D.N.Y. 1976).

¹⁸⁰ *Griggs v. Duke Power Co.*, No. C-210-G-66, 1972 WL 215, at *1 (M.D.N.C. Sept. 25, 1972) (holding on remand to enjoin the educational and testing requirements).

¹⁸¹ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

cause of the adverse action.¹⁸² While it is often said retrospectively that the test was devised to channel the judicial inquiry into a defendant's alleged intent,¹⁸³ a return visit to the 1973 opinion exposes this description as inaccurate. The Court says *nothing* about intentional discrimination—hardly surprising because, in 1973, the intent requirement for Title VII still lay in the future.¹⁸⁴

From the start, courts framed Title VII cases to place some initial burden on the plaintiffs, and then shift the focus to defendant's justification.¹⁸⁵ In a section 1981 action, the *en banc* Fourth Circuit set forth a version of the *prima facie* case:

Where no Negro physicians are on the hospital staff and application in proper form is made for staff membership by a Negro physician who meets the 'paper' qualifications and proves his competency in his chosen specialty field (if any), a *prima facie* inference of discrimination exists

¹⁸² *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1344 (2015). *See Wilkie v. Robbins*, 551 U.S. 537, 556 (2007) (describing *McDonnell Douglas* as a "method[] for identifying the presence of an illicit reason (in competition with others)"); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (noting that *McDonnell Douglas* is a "sensible, orderly way to evaluate the evidence"). As a side note, Congress in the 1991 Civil Rights Act excused plaintiffs pursuing discrimination claims from having to prove cause. 42 U.S.C. § 2000e-2(m) (1991). Under 42 U.S.C. § 2000e-2(m), it is only necessary to establish that discrimination was a "motivating" factor. The defendant may then, under the rubric of the "same-decision" defense, *disprove* causation to avoid monetary and most forms of equitable relief. *Id.* § 2000e-5(g)(2).

¹⁸³ *See, e.g., St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993) (discussing that the *McDonnell Douglas* test was established "[w]ith the goal of 'progressively . . . sharpen[ing] the inquiry into the elusive factual question of intentional discrimination'" (quoting *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255, n.8 (1981))); *Patterson v. McLean Credit Union*, 491 U.S. 164, 186 (1989) (finding *McDonnell Douglas* is "a carefully designed framework of proof to determine, in the context of disparate treatment, the ultimate issue whether the defendant intentionally discriminated against the plaintiff"); *Burdine*, 450 U.S. at 253 ("The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. . . . The *McDonnell Douglas* division of intermediate evidentiary burdens serves to bring the litigants and the court expeditiously and fairly to this ultimate question.").

¹⁸⁴ *See also McDonnell*, 411 U.S. at 792.

¹⁸⁵ *See, e.g., Witherspoon v. Mercury Freight Lines, Inc.*, 457 F.2d 496, 498 (5th Cir. 1972) (noting that once the plaintiff had "made out a *prima facie* case of discrimination . . . [t]he burden of proving absence of discrimination moved to defendant"); *United States v. Hayes Int'l Corp.*, 456 F.2d 112, 120 (5th Cir. 1972) (noting that once a *prima facie* case is established, "[t]he onus of going forward with the evidence and the burden of persuasion is thus on [the defendant]"); *Bing v. Roadway Exp., Inc.*, 444 F.2d 687, 689 (5th Cir. 1971) ("Once [plaintiff], by establishing a *prima facie* case of discrimination, had carried his burden of proof, it was incumbent upon [the defendant] to come forward and refute his case with something more than mere conclusional statements that it had never discriminated against Negroes . . .").

wherever the action on said application is by secret ballot and without hearing from the applicant.¹⁸⁶

Racially-disparate statistics alone were often enough to make out a *prima facie* case.¹⁸⁷

McDonnell Douglas was a Title VII and Section 1981 race discrimination and retaliation case challenging the employer's refusal to rehire the plaintiff, Percy H. Green.¹⁸⁸ On August 28, 1964, the defendant laid off Green and eight other technicians.¹⁸⁹ At the time, Green complained that he was being singled out for being black and for his advocacy for civil rights.¹⁹⁰ Thereafter, Green engaged in "protests by writing letters, filing charges, picketing, and various other means to protest his layoff."¹⁹¹ These protests culminated in Green's participation in an October 1964 "tie-up" or "stall-in," a blockade of the plant entrance "consisting of four cars [that] would 'tie up' five main access roads into McDonnell at the time of the morning rush hour."¹⁹² The company also accused Green of participating in a "lock-in," where activists padlocked the plant entrance to prevent workers from exiting.¹⁹³ Three weeks after the lock-in, "plaintiff applied for work at McDonnell" and, although qualified for the job, was not hired.¹⁹⁴ He filed an EEOC charge

¹⁸⁶ *Cypress v. Newport News Gen. and Nonsectarian Hosp. Ass'n*, 375 F.2d 648, 654 (1967) (en banc) (quoting *Cypress v. Newport News Gen. and Nonsectarian Hosp. Ass'n*, 251 F. Supp. 667, 673 (1966)).

¹⁸⁷ *See, e.g., Spurlock v. United Airlines, Inc.*, 475 F.2d 216, 218 (10th Cir. 1972) (holding that "by showing the miniscule[] number of black flight officers in United's employ, the appellant established a prima facie case of racial discrimination in hiring practices"); *United States v. Chesapeake & Ohio Ry. Co.*, 471 F.2d 582, 586 (4th Cir. 1972) (holding that "statistical evidence is sufficient to establish at least a prima facie case of discrimination in Title VII litigation"); *HayesInt'l Corp.*, 456 F.2d at 120 ("[L]opsided ratios are not conclusive proof of past or present discriminatory hiring practices; however, they do present a prima facie case."); *Carter v. Gallagher*, 452 F.2d 315, 323 (8th Cir. 1971) ("Statistical evidence can make a prima facie case of discrimination."); *United States v. Ironworkers Local 86*, 443 F.2d 544, 551 (9th Cir. 1971) ("On the basis that a showing of an absence or a small black union membership in a demographic area containing a substantial number of black workers raises an inference that the racial imbalance is the result of discrimination, the burden of going forward and the burden of persuasion is shifted to the accused, for such a showing is enough to establish a prima facie case."), *cert. denied*, 404 U.S. 984 (1971).

¹⁸⁸ *Green v. McDonnell Douglas Corp.*, 318 F. Supp. 846, 849 (E.D. Mo. 1970), *rev'd*, 463 F.2d 337 (8th Cir. 1972), *vacated*, 411 U.S. 792 (1973).

¹⁸⁹ *Id.* at 848.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at 849.

¹⁹³ *Id.*

¹⁹⁴ *Green v. McDonnell Douglas Corp.*, 318 F. Supp. 846, 849 (E.D. Mo. 1970), *rev'd*, 463 F.2d 337 (8th Cir. 1972), *vacated*, 411 U.S. 792 (1973).

alleging Title VII race discrimination and retaliation and obtained a “reasonable cause” finding on the retaliation claim.¹⁹⁵

The district court, after a bench trial, granted judgment for the defendant on all counts.¹⁹⁶ On the race discrimination failure-to-rehire count, the court held (prior to trial) that Green could not proceed under Title VII because the EEOC did not make a “reasonable cause” finding on that claim.¹⁹⁷ Green’s challenge to the original layoff under section 1981, meanwhile, was held to be time-barred.¹⁹⁸ On the Title VII and section 1981 retaliation count, the court held that liability “depends on the employer’s intent at the time of the decision,” and the record showed “that defendant’s reasons for refusing to rehire the plaintiff were motivated solely and simply by the plaintiff’s participation in the ‘stall in’ and the ‘lock in’ demonstrations.”¹⁹⁹ Because “[i]mpeding the flow of traffic into or from an employer’s plant exceeds . . . reasonable limits,” the court held that “Title VII of the Civil Rights Act of 1964 does not protect such activity.”²⁰⁰

The Eighth Circuit reversed in part, although the panel did not join a single rationale.²⁰¹ The entire panel concurred in dismissal of the section 1981 layoff claim on limitations grounds,²⁰² and affirmed that the stall-in protest was not itself protected activity under Title VII’s retaliation section.²⁰³ It also agreed that the district court erred when it denied Green the right to proceed on a Title VII race discrimination claim solely because the EEOC did not find reasonable cause on that particular claim.²⁰⁴

The court then addressed the central question of whether Green had sufficient grounds for a race discrimination claim related to the 1965 failure to rehire. The defendant argued that it had discretion under Title VII to refuse to hire even a qualified applicant such as Green if, in its “subjective hiring judgment[,]” it decided that his oppositional activity “would affect his

¹⁹⁵ *Id.* at 849–50.

¹⁹⁶ *Id.* at 851.

¹⁹⁷ *Green v. McDonnell Douglas Corp.*, 299 F. Supp. 1100, 1101 (E.D. Mo. 1969).

¹⁹⁸ *Green*, 318 F. Supp. at 849.

¹⁹⁹ *Id.* at 850.

²⁰⁰ *Green v. McDonnell Douglas Corp.*, 318 F. Supp. 846, 850–51 (E.D. Mo. 1970), *rev’d*, 463 F.2d 337 (8th Cir. 1972), *vacated*, 411 U.S. 792 (1973) (drawing heavily from analogous case law concerning protected concerted activities under the NLRA).

²⁰¹ *Green v. McDonnell Douglas Corp.*, 463 F.2d 337, 344–46 (Lay, J., concurring) (8th Cir. 1972).

²⁰² *Id.* at 340–41; *id.* at 346 (Johnsen, J., dissenting in part).

²⁰³ *Id.* at 341; *id.* at 346 (Johnsen, J., dissenting in part).

²⁰⁴ *Id.* at 342; *id.* at 344 (Lay, J. concurring); *id.* at 346 (Johnsen, J., dissenting in part).

ability to perform the job or to work harmoniously with other employees and supervisors.”²⁰⁵ Yet the majority held that “employment decisions based on subjective, rather than objective, criteria carry little weight in rebutting charges of discrimination.”²⁰⁶ Citing *Griggs*, the court observed that hiring criteria must be “related to job performance” in order to carry out the “removal of racial barriers to employment” mandated by Title VII.²⁰⁷ It held that if judges could credit defendants’ subjective bases for employment actions, it would render Title VII an “illusory commitment” because “subjective criteria may mask aspects of prohibited prejudice.”²⁰⁸ Judge Bright set forth this legal standard:

When a black man demonstrates that he possesses the qualifications to fill a job opening and that he was denied the job, we think he presents a *prima facie* case of racial discrimination and that the burden passes to the employer to demonstrate a substantial relationship between the reasons offered for denying employment and the requirements of the job.²⁰⁹

The majority held that there was an insufficient record to determine whether Green’s conduct objectively interfered with his ability to work harmoniously with others.²¹⁰ It even stated in a footnote that a court could find McDonnell Douglas’s reasons for not rehiring Green “pretextual,” given that the company “advanced the unsupported charge that Green had ‘actively cooperated’ in the ‘lock-in’” as one of its reasons.²¹¹

Judge Lay, while concurring in the court’s opinion, submitted a separate opinion expanding on the court’s analysis.²¹² The concurring judge was even more firmly convinced that the defendant’s explanation for its decision—that

²⁰⁵ *Id.* at 343.

²⁰⁶ *Id.* See also *id.* at 345 (Lay, J., concurring) (“Blind acceptance of any non-discriminatory reason offered by an employer in a fair employment case would always preclude correction of any discriminatory practices otherwise existing.”).

²⁰⁷ *Green v. McDonnell Douglas Corp.*, 463 F.2d 337, 343 (8th Cir. 1972).

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 344. On a motion for rehearing, the majority softened the opinion somewhat, removing the “burden” language above and adding the following: “an applicant’s past participation in unlawful conduct directed at his prospective employer might indicate the applicant’s lack of a responsible attitude toward performing work for that employer.” *Id.* at 353. Yet the dissent did not perceive any “practical difference” in the altered language. *Id.* at 355 (Johnsen, J., dissenting). A petition for rehearing en banc was denied by an evenly-divided Court of Appeals.

²¹⁰ *Id.* at 344.

²¹¹ *Id.* at 344 n.6. The court remanded Green’s case for further proceedings. *Id.* at 344 n.7.

²¹² See *id.* at 344–46 (Lay, J., concurring).

Green engaged in the lock-in and even “chained the doors” to the plant—was pretextual.²¹³ “Since the company erroneously imputed the wrongdoing to Green, it would be compounding the error to allow the company to use these facts as a basis for refusal to hire. Thus the district court’s reliance on this fact is clearly erroneous.”²¹⁴ Judge Lay criticized the district court’s analysis for failing to consider the possibility that the defendant targeted Green for his *lawful* opposition activities. “One has grave difficulty in coming away from analysis of the present record without the belief that the company’s rejection of Green was based not so much on an isolated illegal protest but on Green’s prolonged activity in bringing public attention to the company’s alleged discriminatory practices.”²¹⁵ Judge Lay finally noted that if “[d]iscriminatory motives . . . constitute only a partial basis for an employer’s refusal to hire . . .” that by itself would support a judgment in the employee’s favor.²¹⁶ Thus, it would be insufficient for a defendant simply to advance a facially valid reason for its adverse decision in rebuttal: if the employee presents a “prima facie case of discrimination,” the employer must in fact show that unlawful considerations “were in no part a motivating factor in the employer’s decision and that the reason for the rejection is objectively related to job performance.”²¹⁷

The dissent by Judge Johnsen took aim at both the majority’s analysis of the record and the legal standard to be applied. The dissent would have upheld, as not clearly erroneous, the finding that Green was at least partly personally responsible for the lock-in. Green was the head of the protest organization, ACTION, engaged in the direct action culminating in the lock-in. “[T]he demonstration was not one made by a mere aggregation of separate individuals,” according to the dissent, but instead “was conduct engaged in by the membership of ACTION as a body” and thus “McDonnell could properly regard Green as having responsibility for the chaining and padlocking” the plant.²¹⁸ The dissent disputed the holding that Green’s alleged involvement in the lock-in “would not . . . constitute a justification for its not hiring him” because the company’s explanation supposedly lacked job-relatedness.²¹⁹ “The effect of the majority holding is, as I view it, that even though no racial motivation was in fact involved on the part of McDonnell, . . .

²¹³ *Green v. McDonnell Douglas Corp.*, 463 F.2d 337, 345 (8th Cir. 1972) (Lay, J., concurring).

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* at 346.

²¹⁷ *Id.*

²¹⁸ *Id.* at 347–48 (Johnsen, J., dissenting).

²¹⁹ *Green v. McDonnell Douglas Corp.*, 463 F.2d 337, 349 (8th Cir. 1972) (Johnsen, J., dissenting).

McDonnell could nevertheless not refuse to hire Green unless his presence in the plant would disrupt its operations.”²²⁰ Not only did the dissent consider the majority’s liability standard impracticable,²²¹ but unwarranted under *Griggs*. According to the dissent, *Griggs* only addressed work “practices, procedures or tests” that block black advancement “where the things so utilized are without any significant relationship to a performance of the work involved.”²²²

The Supreme Court unanimously remanded the case.²²³ It affirmed the holding that an employee need not obtain a “reasonable cause” finding from the EEOC to proceed.²²⁴ It then addressed the core liability standard, *i.e.*, “the order and allocation of proof in a private, non-class action challenging employment discrimination.”²²⁵ The Court recognized that it had to balance the common-law conception of employment rooted in American law with the demands of Title VII.²²⁶ “The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.”²²⁷

To reconcile these interests, the Court devised a *prima facie* test that allows a plaintiff to establish an inference of race discrimination on the following proof:

This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer

²²⁰ *Id.* at 349–50.

²²¹ *Id.* at 350 (noting that the majority’s invitation to the defendant on remand to establish that “Green’s presence in the plant would disrupt its operations” is little “more than a theoretical and hollow one to McDonnell,” and can effectively only mean “that McDonnell is being required to rehire Green.”).

²²² *Id.*

²²³ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 793–94 (1973).

²²⁴ *Id.* at 798–99.

²²⁵ *Id.* at 800.

²²⁶ *Id.* at 801 (noting the “broad, overriding interest, shared by employer, employee, and consumer, i[n] efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions”).

²²⁷ *Id.* at 800.

continued to seek applicants from persons of complainant's qualifications.²²⁸

Upon meeting the *prima facie* case, “[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.”²²⁹ It is at this second stage where the court assigned error to the Court of Appeals; McDonnell Douglas had cited “respondent’s participation in unlawful conduct against it as the cause for his rejection[.]” which the Supreme Court accepted as meeting the employer’s burden.²³⁰ It disapproved the panel majority’s additional requirement that the defendant’s reason be “objective.”

[W]e think the court below seriously underestimated the rebuttal weight to which petitioner’s reasons were entitled. Respondent admittedly had taken part in a carefully planned ‘stall-in,’ designed to tie up access to and egress from petitioner’s plant at a peak traffic hour. Nothing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it.²³¹

Finally, the Court held the employee must “be afforded a fair opportunity to show that petitioner’s stated *reason* for respondent’s rejection was in fact pretext,”²³² a point that the Court underscored multiple times in the course of the opinion.²³³

On this final step, the Court suggests several kinds of proof that might satisfy the “pretext” burden. First, plaintiffs could establish that “white

²²⁸ *Id.* at 802. “The facts necessarily will vary in Title VII cases, and the specification above of the *prima facie* proof required from respondent is not necessarily applicable in every respect to differing factual situations.” *Id.* at 802 n.13. In this case, the court held that Green made out a *prima facie* case by showing that McDonnell-Douglas had openings for mechanics, that it “continued to do so after respondent’s rejection,” and that the company did not dispute his qualifications and “acknowledge[d] that his past work performance in petitioner’s employ was ‘satisfactory.’” *Id.* at 802.

²²⁹ *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

²³⁰ *Id.* at 803.

²³¹ *Id.* at 803 (footnote omitted).

²³² *Id.* at 804 (emphasis added).

²³³ *Id.* at 805 (“In short, on the retrial respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision.”); *id.* at 807 n.18 (“Respondent under § 703(a)(1) must be given a full and fair opportunity to demonstrate by competent evidence that whatever the stated reasons for his rejection, the decision was in reality racially premised.”); *id.* at 807 (“[R]espondent must be afforded a fair opportunity to demonstrate that petitioner’s assigned reason for refusing to re-employ was a pretext or discriminatory in its application.”).

employees involved in acts against petitioner of comparable seriousness” were “retained or rehired.”²³⁴ Second, plaintiffs could show how defendants treated them previously, including its “reaction, if any, to [plaintiff’s] legitimate civil rights activities.”²³⁵ Third, plaintiffs could introduce evidence of defendants’ “general policy and practice with respect to minority employment.”²³⁶ This might include “statistics as to [defendant’s] employment policy and practice” to determine whether a “refusal to rehire . . . conformed to a general pattern of discrimination against blacks,”²³⁷ although the Court cautioned that such proof may not be enough to rebut a specific explanation.²³⁸

Finally, the Court distinguished *Griggs* because that case addressed generalized discriminatory policies while Green’s case concerned an individualized decision not to rehire him.²³⁹ The defendant supposedly “rejected [Green] for unlawful conduct against it and, in the absence of proof of pretext or discriminatory application of such a reason, this cannot be thought the kind of ‘artificial, arbitrary, and unnecessary barriers to employment’ which the Court found to be the intention of Congress to remove.”²⁴⁰

While the Supreme Court’s Title VII order of proof was not as capacious as the Eighth Circuit’s version, it was nevertheless flexible and labor-protective. Note that the Supreme Court never once referred to the “motive” or “intent” of the defendant in its analysis. Rather, it concerned itself with the asserted “reason” for a defendant’s decision, and whether such a “reason” might mask, or be a “pretext” for, a racially discriminatory cause.²⁴¹ Title VII does not, in this formulation, require proof of the decisionmaker’s state-of-mind. Rather, it directs the court to weigh defendants’ avowed reasons for its actions against the evidence of race discrimination, whether intentional or not, to determine which explanation better fits the historical facts.²⁴²

²³⁴ *Id.* at 804.

²³⁵ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973).

²³⁶ *Id.* at 804–05.

²³⁷ *Id.* at 804–05.

²³⁸ *Id.* at 805 n.19 (“We caution that such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to rehire.”).

²³⁹ *Id.* at 805–806.

²⁴⁰ *Id.* at 806.

²⁴¹ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973).

²⁴² The district court re-tried the case and entered judgment against Green; the Eighth Circuit (with only Judge Lay from the original panel) affirmed. *Green v. McDonnell Douglas Corp.*, 390 F. Supp. 501 (E.D. Mo. 1975), *aff’d*, 528 F.2d 1102 (8th Cir. 1976).

Notably, the focus continues to be on eliminating barriers to black employment, both “to assure equality of employment opportunities *and* to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.”²⁴³ The Court was still keeping its eye on the economic justice goal of Title VII.

V. THE COURTS APPLY THE SUPREME COURT AUTHORITY (1972–76)

While cases involving overt racial discrimination continued into the 1970s,²⁴⁴ much of the litigation had moved on to challenging neutral practices and decisions that, while less transparently racial, caused employment discrimination against blacks.²⁴⁵ The Supreme Court gave employees more tools with *Griggs* and *McDonnell Douglas*, and courts continued to order systemic relief to uproot barriers to black employment.

A. Intent Still Not Required to Establish Liability Under Title VII

Courts continued to eschew any intent requirement under Title VII, other than as previously understood, *i.e.*, practices that were not inadvertent or accidental.²⁴⁶ Courts echoed the holding in *Griggs* that the absence of discriminatory intent does not immunize a defendant from liability.²⁴⁷ Thus,

²⁴³ *Green*, 411 U.S. at 800 (emphasis added).

²⁴⁴ *See, e.g.*, *Reed v. Arlington Hotel Co., Inc.*, 476 F.2d 721, 723–24 (8th Cir. 1973) (“While porters and bellmen performed substantially the same duties, they were divided into two separate departments—each one racially segregated.”); *United States v. Lee Way Motor Freight, Inc.*, No. CIV-72-445, 1973 WL 278, at *23 (W.D. Okla. Dec. 27, 1973) (defending white union members discharged for “refusing to ride with a black by stating that the discharge could be based upon the uncleanness of the fellow driver rather than the pigmentation of his skin.”).

²⁴⁵ *See generally* Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 755–66 (2006).

²⁴⁶ *See, e.g.*, *Peters v. Jefferson Chem. Co.*, 516 F.2d 447, 449 (5th Cir. 1975) (showing that plaintiff’s prima facie “burden does not include proof of a discriminatory intent by the employer”); *Tillman v. Wheaton-Haven Recreation Ass’n, Inc.*, 517 F.2d 1141, 1143 (4th Cir. 1975) (“Law is directed at the consequences, not the motivation, of discrimination.”); *Brito v. Zia Co.*, 478 F.2d 1200, 1206 (10th Cir. 1973) (holding that intentionally “mean[s] that the practice was used deliberately, not accidentally”); *Schaeffer v. San Diego Yellow Cabs, Inc.*, 462 F.2d 1002, 1006 (9th Cir. 1972) (“We agree with the Fifth, Seventh, and Tenth Circuits, and adopt a broad interpretation of the term ‘intentionally’ to include all employment practices engaged in deliberately rather than accidentally.”). *But see* *Shack v. Southworth*, 521 F.2d 51, 55 (6th Cir. 1975) (“The essential element that is missing from this case is evidence, either statistical or testimonial, which compels the inference that appellant’s rejection on December 28, 1972 was racially motivated.”).

²⁴⁷ *See, e.g.*, *Gibson v. Local 40, Supercargoes and Checkers of Int’l Longshoremen’s & Warehousemen’s Union*, 543 F.2d 1259, 1268 (9th Cir. 1976) (“Appellants were not required to

unions could be held liable simply for acquiescing in discriminatory employment policies, even if they did not create them.²⁴⁸

The Supreme Court in *Albemarle Paper v. Moody* interpreted Title VII's remedial section 706(g) to require that backpay be awarded presumptively on a finding of discrimination and denied only upon specific findings that it "would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries

prove that appellees intentionally discriminated against appellants and their class."); *United States v. Int'l Union of Operating Eng'rs, Local Union No. 520*, 476 F.2d 1201, 1204 (7th Cir. 1973) (rejecting informal commitment by union to provide affirmative action for non-whites because "[w]hile the union may be in utter good faith in maintaining the so-called 'gentlemen's agreement,' it is too casual and indefinite a way to assure the affirmative action required to eliminate past discrimination"); *Anderson v. Methodist Evangelical Hosp., Inc.*, 464 F.2d 723, 725 (6th Cir. 1972) (ordering remedy despite that "record clearly shows that the Hospital's record in race relations, insofar as upper management is concerned, is exemplary"); *Johnson v. Shreveport Garment Co.*, 422 F. Supp. 526, 536 (W.D. La. 1976) ("[Plaintiffs] need not show that defendants enacted the policy or practice with a discriminatory intent or that the defendants enforced the policy in bad faith; they may prove their case with a mere showing of discriminatory effect"); *English v. Seaboard Coastline R.R. Co.*, No. 2371, 1975 WL 251, at *7 (S.D. Ga. Sept. 24, 1975) ("Compliance with an Affirmative Action Program approved by the Office of Federal Contract Compliance does not necessarily fulfill the demands of Title VII."); *United States v. Int'l Ass'n of Bridge, Structural and Ornamental Ironworkers, Local Union 10*, No. 19693-4, 1973 WL 174, at *14 (W.D. Mo. June 15, 1973) ("[The union] made substantial and apparently sincere effort since the approximate time of the filing of this suit to erase the then existing pattern and practice of employment discrimination against Negroes and to some appreciable degree against Mexican-Americans, its efforts have failed in the main to remove the results of that prior pattern and practice.").

²⁴⁸ See, e.g., *Myers v. Gilman Paper Corp.*, 544 F.2d 837, 851 (5th Cir. 1977) (affirming liability for "international [that] gave its imprimatur to local contracts by providing contract advisors and approval of the final agreement"); *EEOC v. Enter. Ass'n Steamfitters Local No. 638*, 542 F.2d 579, 585 (2d Cir. 1976) ("[T]he union's arguments against a backpay award amount to a claim for special treatment for unions and special immunity for the discriminatory practices in which they engage."); *Patterson v. Am. Tobacco Co.*, 535 F.2d 257, 270 (4th Cir. 1976) (affirming liability against local that "acquiesced without protest in the lines of progression"); *Kaplan v. Int'l Alliance of Theatrical and Stage Employees*, 525 F.2d 1354, 1360 (9th Cir. 1975) (showing international union liable for provisions of collective bargaining agreement approved by local chapter; "[b]y making and enforcing, albeit tacitly, a collective bargaining agreement which perpetuates past discriminatory effects, appellant International has violated Title VII"), *abrogated by B.K.B. v. Maui Police Dep't*, 276 F.3d 1091 (9th Cir. 2002); *EEOC v. Detroit Edison Co.*, 515 F.2d 301, 314 (6th Cir. 1975) ("Acquiescence in a departmental seniority system which produces unequal treatment on the basis of race is sufficient to subject a union to liability under Title VII."), *judgment vacated by Detroit Edison Co. v. EEOC*, 431 U.S. 951 (1977). *But see Thornton v. East Texas Motor Freight*, 497 F.2d 416, 426 (5th Cir. 1974) (showing no liability for union where "all the proof shows that it had knowledge of the employer's alleged discrimination, and that it did not initiate any action to stop it until 1967," and "[n]one of the plaintiffs or other union members ever requested the union to take action.").

suffered through past discrimination.”²⁴⁹ The Court rejected an absence of “bad faith” by the defendant as a sufficient reason to deny back-pay.²⁵⁰ The six-justice majority²⁵¹ held that “Title VII is not concerned with the employer’s ‘good intent or absence of discriminatory intent’ for ‘Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.’”²⁵² Courts cited this decision to support the conclusion that Title VII did not authorize punitive damages because “good intent is not a defense to a Title VII violation,” while “[p]unitive damages are generally based on the ‘degree of culpability’ of the defendant.”²⁵³

The significance of “intent” under Title VII was analyzed in *Watkins v. Scott Paper Co.*,²⁵⁴ reviewing a bench verdict for the defendant in a Title VII case alleging discrimination in transfers and promotions for blacks at a Mobile, Alabama, paper mill. After an avowed history of racial discrimination and failed efforts to integrate the mill, Scott Paper Co. entered into a Memorandum of Understanding (“MOU”) in 1969 that was negotiated with the United States Department of Labor’s Office of Federal Contract Compliance (“OFFC”).²⁵⁵ While the plant-wide numbers improved in some respects, the plaintiffs filed a class action in 1971 charging that the MOU was only incompletely implemented at best, that racially discriminatory policies continued, and did it not remedy past discrimination.²⁵⁶ The district court, among its findings, held that whatever discrimination arose in the post-MOU period was “accidental” and could not be “intentional,” thus warranting no

²⁴⁹ *Albemarle Paper Co v. Moody*, 422 U.S. 405, 421 (1975). The principles that guide Title VII back pay awards were the purposes of the Act to “achieve equality of employment opportunities” and to “make persons whole for injuries suffered on account of unlawful employment discrimination.” *Id.* at 417–18.

²⁵⁰ “[T]he mere absence of bad faith simply opens the door to equity; it does not depress the scales in the employer’s favor. If backpay were awardable only upon a showing of bad faith, the remedy would become a punishment for moral turpitude, rather than a compensation for workers’ injuries.” *Id.* at 422.

²⁵¹ Justice Powell did not participate, while two justices (Chief Justice Burger and Justice Blackmun) filed separate opinions not joining this part of the Court opinion. *Id.* at 436, 449, 453.

²⁵² *Id.* at 422 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971)).

²⁵³ *Campbell v. A. C. Petersen Farms, Inc.*, 69 F.R.D. 457, 468 (D. Conn. 1975). *Accord Alexander v. Consol. Freightways, Co.*, 421 F. Supp. 450, 452 (D. Colo. 1976) (“Because an award of punitive damages requires a finding of bad intention on the part of the employer, punitive damages are inconsistent with the restitutionary or ‘make whole’ purpose of Title VII.”).

²⁵⁴ *Watkins v. Scott Paper Co.*, 530 F.2d 1159, 1164–65 (5th Cir. 1976).

²⁵⁵ *Watkins v. Scott Paper Co.*, No. 6838-71-H, 1973 WL 232, at *10–12 (S.D. Ala. Aug. 27, 1973), *aff’d in part, vacated in part, rev’d in part*, 530 F.2d 1159 (5th Cir. 1976).

²⁵⁶ *Watkins*, 1973 WL 232 at *10–25.

award of back-pay.²⁵⁷ The judge reasoned that “[s]ince Scott’s actions were in fact clearly intended to eliminate not only present discrimination but also all present effects of long-abandoned past discrimination, and since Scott was never apprised that these actions had had any discriminatory impact (if they had any), it is impossible to infer discriminatory intent.”²⁵⁸ The Fifth Circuit reversed.²⁵⁹ With the benefit of *Moody*, Judge Wisdom’s opinion made short work of the lower court’s intent holding, stating the district court judge fatally “confused Scott’s good faith efforts to comply with actual compliance.”²⁶⁰ And the court held that implementation of the MOU did not mean that a back-pay award would unfairly prejudice Scott. “Indeed, it is likely that, in the absence of the OFCC’s intervention in 1968, the defendants here would have been subject to even greater back pay liability than otherwise.”²⁶¹

None of this is to say that intent was entirely irrelevant to Title VII, though courts during this period mostly put the onus on employers to dispel any taint of discrimination.²⁶² Systems based on “subjective” decision-making or lacking objective criteria were often presumed to camouflage discrimination.²⁶³ As one court stated:

²⁵⁷ *Id.* at *49.

²⁵⁸ *Id.* at *48.

²⁵⁹ *Watkins*, 530 F.2d at 1167. Judge Wisdom’s opinion revealed that the lower court’s “extensive opinion [relied] heavily upon the defendants’ post-trial brief.” *Id.*

²⁶⁰ *Id.* at 1195.

²⁶¹ *Id.*

²⁶² The Fifth Circuit even went to the length of shifting the burden of proof to the employer after the plaintiff presented a *prima facie* case. *See, e.g., Long v. Sapp*, 502 F.2d 34, 37 (5th Cir. 1974) (assuming plaintiff made out *prima facie* case, “defendants . . . carried their burden of showing that her termination was not predicated upon reasons involving race”). The Supreme Court eventually rejected the Fifth Circuit’s ruling, in *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 257–58 (1981).

²⁶³ *See, e.g., Young v. Edgcomb Steel Co.*, 499 F.2d 97, 98–100 (4th Cir. 1974) (finding that “company had violated Title VII by discriminating against its black employees through the use of a test that was not job related and through reliance on subjective factors for promotion.”); on remand, employer was ordered to “reevaluate Young’s qualifications for filling the next vacancy in the inside sales force using nondiscriminatory, objective, job related standards.”); *Long v. Ford Motor Co.*, 496 F.2d 500, 506 (6th Cir. 1974) (noting that plaintiff on remand “may be able to establish that Ford’s promotion system, which relies heavily upon the subjective evaluation of supervisors, has a discriminatory impact on minority employees”); *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 231 (5th Cir. 1974) (“[D]epartment superintendents utilized their subjective judgment in determining which qualified (testing and departmental seniority) employees filled job vacancies We note that these supervisory positions are held by all-white employees.”); *United States v. N.L. Indus., Inc.*, 479 F.2d 354, 367–68 (8th Cir. 1973) (choice of foreman decided by superintendent with input of incumbent foremen); *Rowe v. Gen. Motors Corp.*, 457 F.2d 348, 358 (5th Cir. 1972) (rejecting promotion and transfer policy where “foreman’s recommendation is the indispensable single most

Greater possibilities for abuse, however, are inherent in subjective definitions of employment selection and promotion criteria. Yet they are not to be condemned as unlawful per se, for in all fairness to applicants and employers alike, decisions about hiring and promotion in supervisory and managerial jobs cannot realistically be made using objective standards alone. Thus, it is especially important for courts to be sensitive to possible bias in the hiring and promotion process arising from such subjective definition of employment criteria.²⁶⁴

Thus, in *Taylor v. Safeway Stores*, the plaintiff challenged his termination for allegedly not meeting production standards.²⁶⁵ The plaintiff won at trial by showing that his foreman maintained the production records and was known to be bigoted against blacks.²⁶⁶

important factor in the promotion process” and such standards as there were for foreman to apply “were determined to be controlling are vague and subjective”); *United States v. United Bhd of Carpenters, Local 169*, 457 F.2d 210, 215 (7th Cir. 1972) (rejecting union’s hiring hall “system of referral [a]s wholly subjective and inherently non-reviewable”); *Culp v. Gen. Am. Transp. Corp.*, No. C 72-101 Y, 1974 WL 196, at *6 (N.D. Ohio May 23, 1974) (finding that layoff decisions were principally made by one manager, and “merit test” for choosing employees for layoff was “a subjective test without definitive guidelines”); *United States v. United Ass’n of Journeymen and Apprentices of Plumbing and Pipefitting Industry of U.S. and Canada, Local Union No. 24*, No. 444-71, 1973 WL 194, at *21 (D.N.J. Feb. 16, 1973) (“[P]rocedure for selecting apprentices from among applicants who met minimum qualifications was completely subjective.”); *United States v. Local No. 357 of the Int’l Bhd. of Elec. Workers*, 356 F. Supp. 104, 117 (D. Nev. 1972) (“Where an all-white union and its apprenticeship committee exercise subjective and nonreviewable discretion in admitting members, referring individuals for work, and selecting apprentices, and it is shown that white applicants fare significantly better than Negro applicants, a prima facie inference of discrimination arises.”).

²⁶⁴ *Rogers v. Int’l Paper Co.*, 510 F.2d 1340, 1345 (8th Cir. 1975), *vacated on other grounds*, 423 U.S. 809 (1975), *on remand*, 526 F.2d 722 (8th Cir. 1975).

²⁶⁵ *Taylor v. Safeway Stores, Inc.*, 365 F. Supp. 468 (D. Colo. 1973), *aff’d in relevant part*, 524 F.2d 263 (10th Cir. 1975).

²⁶⁶ According to the record, the foreman (named Walker)

was known to be so by the company, that the records kept by him were inherently unreliable as indicators of Taylor’s performance, that the circumstances of Taylor’s discharge were such as to prompt inquiry into the basis for the discharge by Walker’s superiors, . . . and that the latter failed to investigate beyond the facts as represented to them by Walker and quickly acquiesced in Walker’s determination that Taylor should be fired.”

Id. at 474. See also *Franklin v. Troxel Mfg. Co.*, 501 F.2d 1013, 1016 (6th Cir. 1974) (noting that the court considered testimony that the hiring manager, “after receiving plaintiff’s application, called a white mail carrier upon whom they had been relying for character references and asked him about” plaintiff; “[t]he mail carrier said he didn’t know her but also said that her father-in-law had said [plaintiff] didn’t agree with him (the father-in-law) about hardly anything and didn’t get along with people too well.”).

B. Policies That Perpetuate Pre-Act Discrimination Still Prohibited

Courts also continued to hold that facially-neutral policies that perpetuated pre-Act discrimination violated Title VII, unless justified by business necessity.²⁶⁷ This was a common argument in cases involving seniority systems, which kept workplaces racially segregated long past passage of the Act.²⁶⁸ The same principle was applied to experience requirements²⁶⁹ and

²⁶⁷ *See, e.g.*, *Palmer v. Gen. Mills Inc.*, 513 F.2d 1040, 1043 (6th Cir. 1975) (“[T]he department seniority system was designed to permit nondiscriminatory advancement, but under the circumstances it operates to preserve the vestiges of past discrimination.”); *EEOC v. Univ. of N.M., Albuquerque*, 504 F.2d 1296, 1304 (10th Cir. 1974) (“[W]hile Title VII speaks to the future, it necessarily embraces a backward glance in order to determine whether present employment practices are perpetuating past discriminations.”); *Carey v. Greyhound Bus Co.*, 500 F.2d 1372, 1377 (5th Cir. 1974) (“All that need be shown is that the employer discriminated against black employees prior to the passage of the Act and that the present system perpetuates that discrimination.”); *Sims v. Sheet Metal Workers Int’l Ass’n, Local Union No. 65*, 489 F.2d 1023, 1026 (6th Cir. 1973) (“[T]he present use of system or procedure which contains no discriminating features may violate Title VII of the [1964] Civil Rights Act if it serves to preserve longstanding past discrimination.”); *Bailey v. Am. Tobacco Co.*, 462 F.2d 160, 162 (6th Cir. 1972) (“[A] present nondiscriminatory seniority provision, which has no race discrimination features on its face, may nonetheless be a violation of the Equal Employment Opportunities Act if it serves to preserve the longstanding effect of past race discrimination.”); *United States v. Pilot Freight Carriers, Inc.*, No. C-143-WS-71, 1973 WL 185, at *4 (M.D.N.C. July 27, 1973) (“When a company’s employment system has been operated to channelize allocation of particular jobs on the basis of race, reliance on a system of seniority which serves to perpetuate the effects of discrimination . . . constitutes a present pattern . . . of discrimination”); *Thornton v. E. Tex. Motor Freight*, No. C-69-357 1972 WL 278, at *6 (W.D. Tex. July 13, 1972) (“There are business reasons for the establishment of the dual seniority system, but none reach the posture or status of necessity or overriding purpose which would subordinate the interests of the black plaintiffs and the purposes of 42 U. S. C. 2000e-2(a).”), *aff’d in relevant part*, 497 F.2d 416 (6th Cir. 1974). *But see* *Heard v. Mueller Co.*, 464 F.2d 190, 193 (6th Cir. 1972) (affirming judgment in favor of defendant in challenge to departmental seniority, in spite of statistical evidence of racial stratification, where “no continuous policy of discrimination against Negro employees, or prospective employees had been shown.”).

²⁶⁸ *See, e.g.*, *Swint v. Pullman-Standard*, 539 F.2d 77, 98 (5th Cir. 1976) (“The case law precedent is legion if not unanimous in holding that departmental seniority plans similar to that in use by defendant do perpetuate past discrimination.”); *Bing v. Roadway Exp., Inc.*, 485 F.2d 441, 447 (5th Cir. 1973) (“In the instant case Roadway refused to hire blacks as road drivers; its no-transfer rule and the union’s seniority scheme perpetuated the effects of Roadway’s discrimination.”); *N.L. Indus., Inc.*, 479 F.2d at 360 (rejecting collective bargaining agreement that allowed cross-departmental transfers, but provided that “bids from outside a department are permitted only after intradepartmental bidding is completed”); *United States v. Lee Way Motor Freight, Inc.*, No. CIV-72-445, 1973 WL 278, at *46 (W.D. Okla. Dec. 27, 1973) (“Where, as here, a company has in the past operated a racially segregated system of employment . . . perpetuates the effects of past discrimination and constitutes a present pattern or practice of discrimination against black employees.”).

²⁶⁹ *Sims*, 489 F.2d at 1026–27 (challenging apprenticeship program capped by an age twenty-six-maximum); *United States v. Sheet Metal Workers Int’l Ass’n, Local Union No. 10*, No. 487-69, 1973 WL 168, at *5–6 (D.N.J. Apr. 2, 1973) (considering union’s experience

word-of-mouth/referral policies,²⁷⁰ though it was rejected in challenges to layoff policies.²⁷¹

In *Johnson v. Goodyear Tire & Rubber Co.*, a challenge to a seniority policy, the employer formally desegregated its plant in 1962, yet black employees remained clustered in the low-wage labor department years later.²⁷² At first, they were prevented from transferring into other lines by a testing and high-school diploma requirement. Yet even when these requirements were dropped in 1969, “little success was attained in placing blacks in departments other than the labor department” because workers only began to accrue seniority from the date of transfer.²⁷³ The court held that “[a]s a result of this system, white applicants who entered a non-labor department position at the same time as black applicants were segregated into the labor department

requirement for apprenticeship); *Afro Am. Patrolmen’s League v. Duck*, 366 F. Supp. 1095, 1102 (N.D. Ohio 1973) (“Long periods of service in grade before promotion have been held not to be justified by either business necessity or compelling governmental interest. . . . [because] an employee who is merely a time-server does not become anything more simply because he succeeds in serving a long time.”), *aff’d*, 503 F.2d 294 (6th Cir. 1974); *United States v. Local 638, Enterprise Association Enter. Ass’n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Compressed Air, Ice Machine, Air Conditioning & Gen. Pipefitters*, 360 F. Supp. 979, 993 (S.D.N.Y. 1973) (describing union’s policy setting a maximum age of twenty-four to enter an apprenticeship program, since blacks “may have been excluded from the program in the past but who have nevertheless acquired experience in the trade,” so the cap was raised to age thirty).

²⁷⁰ See, e.g., *Bolton v. Murray Envelope Corp.*, 493 F.2d 191, 193 (5th Cir. 1974) (challenging policy of “word of mouth” recruitment, and independent, unsolicited inquiries and applications made directly to the company”); *EEOC v. Int’l Union of Elevator Constructors, Local Union No. 5*, No. 72-516, 1976 WL 13309, at *16 (E.D. Pa. 1976) (“[A]pproximately 75% of the applications for work permits on file with Local 5 were submitted by friends or relatives of Union members, and less than 4% by black persons.”); *United States v. United Ass’n of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Indus. Local Union No. 24*, 364 F. Supp. 808, 827–28 (D.N.J. 1973) (taking of journeyman examination only by invitation of union had discriminatory impact on blacks); *Henderson v. First Nat’l Bank of Montgomery*, 360 F. Supp. 531, 540 (M.D. Ala. 1973) (finding that because prior to 1965 “and during the calendar years 1966, 1967 and 1968 over 90% of the First National Bank’s employees were white[.]” reliance on referrals from current employees “was perpetuating past discriminat[ion] . . .”).

²⁷¹ See *Chance v. Bd. of Exam’rs & Bd. of Educ. of N.Y.*, 534 F.2d 993, 997 (2d Cir. 1976) (rejecting challenge to “facially neutral excessing plan, which operates on the concept of ‘last hired–first fired’”); *Watkins v. United Steel Workers of Am, Local No. 2369*, 516 F.2d 41, 46–47 (5th Cir. 1975) (finding layoff nondiscriminatory and, in any event, exempt under 42 U.S.C. § 2000e-2(h)); *Bales v. Gen. Motors Corp.*, No. C-74-1806 AJZ, 1975 WL 153, at *1 (N.D. Cal. Jan. 27, 1975) (denying preliminary injunction of seniority rules during layoff); Note, *Last Hired, First Fired Layoffs and Title VII*, 88 HARV. L. REV. 1544 (1975) (reviewing legislative history and case law and proposing remedial theories to limit impact of layoffs).

²⁷² *Johnson v. Goodyear Tire & Rubber Co.*, 349 F. Supp. 3 (S.D. Tex. 1972), *aff’d in relevant part*, 491 F.2d 1364 (5th Cir. 1974).

²⁷³ *Id.* at 9.

obtained and maintained a distinct advantage over fellow black employees, an advantage predicated solely on past racial discrimination.”²⁷⁴

Nevertheless, there was a split of authority regarding how strictly to impose the *Griggs* “business necessity” standard.²⁷⁵ In *Williams v. American St. Gobain Corp.*, the court applied the business necessity standard to the position of “Checker Department” in a historically segregated sheet and window glass plant in Oklahoma.²⁷⁶ The checker job was a quality control position within the plant that was historically held by whites, while blacks worked exclusively in the warehouse.²⁷⁷ For a while, the plant experimented with allowing the checker jobs to be filled by seniority, but this reportedly led to a “lack of stability” that “gave rise, according to the Company, to mistakes in shipments and to customer dissatisfactions.”²⁷⁸ Thus, the department reestablished the original practice of operating a dedicated checker unit.²⁷⁹ Three black warehouse workers claimed that this reorganization kept them locked out.²⁸⁰ Yet, while recognizing that Title VII prohibited work practices that perpetuated prior racial segregation, the Tenth Circuit held that the defendant established a “business necessity” because the record showed that checking had “to be performed under conditions of stabilized and accepted individual responsibility and not in the vicissitudes of shifting job traffic.”²⁸¹

The Fourth Circuit took a more pro-worker view of business necessity in *Robinson v. Lorillard Corp.*²⁸² The court there affirmed an injunction of Lorillard’s departmental seniority policy, which blocked blacks from entering

²⁷⁴ *Id.* at 15. As “Goodyear offered essentially no proof which would extricate this system from condemnation because of a substantial business necessity,” the court ordered that the policy end and remedial seniority rights be conferred. *Id.* at 15–17.

²⁷⁵ See Note, *Business Necessity Under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L. J. 98, 99–102 (1974).

²⁷⁶ *Williams v. Am. St. Gobain Corp.*, 447 F.2d 561, 563 (10th Cir. 1971).

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 564.

²⁸⁰ *Id.* at 565.

²⁸¹ *Id.* at 567. The outcome here is clouded by the fact that three plaintiffs probably lacked standing. Although entry into the Checker Department was by seniority, none of the plaintiffs had bid on those positions. *Id.* at 565. See also *Smith v. Olin Chem. Corp.*, 555 F.2d 1283, 1287 (5th Cir. 1977) (en banc) (finding no need to reach business necessity where standard was whether laborers had a degenerative back condition; “[i]n such a case, the employer need not make an evidentiary showing of business necessity, even though the criterion may have a discriminatory impact”); *Richardson v. Hotel Corp. of Am.*, 332 F. Supp. 519, 521 (E.D. La. 1971) (holding “reasonableness” standard applies to uphold decision not to employ bellman with criminal conviction).

²⁸² *Robinson v. Lorillard Corp.*, 444 F.2d 791, 795 (4th Cir. 1971).

departments that were historically staffed with whites.²⁸³ The employer defended departmental seniority as dictated by business necessity.²⁸⁴ The panel laid out the parameters of the defense:

[T]he applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. 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; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.²⁸⁵

In contrast to the Tenth Circuit, the Fourth Circuit held that efficiency did not support Lorillard's policy.²⁸⁶ The panel found that "the record [was] barren of any real evidence that the jobs in the formerly all-white departments [were] so complex and interrelated" as to require departmental seniority.²⁸⁷ Aside from failure of proof, the court also found it "difficult to imagine how even the necessity for job progression could constitute the business necessity which would justify a departmental seniority system that perpetuated the effects of prior discriminatory practices."²⁸⁸

²⁸³ *Id.* at 795–96.

²⁸⁴ *Id.* at 798–99 (citing industry practice, union demand, and efficiency).

²⁸⁵ *Id.* at 798 (footnotes omitted). *See also* *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 254 (5th Cir. 1974) (showing that the Fifth Circuit expressly adopted the *Robinson* standard).

²⁸⁶ *Robinson*, 444 F.2d at 799–800.

²⁸⁷ *Id.* at 799 ("[T]here is direct evidence to the contrary in the fact that the seniority system ordered into effect by the District Court had been originally proposed by Lorillard in the course of negotiating the 1968 collective bargaining agreement. The District Court added only the red-circling requirement to remove the wage rate barrier to transfers.").

²⁸⁸ *Robinson v. Lorillard Corp.*, 444 F.2d 791, 799 (4th Cir. 1971). *Id.* *See also* *Watkins v. Scott Paper Co.*, 530 F.2d 1159, 1181 (5th Cir. 1976) ("[B]usiness necessity is limited to those cases where an employer has no other choice."); *Palmer v. Gen. Mills Inc.*, 513 F.2d 1040, 1044 (6th Cir. 1975) ("[T]he seniority system provided helpful but not absolutely essential training and experience for employees in the line of progression."); *Waters v. Wis. Steel Works of Int'l Harvester Co.*, 502 F.2d 1309, 1321 (7th Cir. 1974) (explaining that the practice of restoring seniority of white bricklayers who accepted severance not supported by business necessity, because "claim of employee-employer goodwill and alleged concern for fear of potential labor strife does not rise to the level of urgency required for a demonstration of business necessity"); *Rock v. Norfolk & W. Ry. Co.*, 473 F.2d 1344, 1349 (4th Cir. 1973) (finding that employer fails to prove "business necessity" for maintaining separate seniority rosters for different

Finally, the Eighth Circuit divided 5–3 *en banc* in *United States v. St. Louis-San Francisco Railway Co.* over whether the defendant established a business necessity that train porters not be permitted to carry over their seniority in bidding on braking jobs.²⁸⁹ From 1928 to 1966, the railway maintained a strict separation of train porters (exclusively black) and brakemen (among whom, until 1966, there had been only one black member).²⁹⁰ With the passage of Title VII, train porters could apply to work as brakemen, but they were not granted carryover seniority from their former craft, thus placing them “at the bottom of the seniority ladder.”²⁹¹ Supposedly this was for safety reasons, *i.e.*, because the incumbent brakemen had more experience, but the court rejected that argument.²⁹² It held that to establish business necessity, a policy “must not only *foster* safety and efficiency, but must be *essential* to that goal.”²⁹³ The majority found that

Safety can be assured in other ways far more certain and practical than those inherent in the craft seniority system, and we feel confident that the trial court, acting within the general guidelines provided herein, will be able to fashion a remedy which will not only assure the safety of the public and employees of Frisco, but will also accord to qualified train porters their “rightful place” as brakemen.²⁹⁴

Conversely, the dissenters would have affirmed the district court’s finding of a safety reason as a business necessity, based on the “functional

yards, and court orders merger of lists); *United States v. Chesapeake & Ohio Ry. Co.*, 471 F.2d 582, 588 (4th Cir. 1972) (“When a Barney yard brakeman has qualified to fill a vacancy in the general yard, no reason founded on business necessity is disclosed by the evidence for denying him to his company seniority.”); *Crockett v. Green*, 388 F. Supp. 912, 920 (E.D. Wis. 1975) (explaining that business necessity “requires not only validation of requirements and tests but also a demonstration by the employer that there are no available alternatives to the tests or requirements which have a lesser racial impact”); *Johnson v. Pike Corp. of Am.*, 332 F. Supp. 490, 495 (C.D. Cal. 1971) (“The sole permissible reason for discriminating against actual or prospective employees involves the individual’s capability to perform the job effectively. This approach leaves no room for arguments regarding inconvenience, annoyance or even expense to the employer.”). *But see* *Roman v. ESB, Inc.*, No. 71-1237, 1973 WL 324, at *24 (D.S.C. Oct. 9, 1973) (rejecting, on grounds of business necessity, claim of “lack of blacks in the clerical and office areas” where “the evidence before the Court shows that there is a very small percent of blacks in this area qualified to handle such employment.”).

²⁸⁹ *United States v. St. Louis-S.F. Ry. Co.*, 464 F.2d 301 (8th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973).

²⁹⁰ *Id.* at 303–04.

²⁹¹ *Id.*

²⁹² *Id.* at 308–09.

²⁹³ *Id.* at 308 (emphasis in original) (citing *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 622 (2nd Cir. 1971); *United States v. Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971)).

²⁹⁴ *St. Louis*, 464 F.2d at 309.

difference between the crafts of train porters and brakemen” and the “recognition that a brakeman’s job is complex and hazardous, requiring related experience in safety and repair work.”²⁹⁵

C. Applying *Griggs* to New Policies That Caused Racial Discrimination

The terse *Griggs* opinion left many blanks to be filled by the lower courts. One open issue was how much evidence the plaintiff needed to make out a prima facie case, often reflected in statistical disparities in outcomes.²⁹⁶ Courts generally followed three methods²⁹⁷ to make comparisons: against the general population group from which the workforce may be drawn,²⁹⁸

²⁹⁵*Id.* at 314 (Stephenson, J., dissenting). See also *Head v. Timken Roller Bearing Co.*, No. 68-278, 1972 WL 262, at *7 (S.D. Ohio July 6, 1972) (showing that defendant “failed to demonstrate,” for purposes of business necessity, “that every position at the Company plant is so complex or specialized as to require, without exception, step-by-step job progression within a single department”), *rev’d on other grounds*, 486 F.2d 870 (6th Cir. 1973).

²⁹⁶ Compare *Chicano Police Officer's Ass'n v. Stover*, 526 F.2d 431, 438–39 (10th Cir. 1975) (reversing exclusion of statistical evidence from prior rounds of testing), *cert. granted, vacated, and remanded*, 426 U.S. 944 (1976); *Vulcan Soc’y of N.Y.C. Fire Dep’t, Inc. v. Civil Serv. Comm’n of N.Y.C.*, 360 F. Supp. 1265, 1269 (S.D.N.Y. 1973) (“[O]nly 15% of minority examinees as against 34% of white applicants passed these procedures as well as the written examination—a ratio of about 2.3 to 1.”); *Arnold v. Ballard*, No. C73-478, 1973 WL 159, at *2 (N.D. Ohio June 12, 1973) (“[A]ccording to the 1970 U. S. Census, 17.5 per cent of the Akron population was black, none of the 312 firemen is black,” while “on the October, 1972, qualifying examination, none of the 12–14 black applicants examined passed while 50 per cent of the 130–135 white applicants examined passed.”); *with Adams v. Tex. & Pac. Motor Transp. Co.*, 408 F. Supp. 156, 161 (E.D. La. 1975) (explaining that plaintiff “produced no evidence whatsoever that Texas & Pacific’s use of the test produced a disparate impact upon black, as opposed to white, job applicants.”); *Officers for Justice v. Civil Serv. Comm’n of S.F.*, 371 F. Supp. 1328, 1334 (N.D. Cal. 1973) (“Presently, this court is constrained to find that, given the limitations of the statistics concerning the respective examinations, there has been no showing of substantial de facto discrimination with respect to the promotion examinations for the assistant inspector, lieutenant, and captain ranks.”); *Afro Am. Patrolmen’s League v. Duck*, 366 F. Supp. 1095, 1103 (N.D. Ohio 1973) (holding that plaintiff failed to present statistical case against a promotions exam where “overwhelming weight of the statistical evidence leaves no doubt that the number of minority members taking the examination was too small to form a basis for any reliable statistical conclusions.”).

²⁹⁷ See *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290, 1293–94 (8th Cir. 1975) (en banc); Elaine W. Shoben, *Probing the Discriminatory Effects of Employee Selection Procedures with Disparate Impact Analysis Under Title VII*, 56 TEX. L. REV. 1, 6–9 (1977).

²⁹⁸ See, e.g., *Green*, 523 F.2d at 1294 (regarding disqualification of applicants with conviction records and comparing the likelihood of having such a record among white and black populations in the St. Louis area); *Afro Am. Patrolmen’s League v. Duck*, 503 F.2d 294, 299 (6th Cir. 1974) (“[T]he minority population of Toledo was 16 percent and that the breakdown by race within the police department disclosed that only 8.2 percent of the members of the Department were of minority races.”); *Johnson v. Goodyear Tire & Rubber Co., Synthetic Rubber Plant*, 491 F.2d 1364, 1371 n.10 (5th Cir. 1974) (“In 1970, 31.9% [o]f Texas blacks possessed a high school diploma compared with an overall level of 49.5%,” while “[i]n the Houston area, 32.7% [o]f the black population had obtained a high school diploma compared with 51.1% [o]f the total population.”).

against the sample of those who applied for the job in question,²⁹⁹ or against the incumbent workforce.³⁰⁰ Courts became more discerning about statistics under Title VII as judges gained more experience evaluating them, and demanded a degree of rigor from litigants that was not always evident in earlier cases.³⁰¹

Another open issue was how deeply to scrutinize a defendant's claim of job-relatedness. Some courts after *Griggs* required only a "reasonable" relationship to the position.³⁰² In *United States v. Georgia Power Co.*,³⁰³ a case decided just a few months after *Griggs*, the court reviewed four aptitude and intelligence tests used for hiring and promotion,³⁰⁴ along with a high school

²⁹⁹ See, e.g., *Hester v. S. Ry. Co.*, 497 F.2d 1374, 1379 (5th Cir. 1974) ("The most direct route to proof of racial discrimination in hiring is proof of disparity between the percentage of blacks among those applying for a particular position and the percentage of blacks among those hired for the position."); *Johnson*, 491 F.2d at 1372 ("[O]ver 49% [o]f the black applicants taking the tests failed, whereas only 15% [o]f the [white] applicants did not pass."); *Vulcan Soc'y of the N.Y.C. Fire Dep't v. Civil Serv. Comm'n of N.Y.C.*, 490 F.2d 387, 392 (2d Cir. 1973) (discussing "[r]oughly 11.5% [o]f the 14,168 applicants who entered the examination halls were black or Hispanic. Yet minority members comprised only 5.6% of those who had passed the written, physical and medical examinations at the time of the hearing.").

³⁰⁰ See, e.g., *Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Serv. Comm'n*, 482 F.2d 1333, 1335–36 (2d Cir. 1973) (showing that although "Bridgeport has a combined Black and Spanish speaking population of 25%, members of these minorities only represent 3.6% of the Department," while "the cities of Hartford and New Haven, Connecticut, which have roughly the same population and the same size police departments, show a decidedly better record of minority police employment.").

³⁰¹ See, e.g., *Roman v. ESB, Inc.*, 550 F.2d 1343, 1350 (4th Cir. 1976) (en banc) ("[W]e do not believe that isolated bits of statistical information necessarily make a prima facie case when divorced from other and contrary statistics and from the statistical picture of all the employment at the plant."); *Shepard v. Beaird-Poulan, Inc.*, No. 750499, 1976 WL 13219, at *5 (W.D. La. Sept. 23, 1976) (discussing how plaintiffs presented historical statistical evidence of underrepresentation of blacks in workplace, but "the Company had been progressively increasing its black representation in all areas of its work force in substantial numbers from 1970 through 1975" and "the evidence regarding terminations by defendant during the period 1972 through 1975 and this indicated that the ratio of whites to blacks terminated for this period was approximately nine to two."); *Floyd v. Kroger Co.*, No. 72-339, 1974 WL 315, at *3 (S.D. Ohio Oct. 8, 1974) (stating while "[r]ecent developments in civil rights law would seem to indicate that such [statistical] evidence" of exclusively white management "may constitute a prima facie case of racial discrimination[,] it was not probative where plaintiffs offered no evidence that blacks ever applied for such positions).

³⁰² See, e.g., *Taylor v Armco Steel Corp.*, 373 F. Supp. 885, 910 (S.D. Tex. 1973) ("[T]he line concept itself is a valid one, reasonably related to legitimate business purposes and 'essential' to their attainment . . ."). See generally Paul N. Cox, *The Future of the Disparate Impact Theory of Employment Discrimination After Watson v. Fort Worth Bank*, 1988 BYU L. REV. 753, 757–59 (1988) (referring to "reasonable relationship" standard as "weak" form of business necessity).

³⁰³ *United States v. Ga. Power Co.*, 1971 WL 162, at *1 (N.D. Ga. June 30, 1971), *aff'd in part, vacated in part, remanded*, 474 F.2d 906 (5th Cir. 1973).

³⁰⁴ *Id.* at *14 (describing the Bennett Mechanical Comprehension Test, PTI Verbal Test, PTI Numerical Test, and General Clerical Test).

diploma requirement. The court upheld all the exams.³⁰⁵ While recognizing that black applicants had lower average test scores than whites, the court held that Title VII demanded only that such testing requirements be “reasonably related to job performance.”³⁰⁶ The district court recited that “[t]he record here, unlike *Griggs*, is replete with testimony, studies, statistics, and expert opinions on both sides,”³⁰⁷ though the opinion itself contains only rote findings in support.³⁰⁸

The Fifth Circuit, though, disapproved the district court’s permissive approach and reversed these findings.³⁰⁹ It held that Georgia Power’s expert failed “to show that the tests did not screen out blacks as blacks”; that the EEOC’s Uniform Guidelines, which are presumptively controlling, mandated “separate racial group validation of tests in a case such as we have here in which there exists an available minority race sample of adequate size to conduct such a study” and that “[t]here was no evidence . . . that Georgia Power had ever attempted to satisfy these [Guideline] provisions.”³¹⁰ The Fifth Circuit also noted the many methodological shortcomings in the Hite Study report underlying the tests and determined bottom-line that “the district court erred as a matter of law in relying on the Hite Study to find that Georgia Power had met the burden of manifesting its tests were job

³⁰⁵ *Id.* at *24.

³⁰⁶ *Id.* at *23.

³⁰⁷ *Id.*

³⁰⁸ *Id.* (conceding, curiously, that the exams would not satisfy the validation standards of the EEOC’s Uniform Guidelines, yet it found those standards unduly stringent despite that *Griggs* expressly deferred to them). The court did strike down the high-school-diploma requirement on both business-necessity and job-relatedness grounds. *Id.* at *25 (“the high school education requirement cannot be said to be reasonably related to job performance”). *But see* *Spurlock v. United Airlines, Inc.*, 475 F.2d 216, 219 (10th Cir. 1972) (affirming finding of district court that “rigorous training course” for pilots and “ability to understand and retain concepts and information given in the atmosphere of a classroom or training program” made the “requirement of a college degree . . . sufficiently job-related to make it a lawful pre-employment standard”); *Wilson v. Woodward Iron Co.*, 362 F. Supp. 886, 895 (N.D. Ala. 1973) (“[T]he questions used in evaluating the qualifications of employees for the Section Foreman job were related to the track work supervised by the job, were samples of the actual work performed by the Section Foreman, and were a legitimate and reasonable measure of job performance.”); *Goodloe v. Martin Marietta Corp.*, No. C-2498, 1972 WL 288, at *3 (D. Colo. Jan. 13, 1972) (“Defendant’s educational requirements are reasonable, and its refusal to transfer plaintiff to the computer department did not constitute discrimination.”).

³⁰⁹ *United States v. Ga. Power Co.*, 474 F.2d 906, 914–18 (5th Cir. 1973).

³¹⁰ *Id.* at 914–15.

related.”³¹¹ The panel remanded for a new hearing based on the higher job-relatedness standards articulated in its opinion.³¹²

Courts also considered validity, *i.e.*, whether a selection method was shown to be reasonably capable of measuring what it purports to measure.³¹³ Much of the decisional law centered on application of the EEOC’s Uniform Guidelines.³¹⁴ In *Western Addition Community Organization v. Alioto*, a section 1981 and 1983 case, the San Francisco Fire Department was staffed by 1800 men, only four of whom were black in a city where blacks made up fourteen

³¹¹ *Id.* at 917.

³¹² *Id.* at 917–18. *See also* *Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Serv. Comm’n*, 482 F.2d 1333, 1338 (2d Cir. 1973) (finding a test developed twenty years earlier was “not geared in any significant fashion to establish whether or not the applicant will be a good policeman,” featuring “vocabulary and arithmetic questions are only superficially or peripherally related to police activity,” and was found to lack validity); *Officers for Justice v. Civil Serv. Comm’n of City and Cty. of S.F.*, 371 F. Supp. 1328, 1335–36 (N.D. Cal. 1973) (describing standard for relatedness as falling between rational-basis and strict-scrutiny review). *But see* *Allen v. City of Mobile*, 331 F. Supp. 1134, 1145 (S.D. Ala. 1971) (finding that sergeants test met job relatedness standards; “[o]ne hundred twelve of the questions should be known to a good, experienced patrolman”), *aff’d*, 466 F.2d 122 (5th Cir. 1972).

³¹³ The D.C. Circuit summarized the three main threads of validity analysis:

‘Empirical’ validity is demonstrated by identifying criteria that indicate successful job performance and then showing a correlation between test scores and those criteria. ‘Construct’ validity is proven when an examination is structured to determine the degree to which applicants possess identifiable characteristics that have been determined to be important to successful job performance. ‘Content’ validity is established when the content of the test closely approximates the tasks to be performed on the job by the applicant.

Douglas v. Hampton, 512 F.2d 976, 984 (D.C. Cir. 1975) (footnotes omitted).

³¹⁴ The Fifth Circuit considered the Uniform Guidelines to be controlling “absent a showing that some cogent reason exists for noncompliance.” *Ga. Power*, 474 F.2d at 913. *Accord* *United States v. City of Chi.*, 549 F.2d 415, 430 (7th Cir. 1977). But other courts left the significance of the Uniform Guidelines open. *See* *Firefighters Inst. for Racial Equality v. City of St. Louis*, 549 F.2d 506, 510 (8th Cir. 1977) (“Though it has been argued here that the EEOC Guidelines, which refer to the standards of the American Psychological Association (APA), should be considered ‘guidelines only’ these standards have often been sanctioned as a means by which courts may professionally evaluate the validity of employment tests when called upon to do so.”); *Douglas*, 512 F.2d at 986 (“These guidelines have been cited with approval by the Supreme Court, followed by all courts dealing with these issues, and recognized as controlling in at least one circuit. We think it unwise to depart from these accepted principles at this stage in the development of the law concerning equal employment opportunity.”); *Vulcan Soc’y of the N.Y.C. Fire Dep’t v. Civil Serv. Comm’n of N.Y.C.*, 490 F.2d 387, 394 n.8 (2d Cir. 1973) (“While these Guidelines are not binding on the courts, they have been relied or [sic] as a helpful summary of professional testing standards in both § 1983 and Title VII cases.”); *Castro v. Beecher*, 459 F.2d 725, 737 (1st Cir. 1972) (“Some have protested that nothing less than adherence to the guidelines governing examinations under the Equal Employment Opportunity Act, 32 C.F.R. § 1607, would suffice. We do not see fit to interfere with the exercise of the court’s discretion on such a point.”).

percent of the population.³¹⁵ In response to the “grossly disproportionate representation” of blacks and Mexicans, the city revised its testing procedures for new-hires, yet the results still favored white applicants 3–1 over blacks.³¹⁶ The court held that the test lacked validity.³¹⁷ The city argued that it was infeasible to conduct “empirical” validation (an actual comparison of the test scores of individuals with their work performance), so it relied on “content-construct” validation to show that the method used to devised the test indicates a relationship between the subject of the test and job performance.³¹⁸ Yet the court held that, under any standard, the test lacked validity because the defendant performed no actual job analysis.³¹⁹ This was despite the court finding that, “far from entertaining any intent to racially discriminate, [the city] means well and has tried in its own way to improve minority representation in the Fire Department without impairing departmental efficiency”³²⁰

³¹⁵ *W. Addition Cmty. Org. v. Alioto*, 340 F. Supp. 1351, 1352 (N.D. Cal. 1972).

³¹⁶ *Id.* at 1352–53.

³¹⁷ *Id.* at 1356.

³¹⁸ *Id.* at 1354–55.

³¹⁹ *Id.* at 1355–56.

³²⁰ *Id.* at 1356. *See also* *Watkins v. Scott Paper Co.*, 530 F.2d 1159, 1188 (5th Cir. 1976) (affirming district court’s rejection of company’s validity study where background data was destroyed, while Guidelines mandated “that there be ‘careful job analyses,’ 29 C.F.R. § 1607.5(b)(3), and that the ‘(e)vidence of a test’s validity should consist of empirical data’ 29 C.F.R. § 1607.4(c)”; *Duhon v. Goodyear Tire & Rubber Co., Beaumont Plant*, 494 F.2d 817, 819 (5th Cir. 1974) (finding that non-validated educational requirements and use of Wonderlic and Bennett tests must be enjoined, even if they were adopted in good faith); *Moody v. Albemarle Paper Co.*, 474 F.2d 134, 139 (4th Cir. 1973) (“In developing criteria of job performance by which to ascertain the validity of its tests, Albemarle failed to engage in any job analysis. Instead, test results were compared with possibly subjective ratings of supervisors who were given a vague standard by which to judge job performance.”); *rev’d on other grounds*, 422 U.S. 405 (1975); *Armstead v. Starkville Mun. Separate Sch. Dist.*, 461 F.2d 276, 279 (5th Cir. 1972) (affirming the lower court’s determination that under Equal Protection, school district’s use of GRE cut-off score to qualify for employment as teacher not shown to be a valid measure of teacher competency); *Crockett v. Green*, 388 F. Supp. 912, 919–20 (E.D. Wis. 1975) (“[E]ven assuming that ‘content validation’ is a permissible method of validation under these circumstances and further assuming, without deciding, that the apprenticeship and experience requirements have been shown to have content validity, the defendants have not sustained their burden of justification for the continued use of the prejob requirements.”); *Fowler v. Schwarzwald*, 351 F. Supp. 721, 725 (D. Minn. 1972) (concluding that the “defendants have not shown the [civil service examination for firefighter applicants] has content validity, principally because of the absence of a proper job analysis, and have not shown the infeasibility of a concurrent or predictive validity study.”). *But see* *Sims v. Sheet Metal Workers Int’l Ass’n, Local 65*, 353 F. Supp. 22, 26 (N.D. Ohio 1972) (crediting “validation studies of the Wargo Journeyman and Flanagan Aptitude and Industrial Tests to job performance conducted by Dr. John C. Denton, an eminent Industrial Psychologist”); *Head v. Timken Roller Bearing Co.*, No. 68-278, 1972 WL 262, *10 (S.D. Ohio July 6, 1972) (stating that “defendant here has made a substantial effort to validate its apprenticeship requirements” where it hired

Plaintiffs filed *Griggs*-type challenges against a variety of discriminatory hiring and promotion policies, including performance evaluation standards;³²¹ psychological, intelligence, and occupational testing;³²² minimum experience or apprenticeship requirements;³²³ a ban on hiring those with criminal records;³²⁴ and high school/college graduation requirements.³²⁵ There

industrial psychologists to conduct a validation study and “these studies beyond question demonstrate a correlation between defendants’ testing and educational requirements and the performance of apprentices.”).

³²¹ See, e.g., *Robinson v. Union Carbide Corp.*, 538 F.2d 652, 662 (5th Cir. 1976), (“The questionnaires and evaluation forms used by Union Carbide require the interviewer’s subjective opinion concerning the candidates’ ‘adaptability,’ ‘bearing, demeanor, manner,’ ‘verbal expression,’ ‘appearance,’ ‘maturity,’ ‘drive,’ and ‘social behavior.’”), *amended on rehearing*, 544 F.2d 1258 (5th Cir. 1977); *Wade v. Miss. Coop. Extension Serv.*, 528 F.2d 508, 518 (5th Cir. 1976) (“[T]here was ample testimony in support of the court’s finding that the questions on the evaluation form were in large part subjective and vulnerable to either conscious or unconscious discrimination by the evaluating supervisors.”); *Brito v. Zia Co.*, No. 8824, 1972 WL 265, at *3 (D.N.M. Nov. 7, 1972), *aff’d*, 478 F.2d 1200 (10th Cir. 1973) (finding that defendant failed to establish validity or job-relatedness for evaluation process).

³²² See, e.g., *Douglas v. Hampton*, 512 F.2d 976, 980–88 (D.C. Cir. 1975) (discussing the racially disproportionate impact and empirical validity of the Federal Service Entrance Examination); *Bos. Chapter, NAACP, Inc. v. Beecher*, 504 F.2d 1017, 1022–24 (1st Cir. 1974) (discussing the invalid nature of a written test for firefighters); *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 212–17 (5th Cir. 1974) (discussing Hite Study for screening applicants); *Armstead*, 461 F.2d at 278–80 (discussing the inadequacy of utilizing GRE scores in hiring of teachers). *But see* *Patmon v. Van Dorn Co., Plastic Mach. Div.*, 498 F.2d 544, 546 (6th Cir. 1974) (*per curiam*) (finding that because plaintiff refused to take qualifying exam, the court could not pass judgment on an alleged bias of exam); *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 225–27 (5th Cir. 1974) (discussing California Test of Mental Maturity for screening candidates for hiring and promotion).

³²³ See, e.g., *Crockett*, 388 F. Supp. at 918 (“Based upon the past discrimination against blacks in the trade unions, whether intentional or not, the apprenticeship and experience requirements are barriers to blacks who are presently applying for jobs with the City.”); *United States v. Local 638, Enter. Ass’n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Compressed Air, Ice Machine, Air Conditioning and General Pipefitters*, 347 F. Supp. 169, 180 (S.D.N.Y. 1972) (“There is a residuum of discriminatory effect stemming from . . . the failure to accelerate minority journeymen membership . . .”).

³²⁴ See, e.g., *Green v. Mo. Pac. R.R.*, 523 F.2d 1290, 1298 (8th Cir. 1975) (*en banc*) (“We cannot conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed.”); *Butts v. Nichols*, 381 F. Supp. 573, 581–82 (S.D. Iowa 1974) (striking down, on Equal Protection grounds, a provision of the Iowa Code prohibiting the employment of felons in civil service positions).

³²⁵ See, e.g., *Watkins v. Scott Paper Co.*, 530 F.2d 1159, 1181–82 (5th Cir. 1976) (emphasizing that business necessity could not justify the exclusion of people without high school diplomas from certain jobs); *Pettway*, 494 F.2d at 221–22 (finding requirement of a high school diploma for hiring eligibility to be discriminatory to blacks); *United States v. Ga. Power Co.*, 474 F.2d 906, 918–19 (5th Cir. 1973) (finding that requiring a high school diploma for employment hindered blacks at a much higher rate than whites and was not justified); *Carter v. Gallagher*, 452 F.2d 315, 326 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972) (affirming the trial court’s decree removing requirement for firefighter applicants to have a high school diploma or

was, for instance, the idiosyncratic certification process for assistant principals in *Chance v. Board of Examiners and Board of Education of City of New York*.³²⁶ In New York City, a school system with a much smaller-than-average black supervisory staff,³²⁷ the school board required applicants for promotion to obtain a state certification *and* to meet a city testing requirement.³²⁸ Plaintiffs argued, “these tests place a premium on familiarity with organizational peculiarities of the New York City school system which, while having little to do with educational needs, are largely gained through coaching and assistance from present, predominately white, supervisory personnel.”³²⁹ The court found that “the written examinations reveals that major portions of them call simply for regurgitation of memorized material. Furthermore, the oral examination procedure leaves open the question of whether white candidates are not being favored—albeit unconsciously—by committees of examination assistants who have been entirely or predominantly white.”³³⁰ Lacking either validity or business necessity, the court enjoined the testing while the board developed a less-discriminatory plan.

Griggs was also applied to termination policies.³³¹ In *Wallace v. Debron Corp.* the Eighth Circuit reviewed an employee’s automatic termination, by virtue of a company rule, for “[p]ermittting garnishment proceedings to be brought against the Company for more than one indebtedness within a twelve-month period.”³³² The employer conceded the racially disparate impact of the rule, yet argued that that under *Griggs*, “only those facially neutral employment practices which have the effect of perpetuating prior racially discriminatory practices are violative of Title VII absent a showing of

G.E.D. by the date of hiring); *Padilla v. Stringer*, 395 F. Supp. 495, 506 (D.N.M. 1974) (striking down high school diploma requirement for zookeepers); *Roman v. Reynolds Metals Co.*, 368 F. Supp. 47, 50–51 (S.D. Tex. 1973) (holding that high-school-diploma requirement discriminated against Mexican-Americans). *But see* *Castro v. Beecher*, 459 F.2d 725, 735 (1st Cir. 1972) (finding that high-school-diploma requirement for police officers valid).

³²⁶ *See generally* *Chance v. Bd. Of Exam’rs of City of N.Y.*, 330 F. Supp. 203 (S.D.N.Y. 1971) (determining the constitutionality of examinations administered to city board of examiners candidates under the Equal Protection clause).

³²⁷ *Id.* at 213 (observing that among major metropolitan areas, “New York City has by far the lowest percentage of minority representation. The next lowest city, Chicago, has almost 5 times the percentage of minority principals found in New York City . . .”).

³²⁸ *Id.* at 207.

³²⁹ *Id.* at 209.

³³⁰ *Id.* at 224.

³³¹ *See, e.g.*, *United States v. Chesterfield Cty. Sch. Dist.*, 484 F.2d 70, 73 (4th Cir. 1973) (“*Griggs* . . . dealt with initial employment and promotion, but the principle . . . is equally applicable to the discharge of employees or the failure to reemploy.”).

³³² *Wallace v. Debron Corp.*, 494 F.2d 674, 674 n.1 (8th Cir. 1974).

business necessity.”³³³ The court disagreed, citing a Ninth Circuit opinion which held that “[h]istorical discrimination need not be shown in order to obtain relief from discrimination in fact, regardless of its cause or motive.”³³⁴ The Eighth Circuit held that,

[f]or us to take any position other than one which requires that all employers remove all artificial, arbitrary, and unnecessary racial barriers to employment would be inconsistent with the broad purposes of Title VII; would permit many employers (those with no past history of discrimination and new employers) to erect such barriers; and would result in an inequitable and unequal enforcement of the Act.³³⁵

The court remanded the case for a determination of “business necessity,” citing the standard set in *United States v. St. Louis-San Francisco Railway Co.*³³⁶ and noting that “Debron must at least prove that its garnishment policy fosters employee productivity and that there is no acceptable alternative that will accomplish that goal ‘equally well with a lesser differential racial impact.’”³³⁷

D. Courts Use Equitable Power to Raise Black Employment

The court knows at least some of the things the whole world knows. We are aware that there is unemployment. We are even more keenly aware that this case is launched by statutory commands, rooted in deep constitutional purposes, to attack the scourge of racial discrimination in employment. We know without parading the familiar literature that discrimination of the type here in question has among its intertwined causes the desire of the discriminators to preserve job preferences and other economic advantages. And we know that, in addition to the spiritual wounds it inflicts, such discrimination has caused manifold economic injuries, including drastically higher rates of

³³³ *Id.* at 675.

³³⁴ *Gregory v. Litton Sys., Inc.*, 472 F.2d 631, 632 (9th Cir. 1972).

³³⁵ *Wallace*, 494 F.2d at 676.

³³⁶ *United States v. St. Louis-S.F. Ry. Co.*, 464 F.2d 301 (8th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973).

³³⁷ *Wallace*, 494 F.2d at 677 (footnote and citation omitted). *But see* *Robinson v. City of Dallas*, 514 F.2d 1271, 1274 (5th Cir. 1975) (finding that plaintiff failed to show that rule requiring city employees to pay “just debts” disproportionately affected black employees).

unemployment and privation among racial minority groups.³³⁸

The imperative of putting black Americans to work continued apace. Plaintiffs filed systemic cases as “across the board” class cases, challenging a wide range of allegedly discriminatory practices.³³⁹ “Pattern-or-practice” cases were also filed to challenge discriminatory policies of a repeated, routine, or a generalized nature.³⁴⁰ The EEOC obtained new authority in the 1972 amendments to Title VII to bring pattern-or-practice cases on behalf of the government under Section 707³⁴¹ (the Attorney General could, likewise, file such suits against state and local governmental authorities), and private plaintiffs were allowed to file such cases as class actions.³⁴²

³³⁸ *United States v. Wood, Wire and Metal Lathers Int’l Union, Local Union 46*, 341 F. Supp. 694, 699 (S.D.N.Y. 1972) (footnote omitted), *aff’d*, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973). *See also* *Patterson v. Newspaper and Mail Deliverers’ Union of N.Y. and Vicinity*, 514 F.2d 767, 772–73 (2d Cir. 1975) (citing *Wood, Wire and Metal Lathers Int’l Union*, 341 F. Supp. 694).

³³⁹ *See, e.g.*, *Barnett v. W.T. Grant Co.*, 518 F.2d 543, 547–48 (4th Cir. 1975) (“Barnett’s suit is an ‘across the board’ attack on all discriminatory actions by defendants on the ground of race, and when so viewed it fits comfortably within the requirements of Rule 23(b)(2).”); *Boles v. Union Camp Corp.*, 57 F.R.D. 46, 51 (S.D. Ga. 1972) (“The Court of Appeals of the Fifth Circuit and other courts have upheld class actions under Rule 23(b)(2) as a means of challenging ‘across-the-board’ discriminatory practices such as those alleged here.”); *Patterson v. Youngstown Sheet & Tube Co.*, 1972 WL 292, at *2 (N.D. Ind. Nov. 14, 1972) (adopting Fifth Circuit framework). The “across-the-board” line of cases was later disapproved. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160–61 (1982).

³⁴⁰ *See, e.g.*, *United States v. Sheet Metal Workers Int’l Ass’n, Local Union No. 10*, No. 487-69, 1973 WL 168, at *3 (D.N.J. Apr. 2, 1973); *United States v. Phila. Elec. Co.*, 351 F. Supp. 1394, 1396 (E.D. Pa. 1972); *United States v. Ironworkers Local 86*, 443 F.2d 544, 552 (9th Cir. 1971), *cert. denied*, 404 U.S. 984 (1971); *United States v. Bricklayers Local No. 1*, No. C-71-65, 1972 WL 240, at *20–21 (W.D. Tenn. Nov. 29, 1972); *United States v. Local No. 357 of the Int’l Bhd. of Elec. Workers*, 356 F. Supp. 104, 116–17 (D. Nev. 1972).

³⁴¹ 42 U.S.C. § 2000e-6 (1964).

³⁴² *See, e.g.*, *Dickerson v. U.S. Steel Corp.*, 64 F.R.D. 351, 359–60 (E.D. Pa. 1974) (rejecting argument that only the government can bring a pattern-or-practice case); *Williams v. Local No. 19, Sheet Metal Workers Int’l Ass’n*, 59 F.R.D. 49, 53 (E.D. Pa. 1973) (allowing class to proceed even where there was some doubt about lead plaintiff’s standing to represent non-members because “a Court should not disallow representative status merely on the bare possibility that a civil rights plaintiff might cynically not be in fact concerned with litigating fully the alleged broad policy of discrimination which he has challenged in his complaint”); *Franks v. Bowman Transp. Co.*, No. 15086, 1972 WL 245, at *4 (N.D. Ga. June 29, 1972) (finding “a pattern of racial discrimination in the hiring, assignment, transfer and discharge policies of the company and such practices as perpetrated by the Bargaining Agreement with the unions constitute unlawful employment practices under the Act”), *rev’d on other grounds*, 495 F.2d 398 (5th Cir. 1974), *rev’d*, 424 U.S. 747 (1976).

Courts continued to award equitable relief in Title VII cases to reform workplaces that discriminated against blacks.³⁴³ Along with ending departmental seniority, which locked black employees into formerly segregated units, courts ordered adjustments to seniority for class members to compensate for lost promotion and transfer opportunities, though the degree of adjustments were sensitive to the facts.³⁴⁴ Courts also “red circled” pay rates for black employees to protect them from losing income as they transferred jobs,³⁴⁵ ordered efforts to recruit black applicants,³⁴⁶ and opened employment records for inspection.³⁴⁷ Most controversially, courts decreed black

³⁴³ *See, e.g.*, *Afro Am. Patrolmen’s League v. Duck*, 503 F.2d 294, 302 (6th Cir. 1974) (vacating the portion of the injunction that shortened the in-service requirement for police promotion from five years to one and holding instead that the district court will, on remand, impose “the proper in-service requirement for promotion at each level in the Toledo Police Department”); *United States v. Wood, Wire and Metal Lathers Int’l. Union, Local No. 46*, 471 F.2d 408, 411, 413–15 (2d Cir. 1973) (requiring union to issue an equal number of permits to non-white applicants as are issued to white applicants); *United States v. Jacksonville Terminal Co.*, 356 F. Supp. 177, 182 (M.D. Fla. 1973) (ordering “the complete desegregation of [the employer’s] toilet, locker and shower facilities and [the employer] shall immediately remove the partition which divides the facility identified by the number 4 on Government Exhibit 3 into two separate facilities”). *But see* *Banks v. Seaboard Coast Line R.R.*, 360 F. Supp. 1372, 1375 (N.D. Ga. 1973) (finding that use of seniority was not discriminatory and does not continue discrimination in effect or by intent).

³⁴⁴ *See, e.g.*, *Hairston v. McLean Trucking Co.*, 520 F.2d 226, 235 (4th Cir. 1975) (“The district court should enjoin classification seniority, but it may, of course, approve other non-discriminatory devices to assure proper qualification and training.”). *United States v. Masonry Contractors Ass’n of Memphis, Inc.*, 497 F.2d 871, 874–78 (6th Cir. 1974) (affirming the district court’s holding, which “ordered certain of the defendants to employ black workers so that at least 5% of the total bricklayer man hours would be worked by black bricklayers for the years 1973 through 1975”); *Thornton v. E. Tex. Motor Freight*, 497 F.2d 416, 420–21 (6th Cir. 1974) (finding no abuse of discretion in lower court granting different seniority status dependent upon the filing of an EEOC claim or request for a transfer); *United States v. Navajo Freight Lines, Inc.*, No. 72-116-MML, 1973 WL 182, at *5 (C.D. Cal. June 6, 1973) (ordering transfer without the loss of seniority), *aff’d in part*, 525 F.2d 1318 (9th Cir. 1975).

³⁴⁵ *See, e.g.*, *Swint v. Pullman-Standard*, 539 F.2d 77, 100–01 (5th Cir. 1976) (“On remand, unless the district court determines that the plaintiffs have failed to show that any discriminates would suffer diminished wages on transfer, red circling must be ordered.”); *Stevenson v. Int’l Paper Co.*, 516 F.2d 103, 112 (5th Cir. 1975) (citing *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 248 n.99 (5th Cir. 1975) (“Red circling is a standard remedy for eliminating past discrimination which prevented employees from reaching higher jobs . . .”).

³⁴⁶ *See, e.g.*, *Mims v. Wilson*, 514 F.2d 106, 111 (5th Cir. 1975) (“The district court on remand should also consider the necessity and the feasibility of directing affirmative recruitment efforts aimed at the black population”); *United States v. Ga. Power Co.*, 474 F.2d 906, 926 (5th Cir. 1973) (directing entry of injunction to change or supplement word-of-mouth policy and prohibiting recruitment solely from “all—or preponderantly all—white institutions”). *But see* *Peltier v. City of Fargo*, 533 F.2d 374, 379–80 (8th Cir. 1976) (denying injunctive relief in a sex-discrimination recruitment case, where the city voluntarily adopted an affirmative action program).

³⁴⁷ *See, e.g.*, *Russell v. Am. Tobacco Co.*, 528 F.2d 357, 364 (4th Cir. 1975) (finding no abuse of discretion when the lower court “directed the company to maintain records, open to

hiring and promotion targets or “quotas” to remedy a defendant’s past discrimination.³⁴⁸

In *Baxter v. Savannah Sugar Refining Corp.*, a Fifth Circuit decision that has often been cited in later pattern-or-practice cases, promotions in the refinery were so corrupted by favoritism and subjective rationales that the court decided to flip the burden of proof to the employer.³⁴⁹ Thus, the defendant would have to *disprove* causation by clear and convincing evidence:

Accordingly, on remand the initial burden will be on the individual discriminatee to show that he was available for promotion and possessed the general characteristics and qualifications which are shown by Savannah to be possessed by the higher paid white employees and are job related. Once this burden is met, the employer must demonstrate by clear and convincing evidence that any particular employee would have never been advanced because of that individual's particular lack of qualifications for a more difficult position or for other good and sufficient reasons such employee would never have been promoted. It is apparent that whether any particular individual would have been advanced under a color-blind system cannot now be determined with 100% Certainty. The court on remand will have to deal with probabilities. Any substantial doubts created by

inspection by plaintiffs’ counsel, of all action taken pursuant to the decree . . . [and also] required the company to file every six months for two years specific detailed information about appointments to supervisory positions and the tests selected by the company for use in filling craft positions.”)

³⁴⁸ See, e.g., *Bos. Chapter, NAACP, Inc. v. Beecher*, 504 F.2d 1017, 1026–27 (1st Cir. 1974) (upholding hiring by ratios until percentage of minority fire fighters equals their percentage in the local population); *NAACP v. Allen*, 493 F.2d 614, 617–22 (5th Cir. 1974) (upholding hiring of black state troopers in 1:1 ratio with whites until blacks reach 25% of force); *Rios v. Enter. Ass’n Steamfitters, Local 638*, 501 F.2d 622, 630–32 (2d Cir. 1974) (affirming hiring quota for non-whites, but remanding order for reconsideration of 30% level); *United States v. N.L. Indus.*, 479 F.2d 354, 377 (8th Cir. 1973) (holding that the lower court can order promotion of blacks in one to one ratio to whites until fifteen foremen are black); *Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Serv. Comm’n*, 482 F.2d 1333, 1339–41 (2d Cir. 1973) (upholding, in part, hiring quotas for patrolmen); *United States v. Local Union No. 212 Int’l Bhd. Electrical Workers*, 472 F.2d 634, 635–36 (6th Cir. 1973) (upholding district court order mandating 11% black membership in apprentice programs); *EEOC v. Local 2P, Lithographers Int’l Union*, 412 F. Supp. 530, 542 (D. Md. 1975) (“Defendant will be required to accept as its goal an increase in its membership so that its active journeyman and apprentice members together will reflect the 22% black work force in the Baltimore standard metropolitan statistical area . . .”). *But see* *Morrow v. Crisler*, 479 F.2d 960, 963–65 (5th Cir. 1973) (finding insufficient proof to hold an abuse of discretion by lower court not implementing hiring preferences or quotas for minorities); *Pennsylvania v. O’Neill*, 473 F.2d 1029, 1030–31 (3d Cir. 1973) (en banc) (per curiam) (vacating injunction ordering promotion ratio of “at least one black officer for every two white officers”).

³⁴⁹ *Baxter v. Savannah Sugar Ref. Corp.*, 495 F.2d 437, 443–45 (5th Cir. 1974).

this task must be resolved in favor of the discriminatee who has produced evidence to establish a prima facie case. The discriminatee is the innocent party in these circumstances.³⁵⁰

Among other things, in the absence of clear job criteria, the district court was charged with ascertaining for each of the two-hundred-seventy-two black class members “what qualifications the white employees possess who occupy the higher paying ‘white’ classifications.”³⁵¹

Courts increasingly confronted the challenge, though, that white workers might be held back in the workplace (even if temporarily) to allow blacks to catch up to their “rightful place.”³⁵² The conflict became acute as the blazing American economy of the 1960s gave way to stagnation and unemployment in the 1970s.³⁵³ Courts offered different responses to this conflict. Some courts all but confessed that pain to white workers—who, to be fair, had been the *beneficiaries* of discrimination up to this point³⁵⁴—was inevitable,

³⁵⁰ *Id.* at 444–45. *See also* United States v. U.S. Steel Corp., 520 F.2d 1043, 1056 (5th Cir. 1975) (recommending that district court award pro rata shares of aggregated back pay to class members, while placing burden on employer to prove that any particular class member would not have been promoted).

³⁵¹ *Baxter*, 495 F.2d at 444.

³⁵² *See, e.g.*, United States v. Navajo Freight Lines, Inc., 525 F.2d 1318, 1327 (9th Cir. 1975) (“[T]hose not discriminated against should be required to sacrifice seniority advantages only to the extent necessary to permit discriminatees to achieve their ‘rightful place.’”); *Stevenson v. Int’l Paper Co.*, 516 F.2d 103, 114 (5th Cir. 1975) (“Advanced entry levels may also be a proper subject for injunctive relief . . . [f]orcing a former discriminatee to transfer to the lowest job in a line of progression can only be required if it can be justified by business necessity.”); *Rodriguez v. E. Tex. Motor Freight*, 505 F.2d 40, 62 (5th Cir. 1974) (“[B]lack and Mexican-American city drivers, many of whom would now be road drivers but for the discrimination of the defendants, must be given an opportunity to transfer to the road as road driving job openings develop.”), *rev’d on other grounds*, 431 U.S. 395 (1977). One way to mitigate any disadvantage to incumbent white employees was to award front pay in lieu of reinstatement. *See, e.g.*, *White v. Carolina Paperboard Corp.*, No. C-C-73-255, 1975 WL 250, at *8 (W.D.N.C. Sept. 15, 1975) (explaining that front pay and other prospective relief “necessary in order to avoid the necessity of ‘bumping’ white employees to put the plaintiffs in their rightful positions”), *aff’d in part, rev’d in part, and remanded*, 564 F.2d 1073 (4th Cir. 1977).

³⁵³ Paul Burstein & Mark E. Edwards, *The Impact of Employment Discrimination Litigation on Racial Disparity in Earnings: Evidence and Unresolved Issues*, 28 LAW & SOC’Y REV. 79, 101–03 (1994) (discussing research on the impact of the economic downturn of the 1970s on EEO litigation).

³⁵⁴ *Williams v. Norfolk & W. Ry. Co.*, 530 F.2d 539, 542 (4th Cir. 1975) (stating that while black plaintiffs will “advance their seniority over some [white] brakemen who started working for the Norfolk & Western before it merged with the Virginian This circumstance presents no greater obstacle to granting relief now than did the earlier acceptance of the white brakemen’s Virginian seniority.”).

though necessary.³⁵⁵ Others expressed concern that awarding such preferences might be inequitable, unwise policy, or even unconstitutional.³⁵⁶

Opponents of remedial decrees cited section 703(j) of Title VII, which bars courts from ordering “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 [a numerical] imbalance.”³⁵⁷ However, courts generally interpreted this section to only mean that such orders could not be based *solely* on uneven workplace representation, regardless of its cause, and did not apply where a court finds racial or other discrimination.³⁵⁸

³⁵⁵ See, e.g., *Patterson v. Newspaper and Mail Deliverers’ Union of N.Y. and Vicinity*, 514 F.2d 767, 772–73 (2d Cir. 1975) (explaining that white union members, though injured by same practices challenged by class of black members of bargaining unit, not entitled to relief under settlement; “[m]inority members . . . were the targets of racial discrimination on the part of the virtually all-white Union” and under Title VII “we are limited to consideration of the fairness of relief directed only to the latter.”); *Associated Gen. Contractors of Mass., Inc. v. Altshuler*, 490 F.2d 9, 16 (1st Cir. 1973) (rejecting Equal Protection challenge to state affirmative action requirement that 20% of man-hours associated with construction of state college be allocated to racial minorities; “[i]t is by now well understood, however, that our society cannot be completely colorblind in the short term if we are to have a colorblind society in the long term.”); *United States v. Roadway Express, Inc.*, 457 F.2d 854, 856 (6th Cir. 1972) (rejecting challenge to consent decree altering transfer rules; white drivers “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 Roadway Express.”); *United States v. Wood, Wire and Metal Lathers Int’l Union, Local Union 46*, 341 F. Supp. 694, 699 (S.D.N.Y. 1972) (“[I]t should be recognized . . . that the remedies Congress ordered are not required to be utterly painless.”).

³⁵⁶ See, e.g., *Waters v. Heublein, Inc.*, 547 F.2d 466, 469 (9th Cir. 1976) (agreeing with district court that “Title VII is aimed at lifting economically persons belonging to racial and ethnic minorities by providing equal access to employment opportunities,” but the court also found countervailing statutory purpose of attaining “interracial harmony”); *Chance v. Bd. of Exam’rs and Bd. of Educ.*, 534 F.2d 993, 998 (9th Cir. 1976) (“To require a senior, experienced white member of such a group to stand aside and forego the seniority benefits guaranteed him by the New York Education Law and his union contract, solely because a younger, less experienced member is black or Puerto Rican is constitutionally forbidden reverse discrimination.”); *Waters v. Wis. Steel Works of Int’l Harvester Co.*, 502 F.2d 1309, 1320 (7th Cir. 1974) (expressing caution that challenges to seniority policies could be “tantamount to shackling white employees with a burden of a past discrimination created not by them but by their employer”); *Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Serv. Comm’n*, 482 F.2d 1333, 1341 (2d Cir. 1973) (reversing award of promotion quotas for blacks; “the imposition of quotas will obviously discriminate against those whites who have embarked upon a police career with the expectation of advancement only to be now thwarted because of their color alone,” and quotas “can only exacerbate rather than diminish racial attitudes.”).

³⁵⁷ 42 U.S.C. § 2000e-2(j) (2019).

³⁵⁸ See, e.g., *Rios v. Enterprise Association Ass’n Steamfitters Local 638 of U. A.*, 501 F.2d 622, 630 (2d Cir. 1974) (explaining that § 703(j) “was intended to bar preferential quota hiring as a means of changing a racial imbalance attributable to causes other than [sic] unlawful discriminatory conduct”); *Associated Gen. Contractors of Mass., Inc.*, 490 F.2d at 21 (stating that the provision means “that an employer was not required to grant preferential treatment to

While there were those who protested remedies perceived as unduly aggressive, courts also heard complaints by plaintiffs that remedies were too slow or ineffective. In *United States v. Local Union No. 3, Int'l Union of Operating Eng'rs*, private litigants whose cases were joined with a pattern-or-practice case by the Attorney General disputed entry of a consent decree in the latter case.³⁵⁹ The case involved discrimination in apprenticeship programs, training, and referrals. The numbers were stark: “Of the 35,113 members of Local 3, only .9 per cent are Black,” despite that the local workforce was reportedly seven percent or more black.³⁶⁰ The plaintiffs objected that the decree demanded unreasonably long training periods (some 4000 hours) that could “be used to erect barriers to entry into the Union and to discourage minority group members from staying in training long enough to become journeymen.”³⁶¹ The Court restated the remedial principle that, in crafting a remedy, courts are charged under Title VII to enable “full enjoyment of equal job opportunities by qualified black workers” and that the “only limit on granting effective relief is ‘business necessity.’”³⁶² Then weighing the evidence presented on the training program, it held that “insofar as the current courses (except the one for surveyors) last longer than six months and do not stress on-the-job training, they are not justified by business necessity.”³⁶³

minorities merely because of racial imbalance on his work force, but that some preference might be required to remedy the present effects of past discrimination”); *United States v. Local Union No. 212, Int'l Bhd. of Elec. Workers*, 472 F.2d 634, 636 (6th Cir. 1973) (“It . . . appears from the legislative history of certain proposed amendments to 42 U.S.C. § 2000e-2(j) that it is not the intent of Congress to forbid remedies of the kind used in this case.”); *United States v. St. Louis-S.F. Ry. Co.*, 464 F.2d 301, 313 (8th Cir. 1972) (Stephenson, J., dissenting) (finding that “the anti-preference section (§ 2000e-2(j))” does not “operate to prevent courts from eliminating present discriminatory effects of past discrimination which is preserved through the use of neutral employment policies”); *United States v. Int'l of Elec. Workers, Local 212*, No. 6473, 1972 WL 237, at *9 (S.D. Ohio Apr. 3, 1972) (“[O]nce a union engages in discriminatory practices after the effective date of the Act, it subjects itself, not solely by reason of the imbalance but by reason of the imbalance plus subsequent discrimination, to a quota or percentage decree—this to carry out the overall purposes of the Act to bring about equal opportunity.”). *But see* *United States v. Chesterfield Cty. Sch. Dist.*, No. 69-46, 1972 WL 279, at *16 (D.S.C. Nov. 9, 1972) (showing that “[t]he Act does not command that any person be hired merely because he was formerly subject to discrimination or because he is a member of a minority group” and citing § 703(j)).

³⁵⁹ *United States v. Local Union No. 3, Int'l Union of Operating Eng'rs*, No. C-71-1277, 1972 WL 194 (N.D. Cal. July 18, 1972).

³⁶⁰ *Id.* at *1.

³⁶¹ *Id.* at *3.

³⁶² *Id.* at *8 (quoting *United States v. Ironworkers Local 86*, 443 F.2d 544, 553 (9th Cir. 1971), *cert. denied*, 404 U.S. 984 (1971)).

³⁶³ *Id.* at *11. *See also* *Stewart v. Gen. Motors Corp.*, 542 F.2d 445, 450 (7th Cir. 1976) (vacating provision of decree providing that vacancies will “[b]e filled by the employee with the highest seniority on the shift on which the vacancy occurs,” because “two-thirds of the black hourly employees work on the night shift” and thus “a rule that seniority can only be used to obtain

E. Coda: Signs of Resistance in the Courts as Title VII Litigation Matures

In our common law system, things seldom happen in one swoop. While this Article is about to show how the Supreme Court transformed Title VII law, it is fair to say that even before those major developments there were signs of disquiet in the lower courts. Several factors might have been at play: that the earliest cases of stark segregation presented easier cases, that the new generation of cases were increasingly individualized disputes seen as unmoored from historical racial discrimination, and that the Nixon Administration was appointing more conservative federal judges.³⁶⁴ In any event, by 1975 one can detect an uptick of reported Title VII cases decided against

a promotion within the same shift on which it was accrued will have the effect of locking a majority of the black employees who have suffered discrimination into an inferior status.”); *Stevenson v. Int’l Paper Co.*, Mobile, Ala., 516 F.2d 103, 112–13 (5th Cir. 1975) (remanding the case to consider plaintiffs’ argument that red-circling remedy was inadequate because “(1) it was limited to employees with a permanent rate of \$3.00 per hour or less, even though some [class members] were making more than that, and (2) it was available only if an application to transfer was filed within six months of . . . [m]emorandum’s effective date.”); *United States v. Hayes Int’l Corp.*, 456 F.2d 112, 118 (5th Cir. 1972) (describing defendant “attempts to justify [seniority] rights because it is necessary in times of rapid employee expansion to have experienced men rather than newcomers in the higher classified positions,” but “[w]hile this may be considered a nonracial business purpose, we do not find it to be sufficiently overriding and compelling to outweigh the discriminatory effect it might have upon the negro transferee.”).

³⁶⁴ ROBERT A. CARP & C.K. ROWLAND, *POLICYMAKING AND POLITICS IN THE FEDERAL DISTRICT COURTS*, 34–36, 51–83, 150–52 (1983) (comparing Nixon appointees to those of predecessors).

plaintiffs.³⁶⁵ Even the supportive Fifth Circuit showed it was reaching its limits.³⁶⁶

VI. THE SUPREME COURT RECHANNELS TITLE VII INTO AN INTENTIONAL TORT STATUTE: *TEAMSTERS V. UNITED STATES*

As late as 1975, the Court explicitly cited the removal of barriers to employment for black workers as a principal goal of Title VII,³⁶⁷ and affirmed without contradiction that “Title VII is not concerned with the employer’s ‘good intent or absence of discriminatory intent’ for ‘Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.’”³⁶⁸ Every U.S. Court of Appeals had held that proof of intent to discriminate was not required under Title VII, and that policies such as seniority that perpetuated pre-Act discrimination were prohibited.³⁶⁹

So, what happened to torpedo the consensus? The Supreme Court dropped a hint to where it was going in *General Electric Co. v. Gilbert*—the

³⁶⁵ See, e.g., *King v. Yellow Freight Sys., Inc.*, 523 F.2d 879, 882 (8th Cir. 1975) (affirming judgment for employer; despite arguable statistical evidence of past discrimination, discharge of plaintiff was “proper, and based upon the reasonable inference that [he] was a habitually negligent driver”); *Shack v. Southworth*, 521 F.2d 51, 54–55 (6th Cir. 1975) (finding that, although the plaintiff was the only black candidate of over 70, he made the finalist list and was eventually hired and the court found no statistical evidence of a history of discrimination); *Doe v. AFL-CIO, Department of Organization, Region 6*, 405 F. Supp. 389, 393–94 (N.D. Ga. 1975) (finding union organizer terminated for disloyalty because he “expressed to prospective members on numerous occasions during organizing drives that he had a negative feeling about trade unionism for black employees” and “candidly and unequivocally stated on at least two occasions that his loyalty to his employer was limited”); *Labat v. Bd. Of Higher Educ. Of N.Y.C.*, 401 F. Supp. 753, 755–57 (S.D.N.Y. 1975) (granting judgment to university in tenure dispute, where school contended that “[p]laintiff’s limited writing and publication record over the years of his academic life was a significant factor in the denial of tenure”; “weight to be given scholarly writings and their publication in a tenure decision involves judgmental evaluation by those who live in the academic world and who are charged with responsibility of decision”); *McRae v. Goddard Coll.*, No. 74-120, 1975 WL 140, at *8 (D. Vt. Jan. 29, 1975) (dismissing Title VII discrimination and retaliation claims; “[t]he primary cause of the administration’s decision not to renew or continue McRae’s contract was his participation in the illegal and disruptive occupations of the President’s office and his subsequent refusal to discuss standards of conduct appropriate to employees of the College.”).

³⁶⁶ See, e.g., *Humphrey v. Sw. Portland Cement Co.*, 488 F.2d 691, 694–95 (5th Cir. 1974) (reversing judgment for plaintiff and entering judgment for employer, where central evidence of discrimination was that the bid sheet was marked up in two different kinds of ink; speculation that it was altered not enough to support inference of discrimination).

³⁶⁷ *Albemarle Paper*, 422 U.S. at 417 (quoting *Griggs*, 401 U.S. at 429–30) (noting that Title VII was meant “to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.”).

³⁶⁸ *Id.* at 422 (quoting *Griggs*, 401 U.S. at 432).

³⁶⁹ See cases cited *supra* note 71 and 94.

notorious case holding that discrimination because of pregnancy was not sex discrimination.³⁷⁰ The outrage over this case was so strong that it prompted Congress to enact the Pregnancy Discrimination Act of 1978 to overturn the result.³⁷¹ In its reasoning, the Court in *Gilbert* invoked a recent holding in *Geduldig v. Aiello*,³⁷² which upheld a state disability program that excluded pregnancy against an Equal Protection challenge. The Court stated:

While there is no necessary inference that Congress, in choosing this [“because of such individual’s . . . sex”] language, intended to incorporate into Title VII the concepts of discrimination which have evolved from court decisions construing the Equal Protection Clause of the Fourteenth Amendment, the similarities between the congressional language and some of those decisions surely indicate that the latter are a useful starting point in interpreting the former. Particularly in the case of defining the term “discrimination,” which Congress has nowhere in Title VII defined, those cases afford an existing body of law analyzing and discussing that term in a legal context not wholly dissimilar to the concerns which Congress manifested in enacting Title VII.³⁷³

What went unremarked in Justice Rehnquist’s opinion for the Court was that the Supreme Court—up to that point—had held only that sex-based discrimination was to be scrutinized under the deferential Equal Protection rational-basis test.³⁷⁴ Instead of necessity, the test under Equal Protection was whether a sex-based classification bore a rational relationship to a legitimate governmental objective.³⁷⁵ Title VII, by contrast, facially applies the same elevated level of scrutiny to both race and sex discrimination, aside from a

³⁷⁰ Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 128 (1976).

³⁷¹ Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076. The committee report disaffirmed the Supreme Court’s holdings in both *Gilbert*, 429 U.S. at 125, and *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977). H.R. Rep. No. 95-948, at 2 (1978).

³⁷² *Geduldig v. Aiello*, 417 U.S. 484, 485 (1974).

³⁷³ *Gilbert*, 429 U.S. at 133. For what it’s worth, Justices Stewart and Blackmun both noted that *Gilbert* did not call *Griggs* into question for purposes of Title VII. *See id.* at 146 (Stewart, J., concurring); *id.* (Blackmun, J., concurring).

³⁷⁴ *Reed v. Reed*, 404 U.S. 71, 76 (1971) (“The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation of [state law].”). An intervening decision which suggested that a higher level of scrutiny was needed for sex-based classifications under Equal Protection, *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973), won only a four-justice plurality of support.

³⁷⁵ *Reed*, 404 U.S. at 76.

“bona fide occupational qualification” defense that does not apply to race.³⁷⁶ The equation of Title VII with Equal Protection was dubious.

Even more brazenly, in judicial dictum, the majority casually rewrote the holding of *McDonnell Douglas*. Observing that the “instant suit was grounded on Title VII rather than the Equal Protection Clause,”³⁷⁷ the Court tipped its hat to *Griggs*, only to note that *Griggs* had been decided under section 703(a)(2) of Title VII, the section making it unlawful “to limit, segregate, or classify . . . 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.”³⁷⁸ This language was contrasted with section 703(a)(1), the principal liability section, which prohibits discrimination “against any individual with respect to his compensation, terms, conditions, or privileges of employment” based on a protected classification.³⁷⁹ Then came the Court’s aside: “Even assuming that it is not necessary in this case to prove intent to establish a prima facie violation of § 703(a)(1), . . . the respondents have not made the requisite showing of gender-based effect.”³⁸⁰ The Court had never before proposed that intent was required to prove *any* kind of violation under Title VII, including the *Green* case.³⁸¹

Then over two terms, majorities in back-to-back, groundbreaking constitutional decisions held that the Equal Protection clause protects citizens only against *intentionally* biased decisions, and that policies that only had an adverse impact on race (or other protected classifications) are not actionable

³⁷⁶ *Mfrs. Hanover Tr. Co. v. United States*, 775 F.2d 459, 468 (2d Cir. 1985) (“Title VII gives sex discrimination the same level of scrutiny it gives to race discrimination; the statutory language forbidding sex discrimination and race discrimination is the same, except for a few differences in defenses and a separate section on pregnancy.”). *But see* 42 U.S.C. § 2000e-2(e) (2012) (noting that bona fide occupational qualification exclusion applies only to religion, sex, or national origin).

³⁷⁷ *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 136 (1976), *superseded by statute*, 42 U.S.C. § 2000e-2(k) (2018).

³⁷⁸ *Id.* at 137 n.13 (quoting 42 U.S.C. § 2000e-2(a)(2) (2012)).

³⁷⁹ *Id.* at 136 (quoting 42 U.S.C. § 2000e-2(a)(1) (2012)).

³⁸⁰ *Id.* at 137 (internal citations omitted).

³⁸¹ The only mentions of intent in the pinpointed pages in *Green* were unelaborated, direct quotations from the district court and the dissenting opinion in the Court of Appeals decision was offered neutrally by the Court without comment. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 803, 805 n.18 (1973). This scarcely supports the idea that *Green* held (or even suggested) that intent was critical to proving liability under Title VII. That the Court insinuated a state-of-mind requirement into a law where it was not otherwise found in the text or history of the act was, of course, not unprecedented. *See* Thomas G.S. Christensen & Andrea H. Swanoe, *Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality*, 77 YALE L. J. 1269, 1292 (1968) (describing how the Court added intent to the Wagner Act prohibition against unfair labor practices).

at all. The first of these cases was *Washington v. Davis*.³⁸² This case, like *Griggs*, challenged a pen-and-paper test, which is a test used for applicants to the D.C. Metropolitan Police Department training program.³⁸³ Plaintiffs challenged the test on section 1981 and Equal Protection grounds.³⁸⁴ The plaintiffs eschewed any “intentional discrimination or purposeful discriminatory” basis, and relied on evidence that a “higher percentage of blacks fail the Test than whites” and the test had not been validated.³⁸⁵ The D.C. Circuit declared the “lack of discriminatory intent in designing and administering Test 21 . . . irrelevant” and, applying the principles of *Griggs*, held that disproportionate impact and lack of validation was enough to establish a constitutional violation.³⁸⁶

Davis reversed the D.C. Circuit, 7–2, and, for the first time, held that “a showing of discriminatory motivation is required to trigger strict scrutiny on a constitutional claim.”³⁸⁷ Justice White’s majority opinion³⁸⁸ admitted that the Court was deciding an issue not presented by the parties: whether “the racially differential impact of the challenged hiring or promotion practices” by itself may constitute an Equal Protection violation.³⁸⁹ It canvassed nearly a century’s worth of cases from *Strauder v. West Virginia*³⁹⁰ to *Keyes v. School*

³⁸² *Washington v. Davis*, 426 U.S. 229 (1976).

³⁸³ *Id.* at 234–35. The Department required “a grade of at least 40 out of 80 on ‘Test 21,’ which is ‘an examination that is used generally throughout the federal service,’ which ‘was developed by the Civil Service Commission, not the Police Department,’ and which was ‘designed to test verbal ability, vocabulary, reading and comprehension.’” *Id.*

³⁸⁴ *Id.* at 233.

³⁸⁵ *Id.* at 235. A “far greater proportion of blacks—four times as many—failed the test than did whites.” *Id.* at 237.

³⁸⁶ *Id.* at 237.

³⁸⁷ *Constitutional Significance of Racially Disproportionate Impact*, 90 HARV. L. REV. 114, 119 (1976).

³⁸⁸ *Davis*, 426 U.S. at 252. Seven justices concurred in the opinion in relevant part, while only Justices Brennan and Marshall dissented. Justice Stewart joined the opinion, except for the final part denying the plaintiffs a remand, in a one-line notation. Justice Stevens “accept[ed] the statement of the general rule in the Court’s opinion” that disproportionate impact alone did not violate Equal Protection, but also noted that there might be cases where the impact is severe enough to imply an intentional purpose. *Id.* at 254–55 (Stevens, J., concurring). Here, he would have ruled that the test was presumptively valid, in part because it was “widely used by the Federal Government.” *Id.* at 255. Even the dissenters refrained from “address[ing] the constitutional questions considered by the Court,” but instead urged a remand or affirmance on a statutory ground (the D.C. municipal code, which adopted by reference the Administrative Procedure Act, 5 U.S.C. § 3304). *Id.* at 257 n.1, 256–70 (Brennan, J., dissenting).

³⁸⁹ *Id.* at 238–39, 238 n.8 (citing SUP. CT. R. 40(1)(d)(2)) (clarifying that the Court “may notice a plain error not presented”).

³⁹⁰ *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879), *abrogated by Taylor v. Louisiana*, 419 U.S. 522 (1975) (noting that exclusion of blacks from juries violates Equal Protection).

*Dist. No. 1*³⁹¹ and held that an Equal Protection challenge to a facially neutral policy demands evidentiary proof of an invidious purpose. “[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.”³⁹² The Court reasoned not only that the injured parties in such a scenario (*i.e.*, those failing the test) were of all races, but that the practical effect of opening up a disparate-impact Equal Protection theory would be monumental: it would “raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.”³⁹³

The Court distinguished and carved out *Griggs*, at least in the Title VII arena.³⁹⁴ The Court stated, nevertheless, that “[w]e have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today.”³⁹⁵ *Griggs* “involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed.”³⁹⁶ Observers at the time likewise noted that the *Davis* decision wrenched a gap between Equal Protection employment-law jurisprudence and the liability standards of Title VII.³⁹⁷

³⁹¹ *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 214 (1973) (ordering that an entire school district in Denver, Colorado be desegregated).

³⁹² *Davis*, 426 U.S. at 242 (“Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination.”).

³⁹³ *Id.* at 248.

³⁹⁴ *See id.* at 246–48.

³⁹⁵ *Id.* at 239.

³⁹⁶ *Id.* at 247.

³⁹⁷ *See, e.g., Constitutional Significance of Racially Disproportionate Impact*, *supra* note 387, at 114 (noting that *Davis* “drew a sharp contrast between the constitutional standard and that of Title VII of the Civil Rights Act of 1964”); Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 573 n.148 (1977) (noting the incongruity of “how fourteenth amendment enforcement legislation (Title VII public employment provisions) can rest on a nonmotivational theory of racial discrimination when the very clause being enforced, as the Court in *Washington* construed it, excludes such a theory”); Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 4 (1976) (footnotes omitted) (“[I]n *Washington v. Davis*, which may be last Term’s most significant civil rights decision, the Court refused to incorporate into the Constitution the far-reaching rule of *Griggs v. Duke Power Co.*”).

The next term, the Court decided *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,³⁹⁸ which applied the lesson of *Davis* to a much starker set of facts. Arlington Heights, Illinois, is situated in Chicago's northwest suburbs, and like Chicago suburbs generally at the time, it had an infinitesimal black residential population. "According to the 1970 census, only 27 of the Village's 64,000 residents were black."³⁹⁹ Against a notorious history of housing segregation in the Chicago area, a religious order located in the village sought to develop its own property to create a moderate-income, racially-integrated community.⁴⁰⁰ To accomplish this, though, it had to have its property rezoned from R-3 (single-family housing) to R-5 (for multifamily units).⁴⁰¹ The developer (MHDC) petitioned for rezoning.⁴⁰² In writing about a series of public meetings, the court noted that the racially-integrated plan for the development was one of the topics that "drew large crowds" to these public meetings.⁴⁰³ But "many" of the opponents, rather than discuss the "social issue" of integration, stressed the potential loss of "property value for neighboring sites."⁴⁰⁴ The Village rejected the plan, and was sued for constitutional and Fair Housing Act (FHA) violations.⁴⁰⁵ The district court found no liability, but the Seventh Circuit (2-1) reversed the decision in part.⁴⁰⁶

The Supreme Court (with Justice Stevens, recently part of the Seventh Circuit bench, recused) held 5-3 that the village's denial of rezoning did not violate Equal Protection.⁴⁰⁷ After addressing a standing challenge,⁴⁰⁸ the Court restated the *Davis* holding that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection

³⁹⁸ *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977).

³⁹⁹ *Id.* at 255. ("Northwest Cook County was enjoying rapid growth in employment opportunities and population, but it continued to exhibit a high degree of residential segregation.") (citing the Seventh Circuit's decision below). *Id.* at 260.

⁴⁰⁰ *Id.* at 256-58.

⁴⁰¹ *Id.* at 257.

⁴⁰² *Id.*

⁴⁰³ *Id.* at 257-58.

⁴⁰⁴ *Arlington Heights*, 429 U.S. at 259. The Village also cited the perceived need for "a buffer between single-family development and land uses thought incompatible, such as commercial or manufacturing districts." *Id.*

⁴⁰⁵ *Id.* at 258-59.

⁴⁰⁶ *Id.* at 259-60.

⁴⁰⁷ *Id.* at 270-71.

⁴⁰⁸ *Id.* at 260-63.

Clause.”⁴⁰⁹ Justice Powell writing for the majority, nevertheless, offered some important provisos. First, because of the difficulty of ascertaining legislative motive, it was enough for a challenger to prove that the discriminatory reason was a *motivating*, rather than *sole*, factor in the decision.⁴¹⁰ Second, evidence of racial impact “may provide an important starting point,” and in “rare” cases may establish a “clear pattern, unexplainable on grounds other than race . . . even when the governing legislation appears neutral on its face.”⁴¹¹ Third, the “historical background of the decision” or “specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker’s purposes.”⁴¹² Applying these guidelines, the Court observed that the zoning was of long-standing, that the policies underlying the challenged decision had been applied to other requests for rezoning, that the proper procedures had been followed (in fact, the developer received three meetings instead of one to make its case), and finally, the record was devoid of invidious motive.⁴¹³ The case was remanded for consideration of the FHA claim.⁴¹⁴

Finally, we arrive at *Teamsters*, a complex decision that codified—seemingly for all-time—the core framework of Title VII liability. The case marks the first appearance in a Supreme Court decision of the term “disparate

⁴⁰⁹ *Id.* at 265. None of the three dissenters disputed the *Davis* rule that adverse impact on a racial group alone does not violate Equal Protection. Justices Brennan and Marshall again dissented, as they did in *Davis*; though they concurred in the constitutional analysis, they would have remanded the case “both to reassess the significance of the evidence developed below in light of the standards we have set forth and to determine whether the interests of justice require further District Court proceedings directed toward those standards.” *Id.* at 271–72 (Marshall, J., concurring in part and dissenting in part). Justice White—the author of the majority *Davis* opinion—dissented on the ground that the case should have been remanded, and also to signal disapproval of the majority’s discussion of *Davis*: “it is wholly unnecessary for the Court to embark on a lengthy discussion of the standard for proving the racially discriminatory purpose required by *Davis* for a Fourteenth Amendment violation.” *Id.* at 273 (White, J., dissenting).

⁴¹⁰ *Arlington Heights*, 429 U.S. at 265. Upon such proof, the burden would shift back to the defendant so “that the same decision would have resulted even had the impermissible purpose not been considered.” *Id.* at 270 n.21 (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), which is another First Amendment case decided during the same term).

⁴¹¹ *Arlington Heights*, 429 U.S. at 266 (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Guinn v. United States*, 238 U.S. 347 (1915); *Lane v. Wilson*, 307 U.S. 268 (1939); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)).

⁴¹² *Arlington Heights*, 429 U.S. at 267 (footnote omitted) (“For example, if the property involved here always had been zoned R-5 but suddenly was changed to R-3 when the town learned of MHDC’s plans to erect integrated housing, we would have a far different case.”).

⁴¹³ *Id.* at 269–71.

⁴¹⁴ *Id.* at 271. See also *Memphis v. Greene*, 451 U.S. 100, 119 (1981) (citing *Arlington Heights*, 429 U.S. 252 (1977)) (ruling in favor of the city and finding that the closure of roads between all-white neighborhoods and predominantly black ones was not intentional discrimination).

impact” to represent a theory distinct from intentional discrimination.⁴¹⁵ *Teamsters* cemented in a general requirement of intent for Title VII and rejected the “perpetuating past discrimination” liability theory that had widely been the law throughout the lower federal courts.⁴¹⁶

The case was a pattern-or-practice case filed against the union and an employer (T.I.M.E.-D.C., Inc.) by the Attorney General, charging widespread discrimination against blacks and Latinx workers at the company’s terminal in Nashville, Tennessee. “The central claim in both lawsuits was that the company had engaged in a pattern or practice of discriminating against minorities in hiring so-called line drivers,” those engaged in long-distance hauling.⁴¹⁷ Non-whites were shunted into less-remunerative local delivery driving, which allegedly yielded poorer opportunities for promotions and transfers.⁴¹⁸ The lawsuit joined the union as defendant to challenge the seniority provisions of the collective-bargaining agreement.⁴¹⁹ The Attorney General won at trial, and the court ordered that protected-group workers receive “preference over all other applicants with respect to consideration for future vacancies in line-driver jobs,” including even those hired before the effective date of Title VII, plus retroactive seniority for some classes of workers.⁴²⁰ The Fifth Circuit affirmed on liability, while ordering additional relief such as granting class members priority over laid-off line drivers to fill vacancies.⁴²¹

The Supreme Court granted certiorari “to consider . . . significant questions presented under the Civil Rights Act of 1964,”⁴²² and vacated and

⁴¹⁵ *Teamsters*, 431 U.S. at 335 n.15.

⁴¹⁶ *Id.* at 381 nn. 2 & 3 (Marshall, J., concurring in part and dissenting in part).

⁴¹⁷ *Id.* at 329.

⁴¹⁸ *Id.* at 337 (“As of March 31, 1971, shortly after the Government filed its complaint alleging systemwide discrimination, the company had 6,472 employees. Of these, 314 (5%) were Negroes and 257 (4%) were Spanish-surnamed Americans. Of the 1828 line drivers, however, there were only 8 (0.4%) Negroes and 5 (0.3%) Spanish-surnamed persons, and all of the Negroes had been hired after the litigation had commenced.”); *id.* at 338 (“The Government bolstered its statistical evidence with the testimony of individuals who recounted over 40 specific instances of discrimination.”).

⁴¹⁹ *Id.* at 329.

⁴²⁰ *Id.* at 331. See *United States v. T.I.M.E.-DC, Inc.*, 1972 WL 280, at *5–6 (N.D. Tex. Dec. 6, 1973), *remanded by* *United States v. T.I.M.E.-DC, Inc.*, 517 F.2d 299 (5th Cir. 1975).

⁴²¹ *Teamsters*, 431 U.S. at 333–34. See generally *United States v. T.I.M.E.-D.C. Inc.*, 517 F.2d 299, 317–24 (5th Cir. 1975).

⁴²² *Teamsters*, 431 U.S. at 334.

remanded.⁴²³ Justice Stewart wrote for the Court, with Justices Brennan and Marshall dissenting in part.⁴²⁴

First, without dissent, the Court held that Title VII ordinarily requires proof of intent to discriminate. This monumental holding was tucked away in footnote fifteen of the opinion:

“Disparate treatment” such as is alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. *Proof of discriminatory motive is critical*, although it can in some situations be inferred from the mere fact of differences in treatment. *See, e.g., Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265–266 Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII. *See, e.g.,* 110 Cong. Rec. 13088 (1964) (remarks of Sen. Humphrey) (“What the bill does . . . is simply to make it an illegal practice to use race as a factor in denying employment. It provides that men and women shall be employed on the basis of their qualifications, not as Catholic citizens, not as Protestant citizens, not as Jewish citizens, not as colored citizens, but as citizens of the United States”).⁴²⁵

The footnote also broke off a piece of Title VII that it termed “disparate impact”:

Claims of disparate treatment may be distinguished from claims that stress “disparate impact.” The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. *See infra*, at 1861. Proof of discriminatory motive, we have held, is not required under a disparate-impact theory. *Compare, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424, 430–432 . . . , *with McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–806 . . . *See generally* B. Schlei & P. Grossman,

⁴²³ *Id.* at 376–77.

⁴²⁴ *Id.* at 377–94 (Marshall, J., concurring in part and dissenting in part) (showing that the Justices dissented from section II.B of the decision, which held that the seniority system was exempt under Title VII § 703(h), 42 U.S.C. § 2000e-2(h) (2012)).

⁴²⁵ *Id.* at 335 n.15 (emphasis added). As a side-note, the EEOC had previously used the term “disparate treatment” in the Uniform Guidelines, but it had an entirely different meaning, in distinction to validation: “Disparate treatment occurs where members of a race, sex, or ethnic group have been denied the same employment, promotion, membership, or other employment opportunities as have been available to other employees or applicants.” 29 C.F.R. § 1607.11 (2018).

Employment Discrimination Law 1–12 (1976); Blumrosen, Strangers in Paradise: *Griggs v. Duke Power Co.* and the Concept of Employment Discrimination, 71 Mich. L. Rev. 59 (1972). Either theory may, of course, be applied to a particular set of facts.⁴²⁶ One who has followed the present article up to this point would be able to issue-spot the problems with this footnote. Point A, the *only* authority cited for the proposition that “[p]roof of discriminatory motive is critical” isn’t even a Title VII case; it’s an Equal Protection decision—*Arlington Heights*—despite the fact that *Washington v. Davis* held that Title VII and Equal Protection impose separate standards of liability.⁴²⁷ Conversely, there is no mention of the recent Supreme Court Title VII case reaffirming that proof of intent was not required.⁴²⁸ Point B, the Court notes only a single source of legislative history as evidence that disparate treatment was “the most obvious evil Congress had in mind” in enacting Title VII, when sponsor Senator Humphrey’s quote is (if anything) equivocal and is easily overmatched by the many places in the record identifying black poverty and unemployment as the key evil.⁴²⁹ Point C, the unmotivated placement of quotation marks around “disparate impact” and “disparate treatment,” to imply that these categories already existed in Title VII law, was something of a sham. Point D, the citation of *Green*, which was borrowed verbatim from the “*but cf.*” citation in *Gilbert*,⁴³⁰ is patently in error. In summation: this pronouncement, after the many cases holding that there was no need to prove intent under Title VII, was a radical and unfounded leap.

Second, over the dissent of Justices Brennan and Marshall, the Court held that the Title VII section 703(h)⁴³¹ exemption for bona fide seniority policies immunizes “an otherwise neutral, legitimate seniority system” from review, and such a policy “does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination.”⁴³² Here, the Court was

⁴²⁶ *Teamsters*, 431 U.S. at 335 n.15. See also *Nashville Gas Co. v. Satty*, 434 U.S. 136, 144 (1977) (“We again need not decide whether, when confronted by a facially neutral plan, it is necessary to prove intent to establish a prima facie violation of § 703(a)(1).”).

⁴²⁷ *Davis*, 426 U.S. at 239 (1976) (“[W]e have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today.”).

⁴²⁸ *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 422–23 (1975) (“Title VII is not concerned with the employer’s ‘good intent or absence of discriminatory intent’ for ‘Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.’”).

⁴²⁹ 110 CONG. REC. 6547. See generally note 379 (discussing the history).

⁴³⁰ *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 137 (1976).

⁴³¹ 42 U.S.C. § 2000e-2(h) (2012).

⁴³² *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 353–54 (1977). Subsequently, the Supreme Court held that the protections provided by § 703(h) govern the adoption as well as

constrained to distinguish its recent decision in *Franks v. Bowman Transportation*,⁴³³ which held that section 703(h) was not an obstacle to awarding retroactive seniority to those who suffered post-Act failure to hire (and, indeed, the Court affirmed such relief in *Teamsters* for victims of post-Act discrimination).⁴³⁴

The Court recognized that its interpretation went against the “wholesale” view of the lower courts.⁴³⁵ It also acknowledged that seniority systems impeded Title VII progress:

The heart of the system is its allocation of the choicest jobs, the greatest protection against layoffs, and other advantages to those employees who have been line drivers for the longest time. Where, because of the employer's prior intentional discrimination, the line drivers with the longest tenure are without exception white, the advantages of the seniority system flow disproportionately to them and away from Negro and Spanish-surnamed employees who might by now have enjoyed those advantages had not the employer discriminated before the passage of the Act. This disproportionate distribution of advantages does in a very real sense “operate to ‘freeze’ the status quo of prior discriminatory employment practices.”⁴³⁶

the administration of seniority systems and are applicable to bona fide seniority systems created after, as well as before, the passage of Title VII. *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68–71 (1982). *See also* *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 62, 82 (1977) (“[A]bsent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences.”); *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 560 (1977) (holding that under § 703(h), “a challenge to a neutral [seniority] system may not be predicated on the mere fact that a past event which has no present legal significance has affected the calculation of seniority credit, even if the past event might at one time have justified a valid claim against the employer.”).

⁴³³ *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 762 (1976).

⁴³⁴ *Teamsters*, 431 U.S. at 347–48.

⁴³⁵ *Id.* at 346 n.28 (citations omitted).

[T]he view that [§] 703(h) does not immunize seniority systems that perpetuate the effects of prior discrimination has much support. It was apparently first adopted in *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. Jan. 4, 1968). The court there held that ‘a departmental seniority system that has its genesis in racial discrimination is not a bona fide seniority system.’ The Quarles view has since enjoyed wholesale adoption in the Courts of Appeals.

See also *Myers v. Gilman Paper Corp.*, 556 F.2d 758, 760 (5th Cir. 1977) (per curiam) (noting change of law in *Teamsters*, which “severely called into question [the] rationale and holdings” of prior “well-established Fifth Circuit precedents”).

⁴³⁶ *Teamsters*, 431 U.S. at 349–50 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971)).

Nevertheless, based on its examination of the language and legislative history, the Court held that “the unmistakable purpose of [§] 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII.”⁴³⁷ It rejected the government’s argument that the “bona fide” language meant that a seniority system could not perpetuate pre-Act segregation and discrimination into the post-Act era.⁴³⁸ It simply meant that the policy existed in fact and that it did not specifically target protected-class workers.⁴³⁹

Third, the Court shifted the remedial focus of Title VII to the identification of “actual” victims of discrimination.⁴⁴⁰ The Court in *Franks* had previously considered whether “identifiable applicants who were denied employment because of race after the effective date and in violation of Title VII . . . may be awarded seniority status retroactive to the dates of their employment applications.”⁴⁴¹ It held that such relief was available, notwithstanding the strictures of section 703(h).⁴⁴² *Teamsters*, on the other hand, directly confronted what class members were required to prove before a court could order relief on their behalf. The Court rejected a presumption based on a pattern-or-practice finding alone that all members of the class were victims.⁴⁴³ Such a finding “does not show which of the nonapplicants actually

⁴³⁷ *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 352 (1977). Given the paucity of debate on this provision—it was part of the Mansfield-Dirksen substitute—the Court had little historical evidence to cite. *See, e.g., Franks*, 424 U.S. at 761 (noting the “unusual legislative history and the absence of the usual legislative materials” to interpret § 703(h)). It is startling, then, how harshly the majority treats the government’s argument, which until *Teamsters* represented the consensus of lower federal court decisions. It was “apparent” that § 703(h) was meant to protect seniority rights in the broadest sense and it was “inconceivable” that it was “intended to vitiate” the sponsors’ promises to protect seniority, since its “unmistakable purpose” was to protect ordinary seniority rules. *Teamsters*, 431 U.S. at 352.

⁴³⁸ *Teamsters*, 431 U.S. at 353 (accepting the government’s interpretation of the “bona fide” language “would be a perversion of the congressional purpose” and an “invitation to disembowel [§] 703(h)”).

⁴³⁹ *Id.* at 356.

It is conceded that the seniority system did not have its genesis in racial discrimination, and that it was negotiated and has been maintained free from any illegal purpose. In these circumstances, the single fact that the system extends no retroactive seniority to pre-Act discriminatees does not make it unlawful.

⁴⁴⁰ *Id.* at 357.

⁴⁴¹ *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 750 (1976).

⁴⁴² *Id.* at 757–62.

⁴⁴³ *Teamsters*, 431 U.S. at 368–69.

wanted such jobs, or which possessed the requisite qualifications.”⁴⁴⁴ The Court also rejected any inference that “a nonapplicant’s current willingness to transfer into a line-driver position confirms his past desire for the job,” on the ground that there were disadvantages to such transfers, such as dropping to the bottom of the seniority list, and thus one could not assume that all line-drivers would necessarily have wanted it.⁴⁴⁵ The Court did hold, on the other hand, that employees were not barred from relief simply because they never formally applied for transfers.⁴⁴⁶ “The effects of and the injuries suffered from discriminatory employment practices are not always confined to those who were expressly denied a requested employment opportunity.”⁴⁴⁷

Underscoring the necessity of proving an individualized injury, the Court held that the interests of “innocent” persons outside the protected group must be weighed in the remedial phase. “[A]fter the victims have been identified and their rightful place determined, the District Court will again be faced with the delicate task of adjusting the remedial interests of discriminatees and the legitimate expectations of other employees innocent of any wrongdoing.”⁴⁴⁸ The Court offered no specific prescription for individual relief on remand, noting that “it is not possible to evaluate abstract claims concerning the equitable balance that should be struck between the statutory rights of victims and the contractual rights of nonvictim employees.”⁴⁴⁹

The *Teamsters* decision did grant some benefits to Title VII plaintiffs. For example, the decision reinforced that statistical evidence is a valid method to prove race discrimination.⁴⁵⁰ While affirming the pattern-or-practice finding,

⁴⁴⁴ *Id.* at 369. See also *EEOC v. United Air Lines, Inc.*, 560 F.2d 224, 232 (7th Cir. 1977) (noting that after *Teamsters*, “[i]t is now clear that in order for a nonapplicant to receive the traditional presumption that he would have been hired but for his employer’s discriminatory conduct, he must demonstrate that he was a potential victim of unlawful discrimination.”).

⁴⁴⁵ *Teamsters*, 431 U.S. at 370–71.

⁴⁴⁶ *Id.* at 364–67.

⁴⁴⁷ *Id.* at 365 (“If an employer should announce his policy of discrimination by a sign reading ‘Whites Only’ on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs.”).

⁴⁴⁸ *Id.* at 372.

⁴⁴⁹ *Id.* at 376.

⁴⁵⁰ *Id.* at 339 (quoting *Mayor of Phila. v. Educ. Equal. League*, 415 U.S. 605, 620 (1974) (“In any event, our cases make it unmistakably clear that ‘(s)tatistical analyses have served and will continue to serve an important role’ in cases in which the existence of discrimination is a disputed issue.”). The court also rejected an argument that statistical evidence was a backdoor form of racial balancing barred by § 703(j). *Id.* at 339 & n.20 (noting that “[s]tatistics are equally competent in proving employment discrimination,” held the Court, although “[§] 703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population.”).

the Court credited the government's evidence of low hiring rates of protected-group applicants and even more insignificant number of those individuals serving as line drivers.⁴⁵¹ The numbers were also bolstered by anecdotal evidence: testimony by class members accounting for more than "40 specific instances of discrimination" that "brought the cold numbers convincingly to life."⁴⁵² The Court also rejected the defense argument that all claims of Title VII discrimination, even those threaded through a pattern-or-practice case, must be proven through the *McDonnell Douglas* framework.⁴⁵³ "Our decision in that case . . . did not purport to create an inflexible formulation."⁴⁵⁴ The Court also fleshed out the pattern-or-practice method of proof, adapted from the *Franks* case, which became the standard for private Title VII class actions and federal government lawsuits up to the present day.⁴⁵⁵

While *Teamsters* proved to be useful to plaintiffs in many avenues, especially in pattern-or-practice employment-discrimination class actions, the entirety of the decision altered the course of Title VII in immense and not entirely constructive ways. Nearly all cases henceforth would be fought over whether the defendant *presently meant* to discriminate against blacks or other

⁴⁵¹ *Teamsters*, 431 U.S. at 337–38.

⁴⁵² *Id.* at 338–39.

⁴⁵³ *Id.* at 358.

⁴⁵⁴ *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 (1977). The importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act.

⁴⁵⁵ *Id.* at 360–62. In Phase I of the pattern-or-practice order of proof, the plaintiff presents a *prima facie* case that "unlawful discrimination has been a regular procedure or policy" of a defendant, subject to the defendant's systemic defense that such "proof is either inaccurate or insignificant." *Id.* at 360. In the event "an employer fails to rebut the inference that arises from the Government's *prima facie* case, a trial court may then conclude that a violation has occurred and determine the appropriate remedy." *Id.* at 361. Thereafter, in Phase II, individual relief is awarded. "The Government need only show that an alleged individual discriminatee unsuccessfully applied for a job and therefore was a potential victim of the proved discrimination. As in *Franks*, the burden then rests on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons." *Id.* at 362 (footnote omitted). *Acord Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 354 n.7 (2011). Significant systemic race cases in the years since *Teamsters* have been litigated under a pattern-or-practice theory. *See, e.g.*, *Brown v. Nucor Corp.*, 785 F.3d 895, 898 (4th Cir. 2015) (finding that the denial of promotions followed a pattern of unlawful discrimination); *United States v. City of N.Y.*, 717 F.3d 72, 82 (2d Cir. 2013) (discussing discrimination in hiring); *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 158–60 (2d Cir. 2001) (addressing discrimination in promotions and discipline).

protected groups—essentially creating an intentional tort.⁴⁵⁶ In doing so, *Teamsters* diverted the flow of Title VII away from improving the disadvantaged employment condition of blacks. The material aspects of the *Teamsters* decision have, unfortunately, endured, remaining the law of Title VII today.

VII. EPILOGUE: THE ROAD BACK TO THE AUTHENTIC TITLE VII

Various reasons could have motivated the Court to abandon the Title VII goal of black parity in the workplace. In the most charitable light, the justices in *Teamsters* performed needed surgery on a statute that was on a collision course with political reality: that many white workers, however accepting they might have been of non-discrimination during a rising economy, would resist relief in favor of blacks in a stagnant one. Indeed, one of the key shifts in 1970s and 80s employment law was the rise in challenges by whites to affirmative-action remedies, which became a stock part of the Supreme Court's labor and employment docket in the 1970s and 1980s.⁴⁵⁷ Perhaps some justices were unsympathetic to the mission of Title VII and used *Teamsters* to pare it down.⁴⁵⁸ Whatever the case, the lower courts quickly absorbed the new mantra that proof of intent was essential to prove a

⁴⁵⁶ Jeffrey A. Van Detta, *The Strange Career of Title VII's § 703(m): An Essay on the Unfulfilled Promise of the Civil Rights Act Of 1991*, 89 ST. JOHN'S L. REV. 883, 891–93, 897 (2015) (referring to “tortification” of Title VII). Professor Sandra Sperino of the University of Cincinnati College of Law has written several articles on the relation of tort and Title VII. See generally Sandra F. Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, 2013 U. ILL. L. REV. 1 (2013); Sandra F. Sperino, *Let's Pretend Discrimination Is a Tort*, 75 OHIO ST. L.J. 1107 (2014); Sandra F. Sperino, *The Tort Label*, 66 FLA. L. REV. 1051 (2014).

⁴⁵⁷ See, e.g., *Johnson v. Transp. Agency, Santa Clara Cty.*, 480 U.S. 616 (1986); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). See also James W. Nickel, *Preferential Policies in Hiring and Admissions: A Jurisprudential Approach*, 75 COLUM. L. REV. 534, 536–55 (1975) (laying out common arguments used for and against hiring preferences). See generally Joel L. Selig, *Affirmative Action in Employment: The Legacy of a Supreme Court Majority*, 63 IND. L.J. 301 (1988) (describing the history of challenges to affirmative action).

⁴⁵⁸ The Supreme Court later downgraded the goal of promoting black employment opportunity. See, e.g., *Tex. Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259 (1981) (“[Title VII] does not require the employer to restructure his employment practices to maximize the number of minorities and women hired.”); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577–78 (1978) (“[Title VII] does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees.”).

“disparate treatment” claim under Title VII,⁴⁵⁹ and backed off the rule that perpetuation of past discrimination violates Title VII.⁴⁶⁰

The need to return to the authentic Title VII, one not specifically rooted in proving motive, is no less urgent today than it was in 1964. Where economic opportunity is concerned, the needle has barely moved for black Americans since the passage of the Act, and by some measures (such as in

⁴⁵⁹ See, e.g., *Sweeney v. Bd. of Trs. of Keene State Coll.*, 569 F.2d 169, 174 (1st Cir. 1978) (“proof of discriminatory motive is critical in a disparate treatment case”), *vacated on other grounds*, 439 U.S. 24 (1978); *Meyer v. Mo. State Highway Comm’n*, 567 F.2d 804, 807–08 (8th Cir. 1977) (noting that “[r]ecent decisions of the Supreme Court have greatly clarified the legal tests employed in determining whether or not a hiring practice is discriminatory under the applicable provisions of Title VII,” and for disparate treatment the plaintiff must prove a “discriminatory motive on the part of her employer”); *Chavez v. Tempe Union High Sch. Dist.* No. 213, 565 F.2d 1087, 1091 (9th Cir. 1977) (“[D]iscriminatory motive . . . is a critical factor where, as here, plaintiff alleges disparate treatment on the basis of race.”); *Barnes v. St. Catherine’s Hosp.*, 563 F.2d 324, 328 (7th Cir. 1977) (“[A]ssuming that ‘disparate treatment’ was established by virtue of the personnel files, the law requires proof of a racial motive underlying a discharge decision in order to sustain a claim under 42 U.S.C. § 2000e-2(a).”); *Townsend v. Nassau Cty. Med. Ctr.*, 558 F.2d 117, 119 (2d Cir. 1977) (“[A]ppellee adduced no evidence whatsoever of intentional discrimination, past or present, either by the County or by the Medical Center.”). *But see* *United States v. City of Milwaukee*, 441 F. Supp. 1377, 1382 (E.D. Wis. 1977) (refusing to vacate decree under new Supreme Court decisional law; “[t]he recent Supreme Court cases discussed above do not change the prevailing standard of discrimination under Title VII which was in effect at the time that the consent decree in this action was entered.”).

⁴⁶⁰ See, e.g., *Alexander v. Aero Lodge No. 735, Int’l Ass’n of Machinists*, 565 F.2d 1364, 1379 (6th Cir. 1977) (“[W]e are obliged to hold that in light of *Teamsters*, the district court erroneously concluded that the defendants violated Title VII by utilizing a seniority system, including its job equity feature, that perpetuated pre-Act discrimination.”), *superseded by statute*, FED. R. APP. P. 3(d), *as recognized in* *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 59 (1982); *Younger v. Glamorgan Pipe & Foundry Co.*, 561 F.2d 563, 565 (4th Cir. 1977) (per curiam) (“To the extent that it relied on Glamorgan’s seniority system as perpetuating pre-Act employment discrimination, the district court should give close attention to *Teamsters*.”); *DeGraffenreid v. Gen. Motors Assembly Div.*, St. Louis, 558 F.2d 480, 484 (8th Cir. 1977) (“[A]n otherwise neutral seniority system cannot be attacked merely because it perpetuates the effect of such discrimination.”); *Myers v. Gilman Paper Corp.*, 556 F.2d 758, 760 (5th Cir. 1977) (per curiam) (finding that after *Teamsters*, “[i]t is clear at least that the judgments of the district court and this court cannot stand on the [perpetuation of past discrimination] theory this case has proceeded on to date”). Notoriously, the Supreme Court held in *Ledbetter v. Goodyear Tire & Rubber Co.*—a sex discrimination case—that the Title VII 300-day charge-filing period barred challenges to continuing discriminatory pay when the alleged act of discrimination (the setting of the wage) occurred earlier. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 623–24 (2007). This holding departed from the standard under the Equal Pay Act (rooted in the Fair Labor Standards Act) that each unequal paycheck constitutes a separate violation. The outcry at this injustice was so loud that the decision became a Democratic talking-point during the 2008 presidential election campaign and led to instant passage of the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified as amended at 42 U.S.C. § 2000e (2012) and 29 U.S.C. § 626 (2009)).

household net worth) has even swung backwards.⁴⁶¹ Black unemployment rates persist at double that of whites, the very statistic invoked by supporters of Title VII as a crisis in need of a solution.⁴⁶² Black household median earnings remain tens of thousands of dollars behind whites, showing to be a little more than half of what average white households earn.⁴⁶³ The gap in net worth between black and white families has actually grown, with median white households holding ten or more times the wealth of black households.⁴⁶⁴ The aspiration towards black parity in employment and economic security has never been attained.⁴⁶⁵

⁴⁶¹ Drew Desilver, *Black Incomes Are Up, But Wealth Isn't*, PEW RESEARCH CTR. (Aug. 30, 2013), <https://www.pewresearch.org/fact-tank/2013/08/30/black-incomes-are-up-but-wealth-isnt/> [<https://perma.cc/B6PZ-457G>] (“after adjusting for inflation, the median net worth for black households in 2011 (\$6,446) was lower than it was in 1984 (\$7,150), while white households’ net worth was almost 11% higher.”).

⁴⁶² See Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey*, U.S. DEPT OF LABOR (Oct. 4, 2019), https://www.bls.gov/web/empsit/cpsee_e16.htm [<https://perma.cc/KZZ2-RHGC>]; Janelle Jones, *Black Unemployment is at Least Twice as High as White Unemployment at the National Level and in 12 States and D.C.*, ECON. POL’Y INST. (Oct. 30, 2018), https://www.epi.org/publication/2018q3_unemployment_state_race_ethnicity/ [<https://perma.cc/85RM-HDNG>]. See also Drew Desilver, *Black Unemployment Rate Is Consistently Twice That of Whites*, PEW RESEARCH CENTER (Aug. 21, 2013), <https://www.pewresearch.org/fact-tank/2013/08/21/through-good-times-and-bad-black-unemployment-is-consistently-double-that-of-whites/> [<https://perma.cc/S253-XWFS>]. See also *supra* note 27.

⁴⁶³ *On Views of Race and Inequality, Blacks and Whites Are Worlds Apart*, PEW RESEARCH CTR. (June 27, 2016), <https://www.pewsocialtrends.org/2016/06/27/on-views-of-race-and-inequality-blacks-and-whites-are-worlds-apart/> [<https://perma.cc/M4A5-BKV4>]. See also Mary C. Daly et al., *Disappointing Facts about the Black-White Wage Gap*, FED. RES. BANK S.F. (Sept. 5, 2017), <https://www.frbsf.org/economic-research/publications/economic-letter/2017/sep-tember/disappointing-facts-about-black-white-wage-gap/> [<https://perma.cc/P99P-PUMA>] (showing that black wages are lower even when corrected for age, education, job type, and location).

⁴⁶⁴ Rakesh Kochhar & Anthony Cilluffo, *How Wealth Inequality Has Changed in the U.S. Since the Great Recession, by Race, Ethnicity and Income*, PEW RESEARCH CTR. (Nov. 1, 2017), <https://www.pewresearch.org/fact-tank/2017/11/01/how-wealth-inequality-has-changed-in-the-u-s-since-the-great-recession-by-race-ethnicity-and-income/> [<https://perma.cc/2C5U-VB7J>] (“In 2016, the median wealth of white households was \$171,000. That’s 10 times the wealth of black households (\$17,100) a larger gap than in 2007”); Thomas Shapiro et al., *The Roots of the Widening Racial Wealth Gap: Explaining the Black-White Economic Divide*, INST. ON ASSETS & SOC. POL’Y (Feb. 2013), <https://heller.brandeis.edu/iasp/pdfs/racial-wealth-equity/racial-wealth-gap/roots-widening-racial-wealth-gap.pdf> [<https://perma.cc/H8HL-YGLN>].

⁴⁶⁵ Even a black American household doing everything “right”—attaining college degrees, raising children in a two-parent household, working full time, spending less—reportedly cannot expect to close the racial wealth gap. Amy Traub et al., *The Asset Value of Whiteness: Understanding the Racial Wealth Gap*, DEMOS & INST. ON ASSETS & SOC. POL’Y (2017), http://www.demos.org/sites/default/files/publications/Asset%20Value%20of%20Whiteness_0.pdf [<https://perma.cc/AB3A-RU8U>]. Accord William Darity Jr. et al., *What We Get Wrong About Closing the Racial Wealth Gap*, SAMUEL DUBOIS COOK CTR. ON SOC. EQUITY & INSIGHT CTR. FOR COMMUNITY ECON. DEV. (Apr. 2018), <https://socialequity.duke.edu/wp->

One factor in this national failure is the broken promise of Title VII to improve employment opportunities for blacks. While litigants still have access to the disparate impact theory to attack neutral policies, this is truer in principle than reality: such cases are expert-driven and costly, and only a small number of firms in the country file them.⁴⁶⁶ By wrenching Title VII from its history and language and turning the ordinary Title VII case into a snipe hunt for intent, courts refashioned the Act as straight anti-discrimination legislation and defanged it.

What is called for is a long-term legal strategy to return to the authentic Title VII: the one we had before the Act became accreted with a non-statutory requirement of intent. No employer should maintain policies that cause discrimination by race, even if unintended, that are otherwise unsupported by business necessity.⁴⁶⁷ The essential economic facts are no less imperative today than in 1964, and most likely will look the same a half-century or more from now without major corrections both in our economy and United States law.⁴⁶⁸ While the current, stunted interpretation of Title VII has been with us now for over forty years, we know from American legal history that even ancient errors can be overcome. It was fifty-eight years between *Plessy v. Ferguson*⁴⁶⁹ and *Brown v. Board of Education of Topeka*.⁴⁷⁰ It took over eighty years

content/uploads/2019/10/what-we-get-wrong.pdf [https://perma.cc/4VL2-D6F8]. For an especially grim assessment, see also Chuck Collins et al., *The Road to Zero Wealth: How The Racial Wealth Divide Is Hollowing Out America's Middle Class*, INST. POL'Y STUD. 5 (Sept. 11, 2017), https://ips-dc.org/wp-content/uploads/2017/09/The-Road-to-Zero-Wealth_FINAL.pdf [https://perma.cc/H3YU-9S5P] (stating “[i]f the racial wealth divide is left unaddressed and is not exacerbated further over the next eight years, median black household wealth is on a path to hit zero by 2053” while “median White household wealth would climb to \$137,000” over the same period).

⁴⁶⁶ See, e.g., Lanning v. Se. Pa. Transp. Auth., 1998 WL 341605, at *73 n.21 (E.D. Pa. June 25, 1998) (noting the “expensive litigation under the disparate impact theory”), *vacated*, 181 F.3d 478 (3d Cir. 2007); Philip C. Eschels & Mark J. Gomsak, *Defending Employment Cases: Pretrial Litigation Issues and Strategies*, A.B.A. SEC. LAB. & EMP. L. 1, 16 (2008), https://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2008/ac2008/101.pdf [https://perma.cc/44M2-SQDN] (explaining in the context of employment that “[d]isparate impact cases are often complex and expensive, require the use of experts and involve sophisticated statistical methods.”).

⁴⁶⁷ This principle is scrupulously race-neutral, rescuing it from any Equal Protection challenge. Employer policies that cause discrimination against whites are no less proscribed than those hurting blacks. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278–85 (1976).

⁴⁶⁸ Dedrick Asante-Muhammed, et al., *The Ever-Growing Gap: Without Change, African-American and Latino Families Won't Match White Wealth for Centuries*, INST. FOR POL'Y STUDIES (2016), https://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2008/ac2008/101.pdf [https://perma.cc/K265-5QMT] (“[i]f average [b]lack family wealth continues to grow at the same pace it has over the past three decades, it would take [b]lack families 228 years to amass the same amount of wealth [w]hite families have today.”).

⁴⁶⁹ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁴⁷⁰ *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

for the Court to fully disavow the holding in the *Civil Rights Cases*⁴⁷¹ that Congress lacked power under Section Two of the Thirteenth Amendment to enact public-accommodation laws.⁴⁷² Some ninety years yawned between *United States v. Harris*⁴⁷³—holding that “state action” was an essential element for a civil-rights conspiracy under the postbellum Civil Rights Acts—and its disavowal in *Griffin v. Breckenridge*.⁴⁷⁴ Modern civil-rights advocates, lawyers and scholars both, must play the long game to revive the critical mission that Title VII and a bold generation of judges and lawyers launched over half a century ago.

⁴⁷¹ The Civil Rights Cases, 109 U.S. 3 (1883).

⁴⁷² *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441–43 (1968).

⁴⁷³ *United States v. Harris*, 106 U.S. 629 (1883).

⁴⁷⁴ *Griffin v. Breckenridge*, 403 U.S. 88 (1971).