FROM DISPARATE IMPACT TO PROTECTING WHITE MEN AND THEIR INTERESTS: THE EARLY DEVELOPMENT OF TITLE VII

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The early development of employment discrimination law is often perceived as a string of important victories for plaintiffs, although the real story is quite different. Although there were solid victories, including the early creation of the disparate impact theory, the Supreme Court continually refused to adopt a more progressive judicial vision that had been percolating in the lower courts, a vision that imposed far greater scrutiny on employers and their practices. In contrast, the Supreme Court quickly moved from questioning the validity of employer practices to deferring to employer judgments, even when those judgments produced a workplace where Black workers were generally absent or holding the least desirable jobs. And as the first decade of case development progressed, the Supreme Court became increasingly worried about the plight of white workers, ultimately approving of seniority systems that effectively locked Black workers into the jobs they had held prior to the passage of the 1964 Civil Rights Act. This Article explores the first decade of employment discrimination law's development by looking not only at Supreme Court opinions but also at what lower courts were doing. Additionally, this Article incorporates insights from the papers of Justice Powell to demonstrate how the Court moved from a short-lived protective stance to one that seemed more focused on the interests of white workers.

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INTRODUCTION

When Title VII of the Civil Rights Act of 1964 (the "Act") was passed, there were two primary and urgent questions courts had to address. The first was what constituted discrimination and, relatedly, how discrimination could be proved. The Act prohibited discrimination in employment based on race, gender, national origin, color, and religion, but it did not define discrimination, an issue that was instead left to courts.[1] The second issue, equally important at the time, was how to transition from a discriminatory employment system to one that was nondiscriminatory. Prior to the passage of the Act, many employers relegated their Black employees to the worst jobs—when they were willing to hire them at all—and telling employers to no longer discriminate did not say much about how to undo the entrenched pattern of workplace discrimination. This was particularly true in unionized workplaces where seniority played a critical role for employment opportunities and was frequently based on time in a particular job rather than time with the employer.[2] Because of the segregated job lines, a departmental seniority system severely limited opportunities for Black workers.

On the question of what constitutes discrimination, the Supreme Court issued decisions that were widely applauded, including the well-known case of *Griggs v. Duke Power Co.*, which established the disparate impact theory.[3] Two years later, the Court adopted the proof structure for individual claims of discrimination based on circumstantial evidence, a proof structure that still largely governs claims today.[4] But there was also a different side to these cases, one that has largely been forgotten in the long history of employment discrimination doctrine. Virtually every decision the Court made regarding the Act cut back on a more progressive vision that had developed in the lower courts; the Court's consistent rejection of these

1. 42 U.S.C. § 2000e-2 (prohibiting discrimination "because of" the categories: "race, color, religion, sex, or national origin"). The statute includes many definitions, but none cover what it means to discriminate. *See* 42 U.S.C. § 2000e(a)–(n).

2. There were many such cases, including two that reached the Supreme Court and are discussed in Part III of this Article. *See* Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977); Franks v. Bowman Transp. Co., 424 U.S. 747 (1976).

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

4. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–04 (1973).

visions invariably hindered the progress lower courts were making, which likely limited the efficacy of the Act. Not only did the Supreme Court restrain lower courts, but it also largely tracked the conservative social and political law and order movement that emerged in the late 1960s in the wake of the riots that erupted following the murder of Dr. Martin Luther King, Jr. and other similar events.[5] For example, even when its relevance was not apparent, the Supreme Court consistently expressed concerns about affirmative action and the qualifications of African Americans; it also frequently expressed concern for what it perceived as the deterioration of the social order.[6]

This was particularly true in the cases that touched on the transition from a discriminatory to a nondiscriminatory workplace. Within a very short time, the Supreme Court began to express concern for what it often referred to as "innocent whites" and "unqualified Blacks" and ultimately sided with the seniority interests of white employees in a way that deviated from what every lower court had previously ruled.[7] In many of these cases, it seemed as if the Supreme Court believed, in a normative sense, that the proclamation of nondiscrimination was sufficient, ignoring the Act's broader purpose of breaking down barriers necessary to move towards a more equal workplace. This view, particularly the concern for white men (women were virtually absent from all of the race cases) and the qualifications of Black employees, was prominent in the private papers of Justice Lewis Powell, who was especially influential in the development of the case law.[8] As will be discussed in more detail in this Article, his memoranda and draft opinions are replete with concern for the white male employees who now had to compete with Black employees, whereas there is virtually no recognition regarding the plight of African Americans or the purpose behind the Act.

It is also worth noting that the shunned progressive vision that had been developed in the lower courts was not the product of a few rogue judges but was instead reflected in majority decisions across many circuits, including the critical

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5. *See infra* Section II.B.

6. As detailed in the following sections, there was constant concern among the justices that unqualified Black workers would obtain jobs over more qualified white workers, and the Court often went out of its way to make it clear that the law did not require affirmative action. *See, e.g.*, *Griggs*, 401 U.S. at 436 ("Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins."). Since this Article focuses on cases from the first decade of interpretation, namely the 1970s, it does not discuss any affirmative action cases, since the first employment cases did not arise in the Supreme Court until the end of the decade in what was a complicated case involving remedial issues. *See* United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979).

7. The Supreme Court addressed the seniority issue in *Teamsters*. *See infra* Section III.D.

8. The papers of Justice Powell, including his case files while on the Supreme Court, have been catalogued by Washington and Lee Law School and are available online. *See* LEWIS F. POWELL PAPERS, https://scholarlycommons.law.wlu.edu/powellarchives/ [https://perma.cc/W7BX-QYK4] (last visited Oct. 1, 2023). The content of the Court files varies but typically includes memoranda written by law clerks to Justice Powell, memoranda from Justice Powell to other justices, and draft opinions with notations.

southern Fourth and Fifth circuits.[9] So much of legal scholarship—and legal teaching—focuses on Supreme Court decisions; the foundational lower court decisions are rarely read, but they offer a sense of what might have been and reveal how the Supreme Court reflected the conservative vision of the time.

This Article will explore the early development of Title VII by looking at the Supreme Court opinions during the first decade of the Act's development while also analyzing the deliberations that occurred and are now embodied in papers of the Supreme Court justices. In particular, I will rely on the papers of Justice Powell, who was appointed to the Court in 1971 after two previous nominees were not confirmed and who was particularly influential on the Court when it came to interpreting Title VII and civil rights issues more generally. In addition, I will analyze the lower court decisions, both those that were on review in the Supreme Court as well as the broader vision developed in the lower courts, to demonstrate what might have been had the Supreme Court adopted a broader view of the purposes and possibility of Title VII.

Through an exploration of the development of the doctrine, I hope to show that even in the cases that looked like victories for workers, the Supreme Court moved at a cautious pace and was clearly skeptical of how we would transition from a world of segregation and discrimination into a nondiscriminatory setting. Although it is widely recognized that the Supreme Court was hostile to employment discrimination claims in the 1980s, it is less widely appreciated that this hostility and skepticism was present in the earlier decade as well.[10] This realization also suggests that one reason we have not made more progress toward equality through employment litigation is that we never really tried.

Part I of this Article begins by providing an exploration of the statutory and economic background at the time, including how we moved as a society from broad support for the Civil Rights Act to a push for law and order towards the end of the 1960s, a shift that was ultimately reflected in Supreme Court cases. Part II discusses three important Supreme Court cases that established what constituted discrimination and how discrimination was proved before contrasting the Supreme Court's approach—which ultimately became deferential to employers—with the greater scrutiny lower courts applied to employers' practices. Finally, Part III takes up the questions surrounding the interests of white men as they sought to rely on the civil rights statutes to bring claims and to hold onto seniority systems that clearly favored white over Black employees.

I. THE BACKGROUND: STATUTORY AND ECONOMIC

The Supreme Court decisions discussed in this Article can best be understood against the backdrop of the social and political context of the time, both at the time the Act was initially passed and a few years later when the cases started

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9. One of the early highly influential cases was written by Judge Wisdom, a widely respected appellate court judge. *See* Loc. 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

10. The Civil Rights Act of 1991 was intended to overturn a series of hostile Supreme Court decisions issued in the 1980s. For a discussion, see Michael Selmi, *The Supreme Court's Surprising and Strategic Response to the Civil Rights Act of 1991*, 46 WAKE FOREST L. REV. 281, 283–91 (2011).

to reach the Supreme Court. As we will see, much had changed during that short time period, and those changes likely influenced the Supreme Court's perspective in a way that was reflected in both the analysis and outcomes.

A. The Statute

Title VII was part of the comprehensive 1964 Civil Rights Act that was passed after what remains the longest filibuster in history.[11] That filibuster was broken through a series of compromises that left the Act surprisingly bereft of substance and likewise with little meaningful legislative history.[12] The primary section of the employment provisions of the Act, then and now, reads in significant part:

> a) Employer practices
>
> It shall be an unlawful employment practice for an employer
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.[13]

The Act does not define what it means to discriminate other than through the phrase "because of," and there was little meaningful legislative history on what it meant to discriminate. As a result, it was left to courts to define discrimination and to determine what acts, and what state of mind, would ultimately be defined as discrimination.

The Act also created a new administrative agency, the Equal Employment Opportunity Commission ("EEOC"), which by design initially had limited enforcement powers.[14] Potential plaintiffs who believed they were the victims of discrimination were required to file a charge of discrimination with the Agency, which would then investigate the claim, and if it found there was reasonable cause to believe discrimination had occurred, it would seek to conciliate the complaint. However, if conciliation failed, the EEOC was initially unable to pursue a court action; instead, the individual who filed the complaint could bring an action in federal court.[15] Congress also failed to provide the EEOC with rulemaking authority, though the Agency would later develop various guidelines that courts sometimes

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11. For a thorough discussion of the filibuster, see CLAY RISEN, THE BILL OF THE CENTURY: THE EPIC BATTLE FOR THE CIVIL RIGHTS ACT 210–29 (2014). *See also* CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT (1985).

12. *See* RISEN, *supra* note 11, at 217–29 (discussing content of filibuster speeches).

13. 42 U.S.C. § 2000e-2(a)(1).

14. *See* HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960–1972, at 129–48 (1990) (discussing the creation and limited powers of the EEOC).

15. *See* ALFRED W. BLUMROSEN, MODERN LAW: THE LAW TRANSMISSION SYSTEM AND EQUAL EMPLOYMENT OPPORTUNITY 48–50 (1993) (discussing limited power of EEOC).

deferred to.[16] The 1972 Amendments to Title VII provided the Agency with enforcement authority.[17] It is worth noting that the EEOC, which was underfunded and understaffed, was quickly overwhelmed with complaints and has never fully recovered, even nearly 60 years later.[18]

Prior to the 1972 amendments, the Justice Department had enforcement authority over what are labeled "pattern or practice claims." The relevant statutory language is:

> Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States.[19]

As was true with the term "discriminate," the Act did not define a "pattern or practice," and it was again ultimately left to the courts to determine both what constituted a pattern or practice of discrimination and how such a claim could be proved.[20]

B. The Economic and Social Setting

Following the passage of the 1964 Act, and the equally momentous Voting Rights Act the next year, riots erupted in the summer and continued for several years thereafter. The riots undeniably changed public opinion regarding the quest for civil rights for Black Americans and other marginalized groups, and public opinion polls moved from majority support even among whites to a majority who expressed

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16. Although the Supreme Court initially noted that "[t]he administrative interpretation of the [Civil Rights] Act by the enforcing agency is entitled to great deference," the Court quickly moved away from its deferential stance and has historically vacillated in the deference it shows to the EEOC. Griggs v. Duke Power Co., 401 U.S. 424, 433–34 (1971). *See* Melissa Hart, *Skepticism & Expertise: The Supreme Court and the EEOC*, 74 FORDHAM L. REV. 1937, 1941–49 (2006) (discussing deference to EEOC).

17. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103.

18. Michael Sovern, who would later become the president of Columbia University, famously referred to the EEOC as "a poor, enfeebled thing." MICHAEL I. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 205 (1966). For a discussion of the EEOC at its origin, see Nicholas Pedriana & Robin Stryker, *The Strength of a Weak Agency: Enforcement of Title VII of the 1964 Civil Rights Act and the Expansion of State Capacity, 1965–1971*, 110 AMER. J. SOCIO. 709 (2004). Despite a substantial decrease in charges over the last few years, the EEOC's backlog has increased. *See* Eric Dreiband, *EEOC Developments*, A.B.A. LAB. & EMP. L. (Aug. 24, 2022), https://www.americanbar.org/groups/labor_law/publications/labor_employment_law_news/summer-2022/eeoc-developments/ [https://perma.cc/Y6HB-6W7J] (discussing current backlog).

19. 42 U.S.C. § 2000e-6(a).

20. The Justice Department brought a number of cases under its pattern or practice authority, and the Supreme Court eventually heard two of the cases. *See* Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977); Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977).

concern about the evolving civil rights movement.[21] Two scholars writing about the early days of the civil rights acts commented: "Images of black rioters and burning cities from Los Angeles to Detroit replaced images of southern violence inflicted on peaceful protesters, and Congress grew more skeptical about expanding black civil rights."[22] In addition to the riots, there were protests regarding other major issues facing the nation, such as the Vietnam War, including the protest at the Democratic National Convention; the Black Power movement; the summer of love, complete with hippies; and widespread unrest on college campuses around the country.[23]

These events, including the riots, were subject to competing public interpretations. As is well known, President Johnson appointed a commission following riots in Detroit and Newark in 1967—it came to be known as the Kerner Commission and was tasked with studying the riots, particularly what had caused them.[24] The Commission's report, which was lengthy and became a best-seller, largely attributed the riots to poverty and white racism, a conclusion that many were unwilling to embrace, including President Johnson, who initially refused to even acknowledge the report.[25] Several years earlier, the McCone Commission was established to study the Watts riots that erupted in 1965, and that Commission concluded that the riots were the product of outside agitators and civil rights activists.[26] At the end of the day, the McCone Commission seemed to have attracted

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21. *See, e.g.*, Alice George, *The 1968 Kerner Commission Got It Right, but Nobody Listened*, SMITHSONIAN MAG. (Mar. 1, 2018), https://www.smithsonianmag.com/smithsonian-institution/1968-kerner-commission-got-it-right-nobody-listened-180968318/ [https://perma.cc/WH86-RXTA] ("Backlash was immediate. Polls showed that 53 percent of white Americans condemned the claim that racism had caused the riots."). Professor Lucas Powe writes, "Selma had sent civil rights to an all-time poll high as the nation's most pressing problem for well over 50 percent of all respondents. By the fall of 1966, a like number had concluded that the Johnson administration was moving 'too fast' on civil rights." LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 274 (2000). For a fuller discussion of the riots and their effect on America and its politics, see PETER B. LEVY, THE GREAT UPRISING: RACE RIOTS IN URBAN AMERICA DURING THE 1960S (2018); JAMES W. BUTTON, BLACK VIOLENCE: POLITICAL IMPACT OF THE 1960S RIOTS (1978).

22. Nicholas Pedriana & Robin Stryker, *From Legal Doctrine to Social Transformation? Comparing U.S. Voting Rights, Equal Employment Opportunity & Fair Housing Legislation*, 123 AM. J. SOCIO. 86, 103 (2017).

23. For a discussion of the late 60s and how they brought in President Nixon, see RICK PERLSTEIN, NIXONLAND: THE RISE OF A PRESIDENT AND THE FRACTURING OF AMERICA 15–34 (2008).

24. The original Kerner Commission Report is known as the *Report of the National Advisory Commission on Civil Disorders*. Recently, Jelani Cobb produced an edited edition. *See* JELANI COBB, THE ESSENTIAL KERNER COMMISSION REPORT (2021).

25. Reviewing the Kerner Commission report on its fiftieth anniversary, two scholars noted, "President Johnson was enormously displeased with the report . . . . The report also received considerable backlash from many whites and conservatives for its identification of attitudes and racism of whites as a cause of the riots." Susan T. Gooden & Samuel L. Myers Jr., *The Kerner Commission Report Fifty Years Later: Revisiting the American Dream*, 4 RSF: RUSSELL SAGE FOUND. J. SOC. SCIS., Sept. 2018, at 1, 6.

26. *See* Hugh Davis Graham, *On Riots and Riot Commissions: Civil Disorders in the 1960s*, 2 PUB. HISTORIAN 7, 15–16 (1980) (discussing the McCone Commission and its conclusions).

broader public support, even while it was less well known, and the riots produced a law and order sentiment that was largely responsible for the election of Richard Nixon.[27] As we will see, that law and order sentiment found its way into Supreme Court opinions and likely limited the scope and effectiveness of the emerging doctrine.

Since this Article will incorporate the papers of Justice Powell, it is also worth pausing for a moment to consider his relationship to civil rights issues prior to his taking a seat on the Supreme Court. As is well known, Justice Powell was on the Richmond school board for a number of years following *Brown v. Board of Education*, and while Justice Powell opposed the massive resistance strategy of other southern states, he also advocated for a gradualist approach to desegregating the schools, which resulted in very little progress during his time on the school board.[28] What is perhaps less well known is that in his practice with a prominent Richmond law firm, he represented companies, such as Phillip Morris, that were sued for discriminatory practices and that, up until the passage of the Act, had segregated job lines.[29] As will become relevant later in the Article, Justice Powell's legal work was generally in service of preserving the existing social order.

This was perhaps most evident in a famous piece he prepared at the request of the Chamber of Commerce shortly before he took his seat on the Supreme Court, which emphasized how protests and other social activities of the sixties were threatening the existing order.[30] The memorandum is effectively a meditation on what Justice Powell labelled the threat to the free enterprise system and the assault on our capitalist system by students, Marxists, Communists, anti-business politicians, Ralph Nader, and groups like the ACLU.[31] He also called for monitoring textbooks and television news outlets for anti-capitalist thoughts and offered suggestions for how the Chamber of Commerce could respond to the attacks on

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27. *See generally* Jeremy D. Mayer, *Nixon Rides the Backlash to Victory: Racial Politics in the 1968 Presidential Campaign*, 64 HISTORIAN 351 (2002) (discussing backlash to civil rights movement); Dennis D. Loo & Ruth-Ellen M. Grimes, *Poll, Politics and Crime: The "Law and Order" Issue of the 1960s*, 5 W. CRIMINOLOGY REV. 50 (2004).

28. As Professor Anders Walker summarized: "By the time he stepped down from his position as chair of Richmond's school board in 1960" Powell had helped steer Richmond away from massive resistance and preserved segregation virtually intact, with "only 2 of 23,000 black children in Richmond attend[ing] school with whites." Anders Walker, *A Lawyer Looks at Civil Disobedience: Why Lewis F. Powell Jr. Divorced Diversity from Affirmative Action*, 86 U. COLO. L. REV. 1229, 1235 (2015). Justice Powell's background as it relates to civil rights issues is discussed extensively in JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 140–238 (1994).

29. An influential early Title VII case involved a multifaceted challenge to the practices of Phillip Morris, including its segregated job lines prior to the passage of the 1964 Act. *See* Quarles v. Phillip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968). Although Justice Powell sat on the Board of Directors for Phillip Morris and his law firm (Hunton and Williams) represented the company, it does not appear that Justice Powell was involved with the case.

30. Confidential Memorandum from Lewis Powell, Jr., Att'y, Philip Morris, to Eugene B. Sydnor, Jr., Chairman, Educ. Comm., U.S. Chamber Com., *Attack on American Free Enterprise System* (Aug. 23, 1971) (on file with Virginia Business).

31. *Id.*

business. He noted there had been a number of attacks on the property of Bank of America, and on a number of occasions in the memorandum he worried about how students were becoming radicalized on college campuses.[32] Law Professor Ann Southworth called the memorandum a "call to arms," noting that it ultimately led the Chamber of Commerce to create a litigation arm as recommended by Justice Powell.[33] Justice Powell's memorandum did not become public until the year after his confirmation, when a *Washington Post* reporter obtained a copy.[34] The reporter, Jack Anderson, labeled the memorandum "militant," and, in a subsequent column, questioned whether Justice Powell was qualified to hear business cases.[35] As discussed later in this Article, Justice Powell's subsequent employment discrimination opinions reflected this law and order vision and support for American business.

One other historical context that seems relevant to the subsequent developments is the economic status of African Americans in the 1970s as the cases began to arise. In the early 1970s, African Americans had far lower incomes and wealth than whites. One study indicated that African-American men in the South had incomes that were 58% of those of white men and 73% of those of white men outside of the South.[36] The pay gap between Black and white women was smaller but largely because of the lower pay that white women received as the comparison group.[37] The ratio was lowest in the South, where many of the cases originated.[38] Unemployment rates soared in the 1970s and African Americans had rates that were generally twice as high as their white counterparts.[39] It should be noted that African Americans made significant economic progress beginning in the 1960s and into the 1970s, though the progress was uneven and did not eliminate the racial disparities that commonly

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32. For example, Justice Powell quoted newspaper columnist Stewart Alsop:

> Yale, like every other major college, is graduating scores of bright young men who are practitioners of the 'politics of despair.' These young men despise the American political and economic system . . . (their) minds seem to be wholly closed. They live, not by rational discussion, but by mindless slogans.

Id.

33. Ann Southworth, *Lawyers and the Conservative Counterrevolution*, 43 L. & SOC. INQUIRY 1698, 1700 (2018).

34. *See* Jack Anderson, *Powell's Lesson to Business Aired*, WASH. POST, Sept. 28, 1972, at F7.

35. Jack Anderson, *FBI Missed Blueprint by Powell*, WASH. POST, Sept. 29, 1972, at C27 ("[Powell's] views were so militant that it raises a question about his fitness to decide any case involving business interests.").

36. *See* Richard B. Freeman, *Changes in the Labor Market for Black Americans, 1948–72*, 1973 BROOKING PAPERS ON ECON. ACTIVITY 67, 79 (1973). *See also* U.S. BUREAU OF THE CENSUS, THE SOCIAL AND ECONOMIC STATUS OF THE BLACK POPULATION IN THE UNITED STATES, 1974, at 24 (1975) ("In 1974, the median income of black men ($5,400) was about 61 percent of the median income of white men–not statistically different from the 59 percent in 1970.").

37. *See* Freeman, *supra* note 36, at 80.

38. *See* U.S. BUREAU OF THE CENSUS, *supra* note 36, at 37 tbl.19 (illustrating the ratio of Black to white wages was .56 in the South).

39. *See id.* at 52 (documenting 1974–75 unemployment rates).

characterized the labor market.[40] Finally, and relevant to subsequent enforcement actions, approximately 24% of the workforce was unionized in the late 1960s and into the 1970s, with Black workers having a higher representation in unions, as more than a third of Black male workers in private industry were members of unions.[41] In other words, union membership, including in the South, was far more important in the 1970s than it is today, when only about 6% of the private workforce is unionized.[42]

II. DEFINING DISCRIMINATION IN THE EARLY YEARS

Cases began to arise in the late 1960s, and courts, including the Supreme Court, quickly confronted difficult questions regarding how to define discrimination and transition from the segregated days of the past to a more equal workplace. Once employers could no longer segregate employees, there was a question regarding how closely courts should—or would—scrutinize hiring and promotional practices, particularly when those practices led to continued segregation within the workforce. Relatedly, courts confronted the question of how much deference employers should be afforded regarding how they structured their workplaces, and related issues arose regarding the existing white employees who had undoubtedly benefitted from the discriminatory practices of the past. For example, should a group of white workers, who may have had little to do directly with discriminating against Black workers but who now held jobs and seniority that would likely prevent Black employees from moving up in the company, be removed from their positions? Or was the mandate of the Act simply to stop discriminating, without any concomitant duty to undo the remnants of the past? These were difficult questions that went to the core of our commitment to eradicating discrimination—as a society, were we to start fresh and only look forward to limiting future discrimination, or would we also seek to undo the deep-rooted effects of past discrimination—which might include disrupting the lives of those who were (and sometimes still are) referred to as innocent players. Acknowledging the influence of past discrimination was one thing, but disrupting existing institutions, including the workplace, was another. This Part will focus on the initial question regarding defining and proving discrimination, while Part III will take up seniority and related issues.

A. **Griggs v. Duke Power Co.***: The Disparate Impact Theory*

One of the very first cases to find its way to the Supreme Court, *Griggs v. Duke Power Co.*, involved an employer that had previously confined its Black employees to the lowest paying and worst jobs.[43] When the Act invalidated outright discrimination, Duke Power Co. required that certain employees have a high school degree and pass a written test in order to qualify for all but the jobs previously open

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40. For a comprehensive discussion, see Richard B. Freeman, *Black Economic Progress After 1964: Who Has Gained and Why?*, *in* STUDIES IN LABOR MARKETS 249–52 (Sherwin Rosen ed., 1981).

41. *See* Lawrence Mishel et al., *Explaining the Erosion of Private-Sector Unions*, ECON. POL'Y INST., Nov. 18, 2020, at 17 tbl.4.

42. Today about 6% of the private workforce is unionized. U.S. DEP'T OF LAB., BUREAU OF LAB. STATS., USDL-23-0071, UNION MEMBERS — 2022, at 1 (2023).

43. Griggs v. Duke Power Co., 401 U.S. 424, 427 (1971).

to Black workers.[44] The employer did not, however, require employees who were currently performing the more desirable jobs to satisfy either of the new requirements in order to retain their jobs, and many of those white employees did not have high school degrees and likely would not have passed the tests.[45] As such, the employer's move seemed designed to perpetuate the past arrangement, and the question the Supreme Court took up in one of its very first interpretations of the Act was how to evaluate these practices to determine whether they were discriminatory.

This was an enormously important question because if the company was allowed to impose restrictions that would almost certainly limit employment opportunities for African Americans, the Act would not have changed much. Certainly in the South, but also likely throughout the United States, African Americans had lower high school graduation rates than whites—primarily because they had been provided with inferior education for as long as they had been provided with education.[46] And for the same reason, African Americans were likely to perform less well on any written examination.[47] Lower courts saw this dilemma, but the case took on greater importance once it reached the Supreme Court because not only would allowing these practices potentially stifle any progress the Act had hoped to ensure, but it also raised the question of what constituted discrimination. The Act itself was effectively silent on that question; the statutory language said nothing more than that an employer shall not discriminate on the basis of race, national origin, sex, religion, or color. So the case provided an important early opportunity for the Court to define what it meant to discriminate.

In a relatively short and unanimous decision, the Court adopted a broad definition of discrimination in order to address the problem of employers perpetuating a segregated workplace through various means that may have appeared, at least on their face, to be routine employment practices. The Court focused on the effect rather than the intent of the practice, noting that if these facially neutral practices had a disproportionate effect on a protected group—in this instance, African Americans—the employer would have to justify its practice under what the

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44. *Id.*

45. In its opinion, the district court noted that 20 of the 81 white employees did not have high school degrees. *See* Griggs v. Duke Power Co., 292 F. Supp. 243, 247 (M.D.N.C. 1968).

46. In a footnote, the Supreme Court noted that in North Carolina, where Duke Power Co. was located, the 1960 Census indicated that "34% of white males had completed high school, [but] only 12% of Negro males had done so." *Griggs*, 401 U.S. at 430 n.6. The Court did not report the graduate rates for women, and it appears that the jobs at issue were likely held exclusively by men. According to the Census Bureau, in 1970, 65.1% of Black Americans between the ages of 20 and 24 had high school degrees, while 33.7% of those aged 25 and older had degrees. The comparable figures for whites were 82.7% and 57.4%. *See* U.S. DEP'T OF COM., BUREAU OF THE CENSUS, EDUCATIONAL ATTAINMENT: MARCH 1970, at 2 tbl.B (1970), https://www.census.gov/content/dam/Census/library/publications/1970/demo/p20-207.pdf [https://perma.cc/2T3N-WNNH].

47. Based on the three opinions issued in the case, it is not apparent that the tests (there were two) were ever administered. The only reference to the pass rates on the test also was contained in a footnote in the Supreme Court opinion, where in a different case the EEOC found that 58% of white workers had passed a battery of tests, which included the tests at issue in the case, compared with only 6% of Black workers. *Griggs*, 401 U.S. at 430 n.6.

Court labeled "business necessity."[48] This standard effectively requires an employer to demonstrate that the practice served the employer's needs in some particular way.[49] This is where the fact that incumbent employees would not have to satisfy the requirements came into play—if white individuals without a high school degree could perform their jobs adequately, why was it necessary to require new employees, including all of the Black individuals interested in the jobs, to have such a degree and to pass a written test? This was not an easy question to answer, and the Court concluded that if the employer was unable to provide an answer, then it was engaged in discrimination under the Act.[50]

In terms of the development of the law, the key component of the Court's decision was that the plaintiff did not have to prove that the employer established these practices with an intent to discriminate; rather, the adverse effect of the practice was enough to trigger further inquiry into the value of the practices in light of their exclusionary effect.[51] Proving intent may have been possible in this particular case—the practices were adopted on the day the Act became effective,[52] for example—but proving intent is always difficult and here would have required establishing that the employer adopted the practices so as to exclude African Americans. When it comes to practices like those at issue in the case, it is certainly easier to focus on the effect of the practices rather than the intent of the employer.

In its opinion, the Court made two important acknowledgements as it began to navigate the future of employment discrimination law. First, the Court recognized that allowing practices such as tests or degree requirements could render the promise of the Act elusive or, at a minimum, seriously limit its reach.[53] This was an important recognition of what it would take to move forward—barriers of many kinds could serve the same function as the "no blacks need apply" signs, even after those signs were removed. Second, and potentially critical to employment discrimination law, was a recognition that practices adopted by employers were not always good determinants of merit or ability but instead had to be assessed to determine whether they were job-related.[54] At this point in the development of the law, the Supreme Court was unwilling simply to defer to an employer's judgment, though as we will

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48. *Id.* at 431.

49. *Id.* ("The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity.").

50. *Id.* at 436 ("What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.").

51. *Id.* at 432 (noting that good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "'built-in headwinds' for minority groups and are unrelated to measuring job capability").

52. *Id.* at 427.

53. *Id.* at 430 ("Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.").

54. *Id.* at 432 (employer must show that any requirement has "a manifest relationship to the employment in question").

see, over the course of the ensuing decade, the Court would move to adopt a deferential stance toward employers.[55]

Even though the Court adopted a potentially broad vision of discrimination, a more robust vision was percolating in the lower courts and was central to Judge Sobeloff's dissenting and concurring opinion in the appellate court in the *Griggs* case.[56] There were two important aspects to this more progressive vision. First, a number of lower courts sought to incorporate the business necessity test into virtually all selection practices, not just written employment examinations and not just with disparate impact cases, as was true for the Supreme Court.[57] As we will see shortly, this emphasis on requiring employers to justify their practices could have posed a significant limitation on subjective employment practices, which were and often remain a conduit for discrimination.[58] In addition, Judge Soboleff, building on the work ofthe EEOC, would have required employers to validate their practices consistent with prevailing practices at the time, a position the Supreme Court did not address in its opinion.[59] In fact, the Supreme Court never went so far as to require that employers validate their practices, including their written tests, which is the area where validation is most common.[60]

In addition, in what is a largely overlooked part of the opinion, the Supreme Court sought to allay fears that unqualified Black workers would be hired or promoted, a theme that would reappear throughout the decade. The Court specifically noted that the Act "did not intend . . . to guarantee a job to every person regardless of qualifications," adding that "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."[61] Later in the opinion, the Court reiterated that "Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority

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55. This became particularly evident in Furnco Const. Corp. v. Waters, 438 U.S. 567, 578 (1978). *See infra* Section II.C.

56. Griggs v. Duke Power Co., 420 F.2d 1225, 1237 (4th Cir. 1970) (Sobeloff, J., concurring in part and dissenting in part).

57. *See, e.g.*, Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 248 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971) (seniority system evaluated under business necessity); United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1970) (seniority system had to be "essential" to employer's goals); Robinson v. Lorillard Corp., 444 F.2d 791, 799 (4th Cir. 1971) (seniority system did not satisfy business necessity test); Patterson v. Am. Tobacco Co., 535 F.2d 257, 267 (4th Cir. 1976) (seniority system did not satisfy business necessity test). *See also* Note, *Business Necessity Under Title VII of the Civil Rights Act of 1964: A No Alternative Approach*, 84 YALE L.J. 98 (1974).

58. *See infra* Section II.C.

59. *See Griggs*, 420 F.2d at 1238–47 (Sobeloff, J., concurring in part and dissenting in part); *see also* United States v. Ga. Power Co., 474 F.2d 906, 910–11 (5th Cir. 1973) (requiring validation on tests and high school degree).

60. Several years later the Supreme Court revisited the question of what constituted a job-related employment practice, and though the Court extensively critiqued the company's validation effort, it did not go so far as to require a validation study. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 430–36 (1975) (finding employer's validation efforts "materially defective").

61. Griggs v. Duke Power Co., 401 U.S. 424, 430–31 (1971).

origins."[62] This concern that the law might encourage the hiring of unqualified Black workers consistently appeared throughout the Court's cases, even when it was irrelevant to the issues presented.

B. Proving Discrimination: **McDonnell Douglas Corp. v. Green** *and Law and Order*

The second case involving how to define and prove discrimination arose just two years later in the now well-known case of *McDonnell Douglas Corp. v. Green*.[63] The central issue in the case involved the proper procedural structure for proving claims of discrimination based on circumstantial evidence, an issue of great importance then and now. Although the Supreme Court essentially adopted the structure put forth by the court of appeals, the opinions could not have been more different in either tone or substance.

Percy Green had worked at McDonnell Douglas for nearly ten years in a variety of roles and during his employment was always rated as satisfactory.[64] He was also a well-known civil rights activist in the St. Louis area and headed up a local affiliate of the Congress on Racial Equality.[65] He gained some local fame by climbing the St. Louis Arch during a civil rights protest.[66] In 1964, he was laid off from his position; Green complained that his layoff was due to his civil rights activity, but the layoff occurred before the effective date of Title VII, and his other complaints did not result in any relief. Subsequently, Green participated in a "stall-in" at the McDonnell Douglas plant, which was designed to prevent the Company's upwards of 10,000 employees from entering the plant. The stall-in was momentarily successful but ultimately and rather quickly broken up by the police, who arrested Green and others for blocking traffic, a charge Green ultimately pleaded guilty to and for which he was fined $50.00.[67] In addition to the stall-in, there was a "lock-in" where protesters, led by the group for which Green was the chairman, chained doors. While Green actively participated in the stall-in, his role in the lock-in was disputed.[68] Several judges assumed he was aware of and supported the lock-in because his organization was behind the protest, although a majority on the court of appeals panel concluded that he had not played any role in the action.[69] The Supreme

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62. *Id.* at 436.

63. 411 U.S. 792, 793 (1973).

64. *Id.* at 794, 802.

65. *See* Devin Thomas O'Shea, *The Prophet's Bane: How Percy Green's Activism Changed St. Louis*, SLATE MAG. (Dec. 21, 2001, 10:00 AM), https://slate.com/news-and-politics/2021/12/percy-green-st-louis-activism-veiled-prophet-ball-ellie-kemper.html [https://perma.cc/RJD5-FMHK].

66. *Id.*; *see also* David Benjamin Oppenheimer, *The Story of* Green v. McDonnell Douglas, *in* EMPLOYMENT DISCRIMINATION STORIES 13, 23 (Joel Wm. Friedman ed., 2006).

67. *See* Green v. McDonnell-Douglas Corp., 318 F. Supp. 846, 849 (E.D. Mo. 1970); Oppenheimer, *supra* note 66, at 25.

68. *McDonell Douglas Corp.*, 411 U.S. at 795 n.3 (describing the "lock-in" and stating that "the full extent of his involvement remains uncertain").

69. The strongest statement came from the concurring opinion. *See* Green v. McDonnell Douglas Corp., 463 F.2d 337, 345 (8th Cir. 1972) (Lay, J., concurring) ("[T]he record presents no evidence whatsoever that the plaintiff actively and illegally participated in

Court, in contrast, provided several reasons to believe Green had participated, and it seems that this perception likely influenced the Court's subsequent focus on illegal activities.[70]

Just a few days after the protests, McDonnell Douglas advertised openings for the position Green had previously held, but the Company refused to rehire him.[71] At this point, the Civil Rights Act was in effect, and Green filed a charge with the EEOC, arguing that he had been retaliated against for opposing discriminatory activities and that the Company's decision not to rehire him was racially motivated.[72] Both the court of appeals and the district court concluded that because his participation in the stall-in was unlawful, it did not constitute protected activity under the retaliation prong of Title VII, a conclusion that Green did not appeal.[73] On his substantive discrimination claim, the district court held that because the EEOC had not issued a reasonable cause determination, he could not proceed on his claim.[74] The court of appeals reversed that determination and proceeded to discuss what the structure for proving a claim should be: a determination the Company then appealed to the Supreme Court.[75]

The Supreme Court decision has had a venerable life and continues to govern how the most common cases of employment discrimination proceed. On the surface, the Court, in a unanimous decision written by Justice Powell, adopted the familiar proof structure where (1) a plaintiff establishes a prima facie case by demonstrating that they are qualified for an available position that they were not hired for, at which point (2) the employer has the burden to articulate a legitimate nondiscriminatory reason for its action.[76] A key part of the case involved the third

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the so-called 'lock-in.'"). The panel opinion also noted in a footnote that the employer's asserted reason for not rehiring Green may have been pretextual, since it had "advanced the unsupported charge that Green had 'actively cooperated' in the 'lock-in.'" *Id.* at 344 n.6.

70. *See McDonell Douglas Corp.*, 411 U.S. at 795 n.3. Here is what the Court had to say about Green and the lock-in:

> The 'lock-in' occurred during a picketing demonstration by ACTION, a civil rights organization, at the entrance to a downtown office building, which housed a part of petitioner's offices and in which certain of petitioner's employees were working at the time. A chain and padlock were placed on the front door of the building to prevent ingress and egress. Although respondent acknowledges that he was chairman of ACTION at the time, that the demonstration was planned and staged by his group, that he participated in and indeed was in charge of the picket line in front of the building, that he was told in advance by a member of ACTION 'that he was planning to chain the front door,' and that he 'approved of' chaining the door, there is no evidence that respondent personally took part in the actual 'lock-in,' and he was not arrested.

Id. (citation omitted).

71. *Id.* at 796.

72. *Id.*

73. *See* Green v. McDonnell-Douglas Corp., 318 F. Supp. 846, 850 (E.D. Mo. 1970); *McDonell Douglas Corp.*, 411 U.S. at 797 n.6 (noting that Green did not appeal this holding).

74. *McDonell Douglas Corp.*, 411 U.S. at 797.

75. *Id.* at 798.

76. *Id.* at 802–03.

step in the process, which ensures that the plaintiff has a full and fair opportunity to establish that the employer's reason was pretextual; in other words, that it was not the real reason for the decision.[77]

In this particular case, all of the courts agreed that Green had established a prima facie case, given that he was not hired for a position he had previously performed adequately.[78] The dispute came in the next step. The employer stated that it failed to hire Green because of his participation in the stall-in and lock-in, and this is where one finds a different approach among the courts, including the Supreme Court, which accepted the employer's rationale as both legitimate and, on its face, nondiscriminatory.[79] Indeed, it seemed clear, particularly in contrast to the court of appeals, that the Supreme Court considered this rationale as a legitimate reason not to hire Green based on what the Court repeatedly referred to as his "unlawful conduct."[80] At the same time, the Supreme Court agreed with the court of appeals that Green should have an opportunity to prove that the employer's reason was pretextual, though how he could do that was less clear.[81] One way Green might have established pretext was by showing that white individuals who had engaged in similar activity were not disciplined. Depending on how narrowly this question was drawn, it might have been difficult for the plaintiff to identify what is now referred to as a comparator: a white employee who protested company policies in a similar manner but was retained in his job or hired for a new position.[82]

This is where the court of appeals significantly differed from the Supreme Court in two important respects. First, in its relatively short decision, the Supreme Court referred to Green's activity as unlawful or illegal on 12 different occasions, and referred to the acts as "seriously disruptive" on three occasions.[83] This essentially was in line with the dissenting opinion in the court of appeals,[84] whereas the appellate majority referred to the protests by noting that Green had "participated in several demonstrations," later adding that the stall-in activities ran "afoul of the law."[85] In a memorandum prepared by his law clerk, Justice Powell underlined all of the occasions listing Green's behavior as unlawful, and noted with a large arrow that Green had also protested at the home of the Chairman of McDonnell Douglas, even though that protest was lawful and was actually central to Green's claim that

77. At this point in the development of the doctrine, this was all that was required, though twenty years later the Supreme Court would hold that proof of pretext may, but need not, be the equivalent of discrimination and the plaintiff's ultimate burden is to prove discrimination. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 523–24 (1993).

78. *McDonell Douglas Corp.*, 411 U.S. at 802.

79. *Id.* at 803 ("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.").

80. *Id.* at 804 ("Petitioner may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races.").

81. *Id.*

82. *Id.*

83. *Id.* at 797, 803, 806.

84. The dissenting opinion of Judge Johnsen referred to Green's conduct as unlawful or illegal on fifteen occasions. *See* Green v. McDonnell Douglas Corp., 463 F.2d 337, 353–55 (8th Cir. 1972) (Johnsen, J., dissenting in part).

85. *Id.* at 339, 341.

he had not been rehired because of his lawful civil rights protests.[86] The court of appeals also noted that Green had been continuously employed other than during his "honorable military service," which the Supreme Court reduced, in a footnote, to his "service in the military."[87]

Perhaps more significant was how the two courts treated the employer's justification. The Supreme Court stated: "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."[88] The Court went on to find an analogy in an older case involving an illegal sit-down strike in which the Court upheld the dismissal of workers who had participated in the company takeover.[89]

The court of appeals, in contrast, approached the question entirely differently and revealed a different vision of what constituted discrimination and how employers would be required to justify their actions in the face of a claim of discrimination. In its initial opinion, which was later modified on a petition for rehearing, the court labeled the employer's justification as subjective and unrelated to Green's ability to do his job. The court went on:

> Our prior decisions make clear that, in cases presenting questions of discriminatory hiring practices, employment decisions based on subjective, rather than objective, criteria carry little weight in rebutting charges of discrimination . . . . Judicial acceptance of subjectively based hiring decisions must be limited if Title VII is to be more than an illusory commitment to that end, for subjective criteria may mask aspects of prohibited prejudice.[90]

The court added that discrimination "is often cloaked in generalities or vague criteria."[91]

In its initial opinion, the appellate court also borrowed from the recent *Griggs* decision to require employers to "demonstrate a substantial relationship between the reasons offered for denying employment and the requirements of the job"; in this way, McDonnell Douglas would be required to show how Green's participation in the stall-in would affect his job performance and demonstrate the effect in "some objective way" rather than just asserting as much.[92] The court

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86. *See generally* Lewis F. Powell, Jr., Preliminary Memorandum to Lewis F. Powell, McDonnell Douglas v. Green (Dec. 1, 1972), *in* LEWIS F. POWELL PAPERS, https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1038&context=casefiles [https://perma.cc/PB4T-UYX8].

87. *Compare Green*, 463 F.2d at 339 ("He remained with the company continuously, except for twenty-one months of honorable military service, until he was laid off on August 28, 1964."), *with McDonell Douglas Corp.*, 411 U.S. at 794 n.1 ("His employment during these years was continuous except for 21 months of service in the military.").

88. *McDonnell Douglas Corp.*, 411 U.S. at 803 (footnotes omitted).

89. *See* NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 247, 260–61 (1939).

90. *Green*, 463 F.2d at 343.

91. *Id.*

92. *Id.* at 344.

softened this language in its modified opinion, but the focus on requiring the employer to demonstrate how job performance would be affected revealed an entirely different mindset from the Supreme Court. Instead of accepting the employer's rationale as legitimate, as the Supreme Court did, the court of appeals focused on whether Green was qualified to perform his job and worried aloud that allowing employers to articulate non-job-related subjective reasons would run into the arbitrary barrier *Griggs* was designed to eradicate.[93]

These different approaches reflect a point I have made in the past: it is not so much about the doctrine.[94] Functionally, the doctrine in the two courts was the same three-part proof structure, but the difference comes in the courts' perspectives on the validity of the actions, both Green's and the employer's. For the Supreme Court, Green's conduct was unlawful, and equally or perhaps more importantly, disruptive to the employer's operations, as most any effective protest would be. As a recent article documented, Justice Powell, the former head of the Richmond School Board, was particularly concerned with how campus protests had disrupted the order of things, and this concern likely influenced his opinion, which barely mentioned that Green was engaged in civil rights protests challenging McDonnell Douglas's discriminatory practices.[95] The majority on the court of appeals, on the other hand, wanted to know how the protests, lawful or otherwise, interfered with Green's ability to do his job. The two judges forming the majority opinion in the appellate court, and the concurring judge who concluded that Green should prevail on his claim in particular, viewed Green's activities as more noble and the employer's justification less relevant than did the Supreme Court.[96]

The court of appeals was also implicitly concerned with how plaintiffs, including Green, could meet the burden of proving the employer's subjective rationale was pretextual. In some cases, there might be a clear comparator of a different race, but that would be unlikely in a case like Green's—a case in which outcome would turn on how the court, or now a jury, views the different actions. As soon as Green's conduct was defined as unlawful, illegal, and disruptive, the Supreme Court signaled that the employer's justification was both legitimate and nondiscriminatory, just as the dissenting judge in the lower court had concluded.[97]

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93. *Id.* at 343.

94. *See* Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 285 (1997) (discussing how the Court's normative vision drives results).

95. *See* Asad Rahim, *Diversity to Deradicalize*, 108 CALIF. L. REV. 1423, 1427, 1445 (2020) (discussing Justice Powell's Memorandum titled *Civil Disobedience: Prelude to Revolution?*).

96. In his concurrence, Judge Lay introduced what would now be called a mixed-motive claim by noting that to the extent the employer was concerned about "lawful picketing activities" that should be defined as discrimination. *Green*, 463 F.2d at 345 (Lay, J., concurring).

97. *Id.* at 349 (Johnsen, J., dissenting in part): ("[O]ne who has committed such unlawful deeds against some business and then seeks to be hired by it, does not, in my opinion, stand in any different position or have any right to different treatment because he is a black, than if he were a white, in relation to the right of refusal to hire him."). One of the lost aspects of the case is that the court of appeals determined that Green's actions were not protected

And in fact, that is what predictably happened on remand, where Green's comparators, employees who walked off the job in a contract dispute, were rejected as not comparable.[98] Under the approach adopted by the court of appeals, even in the softened version of the modified opinion, the employer would have had to explain how Green's protests affected his job performance, a position that would have put teeth into what is now seen as a relatively toothless second step of the proof process. In this way, the appellate court sought to apply the business necessity test developed in *Griggs* to all hiring practices, regardless of how the underlying theory was framed.[99]

C. Subjective Employment Practices: **Furnco Construction Corp. v. Waters**

A handful of other early cases yielded mixed results. Two important cases involving the meaning of discrimination turned on statistical proof. One case involved the lack of African-American long-haul truck drivers in union facilities, and the other concerned the absence of African-American teachers in a suburb outside of St. Louis.[100] In both cases, the Court upheld the use of statistics to prove pattern or practice claims, incorporating some of the analysis from a jury discrimination claim decided in the same term.[101] Oddly enough, the Supreme Court has never returned to the pattern-or-practice cases or elaborated on the nature of the statistical cases, though it has indirectly addressed similar issues.[102]

Although the Court's decisions on the use of statistical analyses were beneficial to plaintiffs, the Court moved in an entirely different direction the following year in a case that has now been largely forgotten but which, at the time, had the potential to provide far greater judicial scrutiny to employer practices. The case involved a construction company that did not accept applications or hire people who showed up at the gate, as was common in some construction sites, but instead delegated hiring to a supervisor who in turn hired individuals he knew or who were friends of friends, what is known as word-of-mouth recruiting or hiring.[103] The foreman who was responsible for hiring worked off a list of individuals he personally

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under the retaliation provision of Title VII, a conclusion that was not appealed even though, at least by contemporary standards, it was likely erroneous. *See* David Benjamin Oppenheimer, McDonnell Douglas Corp. v. Green *Revisited: Why Non-Violent Civil Disobedience Should Be Protected from Retaliation by Title VII*, 34 COLUM. HUM. RTS. L. REV. 635, 640 (2003).

98. *See* Green v. McDonnell Douglas Corp., 390 F. Supp. 501, 504 (E.D. Mo. 1975) (rejecting comparators), *aff'd*, 528 F.2d 1102 (8th Cir. 1976).

99. *See Green*, 463 F.2d at 343 (relying on Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971), to question the employer's rationale). The Supreme Court ultimately rejected the use of the *Griggs* test in this context. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 806 (1973).

100. *See* Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 329 (1977); Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 303–04 (1977).

101. *See* Castaneda v. Partida, 430 U.S. 482, 498–99 (1977).

102. *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 342, 352 (2011) (a pattern-or-practice case, but, in the Supreme Court, the issue was class certification).

103. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 570 (1978) (noting that the person in charge of hiring "did not accept applications at the jobsite, but instead hired only persons whom he knew to be experienced and competent in this type of work or persons who had been recommended to him as similarly skilled").

knew, and that list included only white men.[104] As is still common today, word-of-mouth recruiting frequently reproduces the existing demographic—white employees refer white employees, and it may also be the case that Black or Latino employees would refer members of their own race.[105] In this particular instance, the workforce consisted of predominantly white bricklayers even though the company purportedly sought to hire Black workers in response to prior discrimination charges.[106]

The case arose in the early years of Title VII, and there was clearly some confusion regarding the nature of the plaintiff's claim. Eight individuals sued but did not seek class status, and some of the plaintiffs were hired at a point but ended up working fewer days than white workers.[107] The district court dismissed the case in its entirety, but on appeal, the Seventh Circuit focused its attention on how the employer's practice perpetuated a segregated workforce. The court wrote:

> The historical inequality of treatment of black workers seems to us to establish that it is prima facie racial discrimination to refuse to consider the qualifications of a black job seeker before hiring from an approved list containing only the names of white bricklayers. How else will qualified black applicants be able to overcome the racial imbalance in a particular craft, itself the result of past discrimination?[108]

In addition, the court questioned the employer's subjective hiring practice, as was growing more common in lower courts at the time, and called for the employer to accept applications, which the court referred to as a "middle ground" between hiring those who showed up at the gate and hiring through word of mouth.[109] In its

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104. The court of appeals stated: "[Superintendent] Dacies was expected to hire bricklayers in whom he had confidence, and he had a list of bricklayers with whom he had worked on previous jobs. The bricklayers whose names he had from this source were all white, although he had occasionally worked with black bricklayers." Waters v. Furnco Constr. Corp., 551 F.2d 1085, 1086 (7th Cir. 1977). The court later reiterated that he was using an "approved list containing only the names of white bricklayers." *Id.* at 1089.

105. *See, e.g.*, Laurel Kalser, *Employer Settles DOL Claim It Filled Jobs by Word of Mouth, Resulting in Racial Disparities*, HRDIVE (May 9, 2022), https://www.hrdive.com/news/employer-settles-dol-claim-it-filled-jobs-by-word-of-mouth-resulting-in-ra/623384/ [https://perma.cc/H98D-TUAA]. Subjective employment practices, such as word-of-mouth recruiting, have been the subject of a vast literature. For a recent discussion, see Catherine Albiston & Tristin K. Green, *Social Closure Discrimination*, 39 BERKELEY J. EMP. & LAB. L. 1, 19–21 (2018).

106. The court of appeals noted that 4 of the 41 bricklayers hired for a project in 1971 were Black. *See Waters*, 551 F.2d at 1086–87. The company subsequently hired several Black bricklayers who had previously brought discrimination charges. *Id.* at 1087.

107. *Id.* at 1086 ("Plaintiffs are eight black bricklayers who allegedly sought employment on a firebrick job . . . ."); *id.* at 1089 (noting the "[w]hite bricklayers also tended to be employed earlier and therefore obtained the longer lasting and more profitable jobs.").

108. *Id.* at 1089.

109. *Id.* at 1088 ("It seems to us that there is a reasonable middle ground between immediate hiring decisions on the spot and seeking out employees from among those known to the superintendent. A written application could be taken, with inquiry as to qualifications and experience.").

opinion, the court of appeals also noted that "subjective procedures lend themselves to arbitrary and discriminatory hiring."[110] This was a conclusion that many lower courts had reached: namely that discretion and subjective practices were often vehicles for discrimination.[111] Critical to the appellate opinion was the court's recognition that the employer's subjective hiring practice would likely further the hiring system that had been in place prior to the Act and that had perpetrated a nearly all-white workforce: the same concern that underlaid the Court's *Griggs* decision. Borrowing from the emerging disparate impact theory, and similar to what the appellate court had required in the *McDonnell Douglas* case, the court also noted that the employer had never explained why its practice was necessary, legitimate, or even preferred.[112]

The Supreme Court, in another relatively short opinion, unanimously rejected the appellate court's approach, concluding that it was based on a mistaken reading of the Court's prior decision in *McDonnell Douglas*. In a curious move, the Court began its opinion by mischaracterizing the lower court opinion, stating that the court had required the employer to adopt practices that would maximize the hiring of minority employees.[113] That was not, however, what the appellate court had required, and it is difficult to see how the Supreme Court could have construed the opinion in that way.[114] Rather, what the appellate court had suggested was that taking applications would be the appropriate course, not necessarily a course that would maximize minority hires but one that would serve the employer's interests while likely opening up opportunities for minority bricklayers.[115] Nevertheless, the Supreme Court held: "Title VII prohibits [the employer] from having as a goal a work force selected by any proscribed discriminatory practice, but it does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees."[116] The Court went on to note, in what has now become a mantra throughout

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110. *Id.* at 1089 (quoting Reed v. Arlington Hotel Co., 476 F.2d 721, 724 (8th Cir. 1973)).

111. *See* Rogers v. Int'l Paper Co., 510 F.2d 1340, 1345 (8th Cir. 1975) (noting that while subjective practices are not illegal per se, "it is especially important for courts to be sensitive to possible bias . . . arising from subjective definition of employment criteria"), *judgment vacated on different grounds*, Rogers v. Int'l Paper Co., 423 U.S. 809 (1975); Pettway v. Am. Cast Iron Pipe Co., 494 F.2d 211, 232 n.47 (5th Cir. 1974) ("Courts have condemned procedures for promotion and job assignment which are not objective and uniform."). *See also* Moore v. Bd of Educ. of the Chidester Sch. Dist. No. 59, 448 F.2d 709, 713 (8th Cir. 1971); United States v. N.L. Indus., Inc., 479 F.2d 354, 372 (8th Cir. 1973).

112. *Waters*, 551 F.2d at 1088–89 (discussing Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

113. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978) ("The Court of Appeals, as we read its opinion, thought Furnco's hiring procedures not only must be reasonably related to the achievement of some legitimate purpose, but also must be the method which allows the employer to consider the qualifications of the largest number of minority applicants.").

114. The Supreme Court did not provide any citation for its conclusion. *See id.* at 578.

115. *Waters*, 551 F.2d at 1089 (noting that the method used by the defendants "relying on [the] recollections of the brick superintendent and recommendations he accepted from others, was by its nature haphazard, arbitrary, and subjective").

116. *Furnco Constr. Corp.*, 438 U.S. at 577–78.

employment law: "Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it."[117]

Here, less than a decade into the development of Title VII, the Court had forsaken its concern for integrating African Americans into the workforce after the many decades of overt segregation, choosing instead to defer to an employer's judgment even when that judgment produced an overwhelmingly white workforce. And unlike the appellate courts, the Supreme Court never seemed particularly concerned about the use of subjective employment practices but rather saw them as common and presumably valid.[118] As noted previously, one of the curious parts of the case was the general confusion regarding what the underlying basis for the claim was, and in some ways, the court of appeals analysis better fit within the disparate impact framework. If one assumes that the word-of-mouth hiring would have a disparate impact on Black workers, as is evident by the makeup of the workforce, then the employer would have an opportunity to justify its practice under the developing business necessity test. This is where the lower court inserted its concern for the subjective practices. Similarly, under disparate impact law, as discussed previously, a plaintiff has the opportunity to suggest an alternative practice that would serve the employer's needs while reducing adverse impact; effectively, the employer is then required to demonstrate why it will not adopt the alternative, including by showing it would not be as effective or would be more costly. In fact, in the lower courts, the plaintiffs pursued their case under both a disparate treatment and disparate impact theory, and in their concurring opinion, Justices Marshall and Brennan suggested that the disparate impact theory would be appropriate and still available on remand.[119]

Nevertheless, by 1978, less than a decade after the first cases made their way to the Supreme Court, the Court appeared more concerned with the interests of employers and, as we will see momentarily, the established rights of white workers, rather than the Black workers who were indisputably the primary intended beneficiaries of the Act. Just as was true in *McDonnell Douglas*, where the Court all but voted to uphold the employer's decision not to hire Green, here the Court deferred to the employer's—an employer that had previously been held liable for racial discrimination—preferred hiring practice despite the likelihood of that practice leading to biased decisions.

III. WHITES AND CIVIL RIGHTS LAWS

As is evident from the prior discussion, the interests of whites, particularly white employees, were always present in the cases, whether they had to do with potential issues relating to affirmative action or the use of subjective employment

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117. *Id.* at 578.

118. A decade later, while the Supreme Court held that the disparate impact theory could be applied to subjective employment practices, it also made clear that "it may be customary and quite reasonable simply to delegate employment decisions to those employees who are most familiar with the jobs to be filled and with the candidates for those jobs." Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 990 (1988).

119. *Furnco Constr. Corp.*, 438 U.S. at 583–84 (Marshall, J., concurring in part and dissenting in part).

practices that benefitted white men. The seniority issue, discussed in detail below, also directly pitted the interests of white workers against Black workers, and it is no spoiler to note that ultimately the Supreme Court chose to protect the rights of whites. In addition, even in the early years, white men began to file suit under the Civil Rights Acts, raising the question whether the statutes included whites within their protective scope. This was a question that lower courts had split on, but the Supreme Court moved forward even though—as will also prove true on the seniority question—it had to engage in some linguistic gymnastics to reach its conclusions. In this Part, I will first take up the question of whether the Civil Rights Acts covered whites and then move to the seniority issue.

A. White Men and the Civil Rights Acts

A case that involved the scope of the statutes arose early on, raising the question of whether whites were protected under Title VII or the Reconstruction-era statute known as section 1981.[120] The case that eventually made its way to the Supreme Court began in 1970 after three workers were charged with misappropriating sixty cans of antifreeze. The two white individuals who were involved were fired in 1969 while the Black individual was retained.[121] The white individuals sued under both statutes, arguing that they were the victims of discrimination.

Although we now take for granted that these laws apply to whites, it was an open question in the early development of civil rights law, and a number of lower courts had held that whites were not covered by the statutes.[122] Indeed, in the particular case, both the district court and the Fifth Circuit Court of Appeals held that whites were not beneficiaries of the statutes and therefore could not pursue their claims.[123] Although the Fifth Circuit opinion simply affirmed the lower court, the panel included the esteemed Judge John Minor Wisdom.

By the time the case reached the Supreme Court, there was a general consensus that the language of Title VII included whites based both on the statutory language, which left little room to exclude whites from coverage, and the fact that the EEOC had consistently interpreted Title VII to apply to white individuals.[124] Although the Court struggled with some procedural issues, its decision, written by

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120. 42 U.S.C. § 1981.

121. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 275–76 (1976).

122. *See, e.g.*, Perkins v. Banster, 190 F. Supp. 98, 99 (D. Md. 1960), *aff'd*, 285 F.2d 426 (4th Cir. 1960); Kurylas v. U.S. Dep't of Agric., 373 F. Supp. 1072, 1075–76 (D.D.C. 1974), *aff'd*, 514 F.2d 894, 894 (D.C. Cir. 1975); Van Hoomissen v. Xerox Corp., 368 F. Supp. 829, 839–40 (N.D. Cal. 1973). Other courts had held the contrary. *See, e.g.*, Gannon v. Action, 303 F. Supp. 1240, 1244 (E.D. Mo. 1969), *aff'd in part*, *remanded in part on other grounds*, 450 F.2d 1227, 1238 (8th Cir. 1971). Oddly enough, Judge Bue, who issued the opinion in *McDonald*, reversed himself while the case was before the Supreme Court. *See* Spiess v. C. Itoh & Co., 408 F. Supp. 916, 918 (S.D. Tex. 1976) (holding that section 1981 applies to whites).

123. *See* McDonald v. Santa Fe Trail Transp. Co., No. 71-H-891, 1974 WL 10598 (S.D. Tex. June 13, 1974); McDonald v. Santa Fe Trail Transp. Co., 513 F.2d 90, 90 (5th Cir. 1975) (per curiam).

124. *Santa Fe Trail Transp. Co.*, 427 U.S. at 279–80 (citing EEOC decision).

Justice Marshall, included scant discussion regarding the purpose behind the Statute. Instead, the Court simply held that whites could pursue claims under Title VII.[125]

Section 1981, however, presented a far more difficult statute for interpretation. Section 1981 was passed in 1866 as part of a series of civil rights statutes that were clearly intended to provide protections to African Americans following the Civil War.[126] The statutory language seemed to exclude whites from its coverage, given that the Act was designed to ensure African Americans had the same rights "enjoyed by white citizens."[127] On its face, it is hard to see how white individuals could be guaranteed to have rights equal to white citizens; the language would not just be redundant but nonsensical. It is equally hard to understand how Congress could have thought that whites needed protection immediately following the Civil War or why President Andrew Johnson would have vetoed the Statute (his veto was overridden) if it provided rights to whites.[128]

Here Justice Powell's papers are revealing, particularly the memorandum drafted by one of his law clerks. In that memorandum, the clerk begins by noting that "[u]nlike the case with Title VII, where the words of the Statute virtually compel the conclusion that whites are covered, the language of § 1981 points in the opposite direction."[129] The clerk then added that "[s]ection 1981 on its face appears intended to bestow rights on all races except the white race."[130] A plain or natural reading would lead one to conclude that white individuals were not covered by the Statute. The only plausible evidence to the contrary consisted of several statements by senators who, while debating different language, suggested that whites would be protected by the Statute.[131] But the language regarding the rights enjoyed by white persons was added in the House after the Senate debate, so it is hard to see how any statements from the Senate on different language would be relevant to the final

125. *Id.*

126. See George Rutherglen, *The Improbable History of Section 1981: Clio Still Bemused and Confused*, 2003 SUP. CT. REV. 303, 307–12 (2004), for a discussion of the history as it related to a subsequent case.

127. Subsection 1981(a) guarantees the following rights:

> [T]o make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981(a).

128. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 245–51 (Henry Steele Commager & Richard B. Morris eds., 1988) (discussing veto of the Civil Rights Act).

129. Lewis F. Powell, Jr., Bobtail Memorandum, McDonald v. Santa Fe Trail Transp. Co. (Apr. 8, 1976), *in* LEWIS F. POWELL PAPERS, 26, https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1677&context=casefiles [https://perma.cc/LAE3-X65Q] [hereinafter Bobtail Memorandum].

130. *Id.*

131. The Supreme Court relied on these statements. *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 290 (citing statements of Senators Davis and Trumbull on the original version of the bill that did not include the language relating to "white citizens").

statutory language.[132] What is most revealing, however, is the following pronouncement in the law clerk's memorandum that arrives five pages later, after the clerk analyzes the various arguments advanced by the parties: "I am forced to admit," the clerk writes, "that [the defendant's] argument against coverage of whites is quite strong. Nevertheless, my present inclination would be to hold that § 1981 does protect whites."[133]

The clerk's language indicates how far the law had moved in such a short period of time. The clerk notes that he was "forced" to admit this, suggesting that he did so reluctantly, presumably because he desired or thought that the statute should be applied to whites. In 1975, this should have been seen as a remarkable step, particularly as to an interpretation of a century-old statute where the law clerk admitted that the language went in the opposite direction. The clerk's reasoning was also hopelessly flawed. Here is what he had to say: "My thinking is that, while it's probably true that the 1866 Congress had blacks in mind due to the temper of the times, if they had stopped to think about it they would have wanted whites to be protected, too."[134] The temper of the times? And even though at the time the clerk wrote his memorandum, plain language and originalism had not gripped the Court quite as fiercely as they have today, there is no theory of interpretation that would have supported implying intent based on what Congress would have done if it had thought matters through.

And yet the Supreme Court adopted this approach in a short opinion that barely wrestled with the statutory language. Although the Court acknowledged that what it referred to as a "mechanical reading" of the statutory language supported the exclusion of white individuals from its coverage, an earlier case had defined the language simply as emphasizing "the racial character of the rights being protected."[135] From there the Court relied on the statements from senators regarding the Statute and added that the language inserted into the bill in the House regarding "white citizens" was intended only to "perfect" or clarify the language rather than alter the scope intended by the Senate.[136] The Court also noted that the Senate sponsor, Senator Trumbull, considered the added words to be "superfluous."[137] In the end, the Court apparently agreed with this interpretation because it never sought to reconcile how a statute could ensure that whites had the same rights as whites.

The Court's interpretation was clearly tortured, and the fact that it was written by Justice Marshall adds a curious element to the case. It may have been that the mistaken but perceived insignificance of section 1981 led to the Court simply seeking to harmonize the scope with Title VII even when the language failed to

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132. The Supreme Court acknowledged as much. *See id.* at 291–92.

133. Bobtail Memorandum, *supra* note 129, at 31.

134. *Id.*

135. *McDonald*, 427 U.S. at 287 (quoting Georgia v. Rachel, 384 U.S. 780, 791 (1966)).

136. *Id.* at 290–91 (noting that the amendment to section 1981 "was offered explicitly to technically 'perfect' the bill").

137. *Id.* at 295.

support such an interpretation.[138] One might also find some additional insight into the Court's interpretation from the Powell papers. After the draft opinion was circulated, only two issues sparked any discussion. One had to do with whether the filing and timing of the EEOC charge was jurisdictional, an issue that was not directly present in the case but dealt with in a footnote that was later deleted before the final opinion was published.[139] More significantly, Justice Marshall had inserted a footnote seeking to distinguish voluntary affirmative action plans from a circumstance like what occurred in the *McDonald v. Santa Fe* case where three individuals had all committed the same offense but race may have explained why one Black employee was retained while the white employees were dismissed.[140] Justice Marshall declined to remove that footnote, which was footnote eight in the final opinion, stating that nothing in the Court's opinion would necessarily apply to voluntary affirmative action programs.[141] It may be that, given the unanimous agreement on the Court that section 1981 applied to whites, Justice Marshall sought to write an opinion that did the least amount of damage, especially since it had become clear that Title VII was now the predominant statute for claims of employment discrimination, even though section 1981 has always provided substantially better remedies for plaintiffs.[142]

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138. In a memorandum to Justice Powell, a clerk made this point, stating: "Given the existence of Title VII, . . . § 1981 is likely to be used only where the plaintiff has failed for some reason to satisfy the exhaustion requirements of Title VII." Lewis F. Powell, Jr., Preliminary Memorandum, McDonald v. Santa Fe Trail Transp. Co. (Oct. 31, 1975), *in* LEWIS F. POWELL PAPERS, 7, https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1677&context=casefiles [https://perma.cc/LAE3-X65Q].

139. The footnote concerned the timing of EEOC suits, something the district court had addressed but that was not present in the Supreme Court. Justice John Paul Stevens objected to the footnote, and Justice Powell later noted his agreement with the objection. *See* Lewis F. Powell, Jr., Memorandum from Justice Stevens to Justice Marshall, McDonald v. Santa Fe Trail Transp. Co. (June 14, 1976), *in* LEWIS F. POWELL PAPERS, 71, https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1677&context=casefiles [https://perma.cc/LAE3-X65Q] [hereinafter Stevens & Marshall, JJ., Memorandum]; Lewis F. Powell, Jr., Memorandum from Justice Powell to Justice Marshall, McDonald v. Santa Fe Trail Transp. Co. (June 15, 1976), *in* LEWIS F. POWELL PAPERS, 80, https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1677&context=casefiles [https://perma.cc/LAE3-X65Q].

140. In his short Memorandum to Justice Marshall, Justice Stevens wrote:

> I think we are kidding ourselves in footnote 9 to the extent that you disavow consideration of the validity of a voluntary affirmative action program. I agree that a judicially required program would not be covered, but the reasoning in the text will surely support the typical reverse discrimination claim which any quota system will stimulate.

Stevens & Marshall, JJ., Memorandum, *supra* note 139. Affirmative action, it seems, was always on the minds of the justices even when it had no application to the case.

141. *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280 n.8 (1976) ("Santa Fe disclaims that the actions challenged here were any part of an affirmative action program, . . . and we emphasize that we do not consider here the permissibility of such a program, whether judicially required or otherwise prompted.").

142. At the time, remedies under Title VII were limited to equitable relief, essentially backpay and lost jobs, while section 1981 provided for broader relief, including punitive and compensatory damages. *See* 42 U.S.C. § 1981.

Here again we see how in less than a decade, when battles over busing and civil rights were raging in the country, the purpose of the statutes had quickly become distorted with virtually no objection or discussion. It also shows how affirmative action was always lurking in the background, almost as if, even so early in the Act's development, it was a principal evil the Act might bring about. An interesting article by two lawyers who worked for a railroad that was the defendant in the *McDonald* case questioned what employers who supported diversifying their workforces were supposed to do, estimating that without some forms of voluntary affirmative action, it would likely take 25 to 40 years to integrate a workforce.[143]

B. The Seniority Issue

No employment issue consumed more time in the courts than the question ofwhat to do about seniority in workplaces that were moving from segregated job lines to greater equal opportunity.[144] In many respects, the underlying issue shared commonality with the disparate impact theory. Just as was true with the implementation of tests that could keep Black workers out of certain jobs, the seniority issue also provided a barrier to advancement for many Black workers, given that prior to the passage of the Civil Rights Act, whites held virtually all of the desirable jobs. The cases, and there were many, typically involved previously segregated workplaces with unions in place.[145] For unions, seniority is perceived as an important workplace condition because it encourages workers to stay at a company—which is in the union's interests because it does not have to worry about losing support—and it takes away managerial discretion by providing an objective measure for promotions and layoffs; a central goal of unions is to reduce managerial power and discretion.[146]

The issue arose in these cases because, prior to the passage of the Act, many employers segregated their workforces, limiting Black workers to the least desirable

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143. *See* Shelley J. Venick & Ronald A. Lane, *Doubling the Price of Past Discrimination: The Employer's Burden After* McDonald v. Santa Fe Trial Transportation Co., 8 LOY. U. CHI. L.J. 789, 802 (1977).

144. The issue also attracted a substantial amount of scholarship. *See, e.g.*, 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, 1601 (1969); Alfred W. Blumrosen, *Seniority and Equal Employment Opportunity: A Glimmer of Hope*, 23 RUTGERS L. REV. 268, 269 (1969); Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 HARV. L. REV. 1260, 1260 (1967); William B. Gould, *Seniority and the Black Worker: Reflections on* Quarles *and Its Implications*, 47 TEX. L. REV. 1039, 1039 (1969).

145. *See, e.g.*, Patterson v. Am. Tobacco Co., 535 F.2d 257, 262 (4th Cir. 1976); United States v. Chesapeake & Ohio Ry. Co., 471 F.2d 582, 584 (4th Cir. 1972); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971). Unions were often defendants in the cases and often had their own past and present history of discrimination concerning Black workers. *See* Herbert Hill, *The Problem of Race in American Labor History*, 24 REVS. AM. HIST. 189, 195 (1996) ("While not all white workers and their labor unions engaged in the same discriminatory practices at all times and places, racial subordination in many different forms became a major characteristic of the most important and enduring labor organizations.").

146. *See, e.g.*, Roger I. Abrams & Dennis R. Nolan, *Seniority Rights Under the Collective Agreement*, 2 LAB. LAW. 99, 100 (1986) ("Where seniority is widespread and decisive, the union gains significant job control.").

jobs (as was true in the *Griggs* case). The companies also had seniority systems to govern personnel decisions, but those systems were generally department- rather than plant-based. What that meant as a practical matter is that after the Act opened up jobs to African Americans, any African American who sought to move into a previously restricted job—which was almost always a better job—would forfeit whatever seniority they had built up, starting at the bottom of the new ladder.[147] Given that the formerly white jobs generally, though not always, paid better than the best of the formerly Black jobs, moving to a new position may still have made financial sense, but it also made Black workers vulnerable to layoffs when they were at the bottom of a new job ladder. As a result, many early cases challenged the seniority systems as discriminatory because they perpetrated past discrimination even while they were ostensibly facially neutral.[148]

There was also a complicating statutory provision contained within the Act that protected "bona fide seniority systems"; one question the cases posed is whether a segregated system that was established prior to the passage of the Act should be considered bona fide given that it could have the effect of locking out minority workers from more desirable positions.[149] The issue arose in two different but related contexts. One was a challenge to the seniority system itself as violating the Act by perpetuating discrimination, while the other involved a remedial question regarding how seniority should be calculated for those who were the victims of discrimination. Although these issues were present in a number of cases that came before the Court, it ultimately addressed them in two cases in the mid-1970s, first taking on the remedial issue.

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147. One circuit court explained:

> [U]nder the present method of job assignments, a black employee hired in 1955 at the Richmond branch prefabrication department has no realistic opportunity to secure a higher paying job in the formerly white Virginia fabrication department because he cannot transfer his company seniority to the Virginia branch. If he seeks a new job there, he must forfeit his seniority and start as a new hire.

Patterson, 535 F.2d at 265.

148. *See supra* note 145. The Kerner Commission Report had likewise noted that "the concentration of male Negro employment at the lowest end of the occupational scale . . . is the single most important source of poverty among Negroes." COBB, *supra* note 24, at 125.

149. The specific language is:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

42 U.S.C. 2000e-2(h).

C. Remedial Issue: **Franks v. Bowman Transportation Co.**

Franks v. Bowman Transportation Co. was a seniority case involving a union and a trucking company located in the South. The company had formally segregated its workforce prior to 1968 and, like so many subsequent cases, the question was how seniority should be treated when it came to promotions or layoffs.[150] As the economy soured in the 1970s, the question of layoffs became particularly important because the standard policy of last hired, first fired would have led to the recently hired African-American employees being laid off, largely returning to the past practice where white workers held all of the desirable jobs.[151] The *Franks* case was a complicated class action with several sub-classes, but by the time the case reached the Supreme Court the remaining plaintiffs were a group of Black individuals who had been discriminated against in the hiring process, and the primary question was whether retroactive seniority was a permissible remedy.[152] Had they been hired when they originally applied, the Black applicants would have begun accruing seniority on the day they began work; the plaintiffs argued that they should be entitled, as part of their remedy for identified discrimination, to seniority based on the date they should have been hired.[153] If this argument were adopted, it would mean that at least some of the Black employees would be placed ahead of existing white employees, though, in the language of the lower courts, they would have been in their "rightful" place—the place into which they should have been hired.[154]

The legal issue was whether retroactive seniority was a permissible remedy given the statutory provision that protected bona fide seniority systems. The seniority system at issue, and seniority systems generally, were not implemented with discriminatory motive, presumably because there was no need to do so in a segregated workplace with departmental seniority. One of the important aspects of this case, which seems to have been glossed over, was that the employer had been found liable for discrimination.[155] This was not, in other words, a voluntary program or one that arose from a settlement; instead, the plaintiffs were all identified victims of discrimination who were simply seeking the seniority that they would have had if they had not been discriminated against.

The lower court essentially divided the plaintiff classes into those who already worked at the plant but had been discriminatorily denied transfers to better jobs and those who had failed to obtain jobs due to discrimination. It concluded that

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150. Franks v. Bowman Transp. Co., 424 U.S. 747, 766–77 (1976).

151. Seniority typically determined who was laid off and later recalled, as it did in the *Franks* case. *See id.* at 768 ("Seniority standing in employment with respondent Bowman . . . determines the order of layoff and recall of employees."). See Caroline Poplin, *Fair Employment in a Depressed Economy: The Layoff Problem*, 23 UCLA L. REV. 177 (1975), for a discussion of seniority issues arising during the economic downturn of the 1970s.

152. 424 U.S. at 752.

153. *Id.* at 768.

154. The "rightful place" theory appears to have originated in an early and influential Fifth Circuit opinion by Judge Wisdom. *See* Loc. 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980, 988 (5th Cir. 1969).

155. As the Supreme Court recounted: "Following trial, the District Court found that Bowman had engaged in a pattern of racial discrimination in various company policies, including the hiring, transfer, and discharge of employees." *Franks*, 424 U.S. at 751.

retroactive seniority was not an available remedy for the latter group in light of the statutory protection for bona fide seniority plans.[156] Other courts, however, had ordered retroactive seniority, and several even permitted bumping white employees out of jobs. As one court noted early on: "Adequate protection of Negro rights under Title VII may necessitate . . . some adjustment of the rights of white employees."[157] Several lower courts had also concluded that perpetuating the seniority systems that were established prior to the Act constituted intentional discrimination.[158]

The Supreme Court approached the case more narrowly, focusing only on whether retroactive seniority was an available remedy. In an opinion written by Justice Brennan, the Supreme Court held that retroactive seniority was permissible and generally required as part of make-whole relief.[159] At the same time, in what has become the generally recognized holding of the case, the Court also noted that white individuals should not be "bumped" from their existing jobs; at the same time, as a result of the application of seniority to those who had been discriminated against, some white individuals would likely have been laid off as a result of the seniority grant—but Black employees would not be entitled to the job they would have received had they not been discriminated against.[160]

As will be discussed momentarily, this was one interpretation of the seniority issue, and the Court would later expand on its approach. But what was most revealing about the case was Justice Powell's opinion dissenting on the mandatory nature of seniority relief. The opinion, joined by Justice Rehnquist and generally agreed to by Chief Justice Burger, was replete with references to the entrenched interests of incumbent employees who were repeatedly referred to as "innocent third parties." In rejecting the majority's approach, Justice Powell noted that "competitive seniority benefits [those relating to layoffs and promotions] directly implicate the rights and expectations of perfectly innocent employees,"[161] later adding that "the incumbents . . . would be seriously disadvantaged" through retroactive seniority for Black employees.[162] Not only did the dissent prioritize the rights of incumbent employees—some of whom had actively engaged in discrimination by refusing to work with Black colleagues—but there was a clear sense that the white employees were qualified for their positions as compared to, as noted in the bench memorandum, Black workers who had not actually worked for the employer.[163] Of course, the reason they had not worked for the employer was

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156. *See* Franks v. Bowman Transp. Co., 495 F.2d 398, 414–17 (5th Cir. 1974).

157. Vogler v. McCarty, Inc., 451 F.2d 1236, 1238 (5th Cir. 1971).

158. *See United Papermakers & Paperworkers*, 416 F.2d at 990 ("Job seniority, embodying as it does, the racially determined effects of a biased past, constitutes a form of present racial discrimination."); Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 517 (E.D. Va. 1968) (noting that seniority system "has its genesis in racial discrimination" and invalidating as intentional discrimination).

159. *Franks*, 424 U.S. at 766, 780.

160. The Court stated: "No claim is asserted that nondiscriminatee employees holding OTR [Over-the-Road] positions they would not have obtained but for the illegal discrimination should be deprived of the seniority status they have earned." *Id.* at 776.

161. *Id.* at 788 (Powell, J., concurring in part and dissenting in part).

162. *Id.* at 793 (Powell, J., concurring in part and dissenting in part).

163. *See* Bobtail Memorandum *supra* note 129.

because they had been discriminated against, though that did not seem to factor into the law clerk's analysis of the issue.

Although the Court afforded more relief than the lower courts had, other lower courts had gone significantly further by recognizing the harm a seniority system does to individuals who had previously been locked out of a plant through discrimination. Interestingly, in contrast to the white employees, in none of the Supreme Court opinions nor the bench memorandum were the Black individuals ever referred to as "innocent" parties, although they were at times referred to as "discriminatees."[164] There was also no discussion of how the white workers had clearly benefitted from discrimination or how many of them likely owed their jobs to the discriminatory system, without which more qualified African Americans likely would have been hired. Today we would likely discuss the issue as one involving white privilege, but even at that time other courts clearly recognized the inconsistency of protecting incumbent white employees over the victims of discrimination.[165] Several lower courts also required employers to justify the use of a seniority system under the business necessity test. As one court noted, "seniority is necessarily an inefficient means of assuring sufficient prior job experience," adding that more experienced employees should perform better on promotional exams if seniority was a legitimate qualification, a sentiment the Supreme Court never expressed.[166]

D. International Brotherhood of Teamsters v. United States

Whatever victory the *Franks* case represented for the plaintiffs was short-lived. The following year the Supreme Court took up an issue that had been percolating in the lower courts for a decade: whether seniority systems that perpetuated pre-Act discrimination were a violation of Title VII or whether they were preserved by the statutory provision protecting bona fide seniority systems. In a case that had many similarities to *Franks*, a trucking company had restricted Black and Spanish-surnamed employees to city driving positions, which were far less financially lucrative than what were known as over-the-road ("OTR") or long-distance driving positions, which were reserved for whites.[167] As was true in many other cases, the company and its union established a seniority system that was based on jobs rather than time at the company.[168] This meant that once the more desirable OTR jobs were opened up to Black employees, transferring to the new job would result in losing whatever seniority the employee had built up over the years and

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164. *Franks*, 424 U.S. at 757 (referring to a "group of discrimanatees").

165. *See, e.g.*, United States v. Bethlehem Steel Corp., 446 F.2d 652, 663 (2d Cir. 1971) ("Assuming arguendo that the expectations of some employees will not be met, their hopes arise from an illegal system."). *See also* Acha v. Beame, 531 F.2d 648, 657 (2d Cir. 1976) (Kaufman, J., concurring) (noting in a sex discrimination case that some male police officers place "high on the seniority list resulted from unfair discrimination at the expense of equally or more qualified females.").

166. Robinson v. Lorillard Corp., 444 F.2d 791, 799 (4th Cir. 1971).

167. Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 324–25 (1977).

168. *Id.* at 343–44.

might even require beginning at a lower salary.[169] Much like the tests at issue in *Griggs*, the seniority system could effectively "lock-out" minority employees from the more desirable jobs, thus providing a barrier to the overarching equality goals of Title VII.

On the other side of the equation were white employees who benefitted from the seniority system. If, for example, Black employees were able to maintain their plant seniority when they moved to a new job, some of them would likely be slotted in ahead of the white employees with less plant seniority. This could adversely affect their positions on bidding for promotions, obtaining new jobs, and avoiding layoffs. As a result, this was a clear clash between white and Black employees—allowing the seniority provision to stand would benefit whites, and only whites, while invalidating it would mostly, but not exclusively, benefit Black employees.[170] There were a number of other complicated issues in the case, but the seniority issue posed the clash between white and Black employees most clearly and in a way that differed from the remedial issue in *Franks*, where only a more limited group of identified victims of discrimination would benefit by the remedial seniority order.

As noted, this issue arose in the very early years of the development of Title VII, and by the time the case reached the Supreme Court, every court of appeals to have addressed the issue had held that a seniority system that perpetuated pre-Act discrimination was a per se violation of Title VII.[171] This was true even though all courts agreed that pre-Act discrimination was not covered by the Statute and that, in general, the seniority systems were not established with an intent to discriminate, though a number of courts raised questions about why the companies had opted for job-based rather than plant-based seniority. In fact, in a number of cases, lower courts ordered that companies abandon job seniority in favor of company seniority.[172] More significantly, all of the lower courts concluded that a seniority system that perpetuates pre-Act discrimination is not a bona fide seniority system

169. *Id.* at 344 ("The practical effect is that a city driver or serviceman who transfers to a line-driver job must forfeit all the competitive seniority he has accumulated in his previous bargaining unit and start at the bottom of the line drivers' 'board.'").

170. The Court noted that while all of the Black drivers were city drivers, there were also whites who held those positions. *Id.* at 356 ("The city drivers and servicemen who are discouraged from transferring to line-driver jobs are not all Negroes or Spanish-surnamed Americans; to the contrary, the overwhelming majority are white.").

171. The first case to address the issue was an influential district court opinion that invalidated a departmental system "that had its genesis in racial discrimination." Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 517 (E.D. Va. 1968). Subsequently, all of the courts of appeals adopted the *Quarles* analysis. *See* Loc. 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980, 987–88 (5th Cir. 1969); United States v. Sheet Metal Workers, Int'l Ass'n, 416 F.2d 123, 131 (8th Cir. 1969); United States v. Bethlehem Steel Corp., 446 F.2d 652, 658–59 (2d Cir. 1971); United States v. Chesapeake & Ohio Ry. Co., 471 F.2d 582, 587 (4th Cir. 1972).

172. *See, e.g.*, *Chesapeake & Ohio Ry. Co.*, 471 F.2d at 591; Robinson v. Lorillard Corp., 444 F.2d 791, 799–800 (4th Cir. 1971).

and therefore was not saved by the statutory clause protecting bona fide systems.[173] The Justice Department, which was the plaintiff in the *Teamsters* case, likewise argued that the job-based seniority system for firms that had previously segregated their jobs violated the Act.[174]

In a rather dry opinion written by Justice Stewart, the Court sided with the white employees and therefore rejected the analysis of every court of appeals. The Court began its analysis by acknowledging that the seniority system benefitted white employees, noting that the line drivers with the longest tenures were "without exception white."[175] The Court added, apparently without irony or concern, that the system "does in a very real sense 'operate to "freeze" the status quo of prior discriminatory employment practices.'"[176] Despite these facts, the Court went on to conclude that the system was bona fide and therefore protected under the Statute.

To reach that conclusion, the Court had to take a circuitous route. It noted, as it did in *Franks*, that the system was not set up with discriminatory intent, again overlooking the fact that there was no need to do so given the segregated job lines.[177] Certainly the Court could have held, as lower courts did, that the presence of segregated job lines rendered the seniority system discriminatory from its inception, and the refusal to change it constituted contemporary discrimination that was covered by the Statute.[178] Instead, the Court turned to legislative history to determine what the statute meant by a bona fide seniority system—but the legislative history was convoluted, and the Court primarily relied on statements of legislators discussing the importance of seniority systems that occurred prior to the introduction of the section and were not related in any way to the statutory provision on seniority systems, a fact the Court conceded.[179] The Court nevertheless suggested that the legislators' comments regarding the importance of seniority prompted the addition of the statutory section that became 703(h), even though the Court had no citations

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173. *See* Patterson v. Am. Tobacco Co., 535 F.2d 257, 266 (4th Cir. 1976) ("Past intentional segregation that is perpetuated by a company's seniority system precludes it from claiming that its system is bona fide within the meaning of s[ection] 2000e-2(h)."); United States v. N. L. Indus., Inc., 479 F.2d 354, 364 (8th Cir. 1973) (system that perpetuated past discrimination was not bona fide); *United Papermakers & Paperworkers*, 416 F.2d at 988 ("Nothing in § 703(h), or in its legislative history suggests that a racially discriminatory seniority system established before the act is a bona fide seniority system under the act.").

174. Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 346 (1977) ("The Government responds that a seniority system that perpetuates the effects of prior discrimination . . . can never be 'bona fide' under [§] 703(h).").

175. *Id.* at 350.

176. *Id.* Here, the Court was quoting from what appears to be an appellate court but did not provide any citation.

177. *Id.* at 356 ("It is conceded that the seniority system did not have its genesis in racial discrimination.").

178. *See, e.g.*, *United Papermakers & Paperworkers*, 416 F.2d at 997 ("The requisite intent may be inferred from the fact that the defendants persisted in the conduct after its racial implications had become known to them.").

179. After discussing the statements of legislators, the Court noted, "[w]hile these statements were made before [§] 703(h) was added to Title VII, they are authoritative indicators of that section's purpose." *Teamsters*, 431 U.S. at 352.

or other indication that this was, in fact, true.[180] The Court went on, again without citation, to note that: "[i]t is inconceivable that [§] 703(h) . . . was intended to vitiate the earlier representations of the Act's supporters by increasing Title VII's impact on seniority systems."[181] Inconceivable to a majority of the Supreme Court perhaps, but not to all of the courts of appeals or the Justice Department. And as one final ironic proclamation, the Court stated, in defining the system as "bona fide," that the system "applie[d] equally to all races and ethnic groups."[182] In another curious twist, the Court also noted that many of the city drivers were white, noting further that they were also disadvantaged by the seniority system—but surely the Court was aware that those white line drivers were not discriminatorily denied opportunities to be OTR drivers and were likely either unqualified or uninterested in those better paying positions.[183] At a minimum, one would expect the Court would recognize a difference between those who were excluded from jobs because of their race and those who did not hold such jobs for other race-neutral reasons.

It was later in the opinion that the Court made clear that it was choosing to protect the seniority rights of white incumbent employees at the expense of Black and Spanish-surnamed workers.[184] The Court said to do otherwise "would place an affirmative obligation on the parties to the seniority agreement to subordinate [the rights of white incumbent employees] in favor of the claims of pre-Act discriminatees without seniority."[185] That is true as far as it goes, but the Court never addressed how prioritizing the rights of incumbent white employees would likely freeze out Black employees from the more desirable jobs and thus subvert the purpose of Title VII, an issue that was central to many of the lower court decisions dating to the late 1960s and central to the Court's decision in *Griggs*.

Although the majority opinion was mechanical in nature—the Statute protects bona fide seniority systems, and this is a bona fide system because it was not established with discriminatory intent—Justice Powell's papers again reveal the concerns that seemed to inform the Court's opinion. On a draft opinion by Justice Stewart, Justice Powell filled the margins with concerns about the qualifications of Black employees and the vested rights of the white incumbents.[186] In a memorandum

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180. Here is what the Court had to say in full on the issue:

> It is apparent that [§] 703(h) was drafted with an eye toward meeting the earlier criticism on this issue with an explicit provision embodying the understanding and assurances of the Act's proponents, namely, that Title VII would not outlaw such differences in treatment among employees as flowed from a bona fide seniority system that allowed for full exercise of seniority accumulated before the effective date of the Act.

Id. at 352. The Court failed to provide a citation for any of that material.

181. *Id.*

182. *Id.* at 355.

183. *Id.* at 356 (noting that the "city drivers and servicemen who are discouraged from transferring to line-driver jobs" are overwhelmingly white).

184. *Id.* at 364. The United States brought the case on behalf of Black and Spanish-surnamed individuals, but it was not explained how the latter group was defined. *Id.* at 328.

185. *Id.* at 353.

186. On the draft opinion, Justice Powell sought to have Justice Stewart insert references to the qualifications of Black workers on three separate occasions, while seeking

he dictated after oral argument, he raised doubts about the qualifications of the Black employees, noting:

> [I]n the great majority of cases relatively uneducated people who have driven light equipment within the city, served in garages or as clerks, have little or no competency to drive safely over-the-road equipment, to make the inevitable emergency repairs, to find their way to deliver truck loads in the great metropolitan centers, and otherwise to perform their duties.[187]

In a separate note to Justice Stewart, Justice Powell stated that the "ultimate public interest" was "served by nondiscriminatory employment [sic] practices, but it is disserved if - in the application of Title VII, incompetent or inefficient employees displace persons[] who are better qualified to serve the public."[188]

Justice Powell's emphasis on ensuring the Black employees were qualified for the OTR jobs seemed particularly odd because there was nothing in the record, or any of the prior cases, to suggest that seniority was the only qualification for the job. Presumably, the employer had other means of ensuring that drivers were qualified, and no court had ever said that seniority was enough to qualify for the over-the-road jobs. And if seniority was the only qualification, one might wonder whether the white employees who obtained their jobs solely based on seniority were qualified, though Justice Powell seemed to assume all of the whites holding the jobs were, in fact, qualified. Based on his twin obsessions with the qualifications of Black employees and the innocence of whites, one might believe that Justice Powell may have thought the old ways were the proper ways—Black workers doing the menial jobs while whites did the more demanding jobs. One might view the case differently if the Court was choosing to protect union governance rather than the interests of white employees, but during this period the Court was not particularly sympathetic to the interests of unions.[189]

Justices Brennan and Marshall dissented from the seniority holding, relying in part on a decision by Judge Wisdom issued in 1969 that recognized a seniority system would "harm anew" every African American coming into the workplace.[190]

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the insertion of "innocent" before (white) employees. Lewis F. Powell, First Draft, International Brotherhood of Teamsters v. United States (Apr. 1977; circulated May 2, 1977), *in* LEWIS F. POWELL PAPERS, 34, 40, 42, 44, scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1406&context=casefiles [https://perma.cc/W4KL-R8UQ].

187. Lewis F. Powell, Memorandum of Justice Powell (Jan. 11, 1977), *in* LEWIS F. POWELL PAPERS, scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1406&context=casefiles [https://perma.cc/W4KL-R8UQ].

188. Lewis F. Powell, Note from Justice Powell to Justice Stewart (May 4, 1977), *in* LEWIS F. POWELL PAPERS, scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1406&context=casefiles [https://perma.cc/W4KL-R8UQ].

189. *See* Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1511, 1548 (1981).

190. *See Teamsters*, 431 U.S. at 378 (Marshall, J., concurring in part and dissenting in part) ("[E]very time a Negro worker hired under the old segregated system bids against a white worker in his job slot, the old racial classification reasserts itself, and the Negro suffers anew for his employer's previous bias.") (quoting Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980, 988 (5th Cir. 1969) (Wisdom, J.)).

The dissenters further noted that six courts of appeals in 30 cases had invalidated seniority systems that perpetuated discrimination, suggesting that the Court's statutory analysis was certainly not inevitable.[191]

In light of how things have changed when it comes to statutory interpretation, the final part of the dissenting opinion is amusing. Justice Marshall, who authored the dissent, chides the majority for its use of legislative history, calling their analysis "imputed legislative intent" and criticizing the majority for protecting the "expectations . . . [of] whites benefiting from unlawful discrimination."[192] The dissent then returned to the distinction that was at issue in *Franks* between existing employees who were denied job opportunities and those who applied after Title VII became effective, the latter of which were the subject of the bona fide seniority system exemption. The dissent then turned to what at the time was the primary emphasis in legislative interpretation, namely the purpose of the Statute and conversely, the effect the Court's decision would have. The dissent's message is worth quoting at length:

> Prior to 1965 blacks and Spanish-surnamed Americans who were able to find employment were assigned the lowest paid, most menial jobs in many industries throughout the Nation but especially in the South. . . . The Court holds . . . that while after 1965 these incumbent employees are entitled to an equal opportunity to advance to more desirable jobs, to take advantage of that opportunity they must pay a price: they must surrender the seniority they have accumulated in their old jobs. For many, the price will be too high, and they will be locked into their previous positions. Even those willing to pay the price will have to reconcile themselves to being forever behind subsequently hired whites who were not discriminatorily assigned. Thus equal opportunity will remain a distant dream for all incumbent employees.
>
> I am aware of nothing in the legislative history . . . to suggest that if Congress had focused on this fact it nonetheless would have decided to write off an entire generation of minority-group employees. Nor can I believe that the Congress that enacted Title VII would have agreed to postpone for one generation the achievement of economic equality.[193]

This sentiment reflected what the lower courts had all concluded, and it was also the sentiment that was entirely missing from the majority opinion or the various documents contained in Justice Powell's papers, where the focus was consistently on the interests of the white employees.

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191. *Id*. at 378–79 (Marshall, J., concurring in part and dissenting in part) (citing cases).

192. *Id.* at 384, 386.

193. *Id.* at 387–88 (footnotes omitted). In his dissent, Justice Marshall suggested that Congress had not focused on this issue, which is reflected in the quotation above.

CONCLUSION

It is hard to believe that by the 1970s, the rights of whites had become as important or threatened as the rights of African Americans. Although the decade began with the important and potentially far-reaching creation of the disparate impact theory,[194] it ended by protecting the rights of white incumbent employees in a way that may have denied African Americans jobs for decades while deferring to employers and their subjective employment judgments, judgments that were often used to further discriminatory ends. We cannot know what might have happened had the Supreme Court subjected routine employer practices to greater scrutiny beginning with the early and still important case of *McDonnell Douglas Corp. v. Green*. Had the Supreme Court seen Percy Green primarily as an important civil rights activist rather than an unlawful and disruptive scofflaw, the law might have evolved in a way that would have required employers to justify their practices under the business necessity test that was developed for disparate impact cases. We will never know what difference another perspective might have made—a perspective more grounded in the equality goals embodied in Title VII and less concerned with law and order or preserving the old social order.

194. As I have previously documented, the theory never lived up to its potential and has largely only been successfully invoked in cases involving tests. *See generally* Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701 (2006).