1970

Litigation versus Mediation under Title VII of the Civil Rights Act of 1964

Theodore J. St. Antoine
University of Michigan Law School

LITIGATION VERSUS MEDIATION UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Theodore J. St. Antoine
Professor of Law
University of Michigan

I. INTRODUCTION

As time is measured in America's Black Revolution, the Civil Rights Act of 1964 was passed a generation ago. It was a product of what seems today almost like an age of innocence. Title VII of the Act,[1] guaranteeing equal employment opportunity, probably reflected a naive optimism about the capacity of law to place black workers on an equal footing with white workers by outlawing all *future* racial discrimination in employment. At least Title VII reflected a wistful hope that when the Act became effective,[2] the victims of past discrimination would let bygones be bygones and would quietly take their places in the starting gate of the job race, ignoring the long leads their white rivals had built up over the years. Things of course have not worked out that way.

Today the most troubling legal issue confronting the courts under Title VII is the status of job discrimination antedating the Act. More precisely, the question is whether hiring or referral arrangements, seniority systems, and job qualifications or testing procedures, though nondiscriminatory on their face, may violate the Act by perpetuating the effects of *past* discrimination. My talk will concentrate on some ten federal court cases which have dealt with this problem. These few decisions on the merits

---

[1] 78 Stat. 241, 253-66 (1964), 42 U.S.C. §§ 1971, 2000a-2000e-15 (1964).

[2] For employers and unions having 100 or more employees or members, Title VII's prohibitions became applicable on July 2, 1965. During each of the three succeeding years, coverage was extended to employers and unions having, respectively, 75, 50, or 25 employees or members, until all employers and unions with at least 25 employees or members were covered on July 2, 1968. *See* § 701(b) and (e) and § 716(a) of the Act.

represent the end product of approximately 20,000[3] charges of racial discrimination in employment filed to date with the Equal Employment Opportunity Commission; around sixty[4] or so suits filed by private parties under § 706(e) of the Act, following exhaustion of EEOC conciliation efforts; and about forty[5] suits filed by the Attorney General under § 707(a) of the Act, alleging a "pattern or practice" of violations of the Act.

II. REFERRAL AND SENIORITY SYSTEMS

A. Background

Seniority is one of the most important concepts in labor relations.[6] Its essence, of course, is to give a preference to the older, more experienced worker in such employment decisions as layoffs, recalls, promotions, transfers, and so on. In part the notion is that the older employee is entitled as a matter of equity to greater job security than newer recruits. In part the aim is to remove a source of worker discontent by substituting an objective standard for job priorities in place of what might otherwise be an arbitrary, or ar least more subjective, decision by employer or union.

Seniority in an industrial plant may take any of several forms. It may be based on time spent anywhere in the plant, or in a particular department, or in a "line of progression," or even in a given job.[7] In the building and maritime trades, where employment is usually temporary and workers must constantly seek new positions through the union's hiring hall, an equivalent of seniority is a system of registration categories which gives certain applicants priority over others for referral to jobs. For example, men who have worked four years with an employer signatory to the hiring hall agreement will receive top priority, and then will follow men who have

---

[3] This figure is an extrapolation, based on information supplied me by EEOC that 14,690 charges of racial discrimination had been filed as of July 1968. A published speech by an EEOC official last summer said 30,000 charges had been received during the three years since July 2, 1965, of which 25 percent alleged sex discrimination. CCH Empl. Prac. Guide ¶ 8017 (1968). An extrapolation from these figures would indicate that by now EEOC has received about 30,000 charges of job bias based on race.

[4] This figure is the best estimate of my colleague Richard B. Sobol, who has represented plaintiffs in a number of Title VII suits in the Deep South.

[5] This figure was supplied me by the Department of Justice. *See also* BNA 71 Analysis 5, 7 (May 12, 1969). *E.g.*, U.S. v. Medical Society of South Carolina, 71 L.R.R.M. 2057, 60 CCH Lab. Cas. ¶ 9244 (D. S.C. 1969).

[6] *See generally* Slichter, Healy & Livernash, *The Impact of Collective Bargaining on Management* 104-141 (1960).

[7] The seniority of the same employee may also have different bases for different purposes, *e.g.*, for layoffs, for promotions, for vacation time, etc.

worked two years with such an employer, persons who have worked two years in the industry in the area, and finally all other qualified applicants.

Assume, now, that prior to July 2, 1965, the effective date of Title VII for employers and unions having 100 or more employees or members,[8] Negroes were entirely excluded from a particular plant, or were segregated in certain departments, or were restricted to menial jobs, or were denied the use of a hiring hall. On July 2, 1965, all active discrimination on the basis of race ceased. A black employee or job applicant will be treated exactly the same as a white employee or job applicant *having the same qualifications*.But the obvious difficulty is that the black worker moving into the formerly lily-white plant or department or line of progression or hiring hall starts with zero seniority. He will be the first laid off, the last recalled, and the last promoted. Or if he registers with a hiring hall, he will necessarily fall into a low-priority category. The racial discrimination of the past prevented the black worker from earning the all-important seniority credits, and now their absence hobbles his efforts to step into positions from which the racial bars have been removed. A Negro may even have worked in a particular plant for twenty years, but if he transfers into a more attractive, previously all-white department where job or departmental seniority prevails, he will find himself junior to a raw recruit hired just two weeks ago. The legal issue is whether Title VII outlaws a seniority system that produces such a result. Section 703(a) and (c) simply makes it an "unlawful employment practice" for an employer or a labor organization to "discriminate against any individual" in employment or membership "because of such individual's race. . . ."

B. Judicial Approaches

The courts have taken several different approaches to the question of whether seniority systems which are otherwise non-discriminatory violate the Act by perpetuating the effects of past discrimination. I have grouped the decisions, not too scientifically, into three general categories, classifying the courts (for descriptive, not pejorative, purposes) as either "strict" constructionists, "loose" constructionists, or "flexible" constructionists.

1. Strict Construction. The *Sheet Metal Workers*[9] case from the Eastern

[8] *See* note 2 *supra.*

[9] United States v. Sheet Metal Workers Local 36, 280 F. Supp. 719 (E.D. Mo. 1968). *See also* United States v. H.K. Porter Co., 59 CCH Lab. Cas. ¶ 9204 (N.D. Ala. Dec. 30, 1968), which I have classed as an instance of the "flexible" approach because of its rationale, but whose holding is really in accord with a "strict" philosophy; U.S. v. Hayes International Corp., 59 CCH Lab. Cas. ¶ 9224, 70 L.R.R.M. 2927 (N.D. Ala. 1968). *Cf.* U.S. v. IBEW Local 38, 70 L.R.R.M. 3019, 59 CCH Lab. Cas. ¶ 9226 (N.D. Ohio 1969).

District of Missouri reflects a "strict" view of Title VII. The court started with the proposition, supported by the legislative history, that Title VII applies prospectively only and not retroactively. From this it concluded that a referral system which was operated nondiscriminatorily following the effective date of the Act did not violate the Act even though it gave priority to applicants with work experience under union contracts. Presumably Negroes lacked such experience because of pre-Act discrimination barring them fron union membership.[10] Nonetheless, the combination *in fact* of the pre-Act exclusion of Negroes from union membership and the post-Act preference for union members in job referrals was not enough in the court's eyes to establish post-Act discrimination on the basis of *race.*

2. Loose Construction. Federal district courts in Virginia and Louisiana and the Fifth Circuit have adopted a markedly more relaxed attitude toward the statute. In their view a referral or seniority system, while racially neutral on its face, violates the Act if it continues in the present the effects of pre-Act racial discrimination, or at least if it continues the effects of a "pervasive pattern" of pre-Act discrimination.

In the *Quarles*[11] and *Papermakers*[12] cases, the vice was the existence of of "departmental" and "job" seniority systems, respectively. At one time certain departments and certain jobs were segregated. Even after the formerly lily-white positions were opened to all applicants without regard to race, long-time Negro employees of the firms were handicapped because they had no seniority in the newly available departments or jobs. Upon transfer they would have to start acquiring seniority in these posts from scratch. The courts showed no hesitancy in coming to grips with what were described as the "present consequences of past discrimination." The remedy was to require the substitution of plant-wide seniority for the departmental or job seniority. Similarly, in the *Asbestos Workers*[13] case, the Fifth

[10] The court observed that a referral system giving priority to union members over nonmembers would be illegal under the National Labor Relations Act, NLRB v. Carpenters Local 111, 278 F.2d 823 (1st Cir. 1960), but that primary jurisdiction over the violation would rest with the Labor Board, Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938). But a system of priority categories is not unlawful merely because it has the effect in actual operation of preferring union men over nonunion men. *See, e.g.,* Asbestos Workers Local 42, 164 N.L.R.B. No. 123 (1967); IBEW Local 367, 134 N.L.R.B. 132 (1961).

[11] Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968).

[12] United States v. Papermakers Local 189, 282 F. Supp. 39 (E.D. La. 1968), *aff'd,* 71 L.R.R.M. 3070 (5th Cir. July 28, 1969). See also 71 L.R.R.M. 2738 (E.D. La. 1969).

[13] Asbestos Workers Local 53 v. Vogler, 407 F.2d 1047 (5th Cir. 1969). *Cf.* U.S. v. IBEW Local 38, 70 L.R.R.M. 3019, 59 CCH Lab. Cas. ¶ 9226 (N.D. Ohio 1969).

Circuit ordered the elimination of referral preferences based on work experience gained under pre-Act discriminatory conditions.

3. Flexible Construction. A third approach of the courts is harder to pin down because the opinions are chary about being too precise in their reasoning, and instead place great emphasis on the peculiar facts of the particular case. Thus, in *Dobbins v. IBEW Local 212*,[14] the court began by conceding that Title VII's operation is prospective, not retroactive; that only post-Act conduct can constitute a violation, although pre-Act conduct may be used as evidence; and that affirmative action to correct pre-Act discrimination may itself be unlawful discrimination. But then the court announced that seemingly innocuous standards in a referral system may become currently discriminatory simply by virtue of the fact of past discrimination.

Having laid that theoretical groundwork, the court proceeded to draw a practical distinction. Where there are a substantial number of competent, qualified persons who are disadvantaged by referral priority standards, it said, the entire referral system should be eradicated. But where, as in *Dobbins* itself, there are only a few such persons, the system may be revised to eliminate the objectionable features. The latter would apparently include such items as preferences for registrants who have worked for a union contractor.

The court in the recent *H.K. Porter*[15] case was likewise skittish about "dogmatic" or "mechanistic" approaches based upon such "theoretical concepts" as retroactivity, and stressed the importance of "particular facts," but otherwise the results were quite different from *Dobbins*. In *Porter* the court rejected the contention of the Attorney General that plant-wide seniority should replace departmental seniority in a firm where Negroes had been largely confined to less appealing jobs prior to 1962 and were now allegedly "locked in" them by the departmental seniority system. The court purported to distinguish cases like *Quarles* by emphasizing that in *Porter* many Negroes had been able to move to, and advance in, the better departments since 1962. Thus there was no demonstrated need to dismantle the existing seniority structure. Despite the court's disclaimer of any disagreement with *Quarles*, however, its attitude actually seems closer to the "strict" constructionist thinking of the *Sheet Metal Workers* case.

C. Comments

There is no serious argument, at least in theory, about the proposition that

[14] 292 F. Supp. 413 (S.D. Ohio 1968).

[15] United States v. H. K. Porter Co., 59 CCH Lab. Cas. ¶ 9204, 70 L.R.R.M. 2131 (N.D. Ala, Dec. 30, 1968).

Title VII's operation is prospective only and not retroactive. This is confirmed by section 701(b) and (e)'s provisions for "staggered" effective dates, depending on the size of the employer or union involved,[16] and by the clearest kind of legislative history.[17] Even the "loose constructionist" courts like *Quarles* and *Asbestos Workers* do not contest this point in the abstract. The dispute is whether it is present discrimination for a seniority or referral system to give current effect to work credits acquired under pre-Act discriminatory conditions.

This precise issue was the subject of much heated debate when the Civil Rights Bill was before Congress in 1964. The original bill proposed by the Kennedy Administration did not contain an equal employment opportunity title. Civil rights groups and influential elements in the labor movement, including the national AFL-CIO, lobbied strenuously for the inclusion of such a provision. Foes of the legislation then sought to rally grass-roots union opposition. Senator Lister Hill of Alabama, a long-time champion of organized labor, distributed literature to local unions all across the country, warning that enactment of Title VII would "destroy" the hard-earned seniority right of many workers. The AFL-CIO, the Justice Department, and such supporters of the bill as Senators Joseph S. Clark, Clifford P. Case, and Hubert H. Humphrey responded by assuring union members and the Congress that Title VII would have no adverse impact on acquired seniority.

Perhaps a Justice Department memorandum, prepared for and placed in the Congressional record by Senator Clark, is most explicit on the problem under consideration:[18]

> First, it has been asserted that title VII would undermine vested rights of seniority. This is not correct. Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by title VII. *This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes.* Title VII is directed at

[16] *See* note 2 *supra*.

[17] *See, e.g.*, the Interpretative Memorandum on H.R. 7152 submitted by Senator Joseph S. Clark and Senator Clifford P. Case, floor managers of Title VII, 110 Cong. Rec. 7213 (1964) ("Its effect is prospective and not retrospective"); Department of Justice Memorandum, submitted by Senator Clark, 110 Cong. Rec. 7207 (1964).

[18] 110 Cong. Rec. 7207 (1964). *See also* 110 Cong. Rec. 7213 (1964) (remarks by Sen. Clark and Sen. Case); 110 Cong. Rec. 7217 (remarks of Sen. Clark); 110 Cong. Rec. 11848 (remarks of Sen. Humphrey).

> discrimination based on race, color, religion, sex, or national origin. It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is "low man on the totem pole" he is not being discriminated against because of his race. (Emphasis supplied.)

The *Quarles* court contended that at most the legislative history sanctioned "employment" seniority, but not "departmental" seniority, where the result was the perpetuation of past discrimination. I find no basis for such a distinction. The operation of seniority, and its purposes of protecting the equity of older workers in their jobs and providing an objective standard for employment preferences, are essentially the same whether the seniority is linked to a particular job, or a given department, or a whole plant. Indeed, departmental or job seniority is more often the rule in industry, especially for promotion purposes. Ordinarily, employers seek the narrowest seniority unit possible, since this increases the likelihood that the employee entitled to advancement will be qualified for the job. The proponents of Title VII would thus have been only half-answering Senator Hill—and incidentally deceiving the labor movement—if their remarks on seniority did not have general applicability. Certainly there is not a whisper of anything affirmative to support the *Quarles'* distinction. I conclude that the legislative history fully sustains the "strict" constructionists in upholding otherwise nondiscriminatory seniority systems, even though they give credit for work done under pre-Act discriminatory conditions.

A more straightforward argument on behalf of the "loose" constructionists is that section 703 by its terms outlaws the present consequences of past discrimination, and that the legislative history represents an unsuccessful attempt to *except* from Title VII conduct which would normally fall within its coverage. The effort is branded a failure on such variegated grounds as the inherent unreliability of all legislative history; the presence of only a few legislators on the floor when Senator Clark and others explained seniority; the absence of any discussion in the form of a committee report (there was no Senate or Conference Committee report on the bill); and the omission of any statutory language to override the plain meaning of section 703's prohibition.

This brings us to the central issue: Is a post-Act layoff, promotion, transfer, or other employment action that takes account of seniority acquired under pre-Act discriminatory conditions a *present* discrimination "because of . . . race" within the meaning of section 703? There is undoubtedly a present disparity in the treatment of different individuals. Moreover, it can be shown in many cases that but for pre-Act racial discrimination, the black employee who now has the lesser seniority credit

would have had the greater. Nonetheless, as I see it, the present disparate treatment is *not* based on race as such, but on the quite independent factor of seniority. A white worker who lacked such seniority, for whatever reason (for example, the personal hostility of a foreman), would be in exactly the same position as the black worker. True, the black employee was deprived of the opportunity to earn seniority because of pre-Act racial discrimination. At that time, however, the discrimination was not violative of Title VII. Assuming the discrimination ceased on July 2, 1965, we simply have an employee who cannot be prejudiced by racial considerations, but who remains subject to all other legitimate employment classifications. To go behind July 2, 1965 to strike down what would otherwise be a valid basis for an employment preference, such as seniority, is giving the Act the baldest kind of retroactive application. For me, this is the natural reading of Title VII. But if there is any possible ambiguity, the legislative history resolves it.

It is important to keep in mind that we are not dealing here with some shoddy kind of "grandfather clause," calculatingly designed to perpetuate racial discrimination by a mere shift of labels. As explained earlier, seniority is a fundamental concept in labor relations, with a long and honorable history behind it. To allow seniority to continue to govern certain job determinations seems to me not essentially different from a couple of other situations which I trust no one would regard as involving a violation of section 703. For example, would we not let a white worker, but not a black, claim a pay check after the effective date of Title VII for pre-Act work performed by the white on a job from which the black was barred because of his race? Would we not let a highly skilled job be awarded to a qualified white rather than an unqualified black even though the black had been prevented from acquiring the necessary skills because of pre-Act racial discrimination practiced by the same employer? Like the work performed in fact by the white and not the black, or the skill learned in fact, seniority is a credit or status (legitimate in itself) acquired in fact by the one and not the other. And it is the existence of that seniority credit or status which justifies the post-Act disparate treatment, regardless of the pre-Act circumstances of its accrual.

Somewhat analogous is the NLRB's handling of union hiring halls under the National Labor Relations Act. Needless to say, a referral system that by its terms or by necessary implication gave priority in job placement to union members over nonmembers would be illegal.[19] But a system of priority categories, otherwise nondiscriminatory; is not unlawful merely

[19] NLRB v. Carpenters Local 111, 278 F.2d 823 (1st Cir. 1960).

because it has the effect in actual operation of preferring union men over nonunion men, for example, by favoring registrants who have had experience with union contractors or who have passed a union qualification test.[20] So too, I should say that a violation of section 703 cannot be made out merely because a seniority system in application results in a preference for white workers over black.

Section 703(h) of the Act, which expressly authorizes different terms of employment pursuant to a "bona fide seniority . . . system," is consistent with this analysis, but I should not want to place too much independent weight on this particular provision. There is a proviso that the differences in employment terms must not be "the result of an intention to discriminate because of race. . . ." Should a court become convinced, as did the court in *Quarles*, that the general prohibitory provisions of section 703 have been violated, section 703(h) can easily be disposed of by saying that the seniority system is not "bona fide" or that the proviso applies. At any rate, section 703(h) establishes that seniority was within the contemplation of the whole of the Congress, and not a mere handful of Senators, when the general language of subsections (a), (b), and (c) was enacted. If disparate treatment on the basis of seniority does not fall naturally within the rubric of discrimination "because of . . . race," the courts should not struggle to place it there to make up for some supposed congressional oversight.

I would impose two qualifications on my view that otherwise nondiscriminatory referral and seniority systems should not be held violative of the Act, even though they give effect to seniority acquired as a result of pre-Act discrimination. First, the system must not be designed or retained for the *purpose* of perpetuating the effects of pre-Act discrimination. For example, I would consider highly suspect the substitution of "job" seniority for "departmental" seniority at the time an employer desegregates a department where the better jobs had formerly gone to whites and the menial ones to blacks. Although I can conceive of valid business motives for the change in the seniority basis, it sounds as if the employer wants to favor white employees who may have less time than blacks in the department but more time in the attractive jobs. Second, I would strike down seniority systems that contain "artificial distortions" not justified by legitimate business considerations. An illustration would be an employer's continuation of separate seniority lists for two separate lines of progression, formerly segregated by race but now desegregated, in a situation where all the jobs are functionally related and the normal pattern would call for a

[20] *See, e.g.*, Asbestos Workers Local 42, 164 N.L.R.B. No. 123 (1967); IBEW Local 367, 134 N.L.R.B. 132 (1961).

single line of progression with "line of progression" seniority. Here the *only* reason for the maintenance of two lines would appear to be the desire to "lock" the black workers into their old line by requiring them to start with zero seniority if they move to the formerly all-white line. (By the "normal pattern" of seniority practices, I mean the customary arrangements of a particular firm, or industry, or area, where racial considerations have not influenced the structuring of the system.)

Throughout this discussion I have paid small heed to the larger policy concerns. I would not deny for a moment that Congress might properly have concluded that, important a value as seniority is, it would have to yield to the paramount public goal of advancing black workers into jobs for which they are or can be qualified. (Indeed, one hopes that enlightened unions may do something along these lines on their own. Thus, the UAW has proposed that certain senior employees be laid off before recently hired hard-core jobless in Detroit's auto plants.) My point is simply that the Congress of 1964 did not decide to subordinate traditional seniority interests, and the courts should respect that legislative judgment. Even a good cause does not excuse impairing the integrity of legal institutions.

Despite my protestations, however, the current direction of judicial thinking is obviously toward a much more expansive reading of the statute. I would not place any wagers against the continuation of this trend. Most of the decided cases, a majority of which favor a broad approach to Title VII, come from federal district courts in the South. Past performance suggests that the courts of appeals and the United States Supreme Court will be at least as liberal on a civil rights issue. Naturally, the possibility of more conservative Nixon appointees to the bench serves to becloud this picture.

D. Fair Representation: Another Way to Skin the Cat

Concentration on Title VII as a means of reaching the present consequences of pre-Act discrimination may obscure an important point. The same results sought by the "loose" constructionists could be achieved in many seniority cases, without violence to congressional intent, though resort to the long-standing doctrine of fair representation, as developed under the Railway Labor Act[21] and the National Labor Relations Act.[22] In

---

[21] Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944).

[22] Syres v. Oil Workers Local 23, 350 U.S. 892 (1955); Vaca v. Sipes, 386 U.S. 171 (1967). The Labor Board has held that unfair representation is also an unfair labor practice. Miranda Fuel Co., 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (1963).

essence, this doctrine holds that a labor organization, as a concomitant of its power of exclusive representation, has the obligation to represent all the employees in the bargaining unit fairly and impartially, without regard to race or other irrelevant considerations. Employers who join in a union's unfair representation are also liable. The duty of fair representation has even been extended to prevent a white union from destroying the jobs of black employees in another union and another unit.[23] I should not think it much of an additional leap to find a violation where a union denied black applicants a job within the unit.

Fair representation claims in the courts would not be restricted, I assume, by the procedural prerequisites of Title VII suits. I do see, however, a couple of drawbacks. First, if fair representation is to add anything to Title VII, it must attack pre-1965 discrimination quite frankly as *past*-discrimination. This means the appropriate state[24] statute of limitations enters the picture. Although a definite time limit on actions is thus introduced, the period is probably fairly generous. Likely possibilities are the relatively lengthy limitations applicable to suits for breach of a written contract or for breach of trust. A second deficiency is that the doctrine of fair representation cannot be employed against unilateral employer conduct not involving a union.[25] But of course a union is involved in most seniority cases.

JOB QUALIFICATIONS AND EMPLOYMENT TESTS

A. Qualifications for Jobs or Union Membership

Competence, as determined by "objective standards," can obviously be made a requirement for admission to a skilled trade or a craft union.[26] But a court has eliminated union membership requirements that an applicant be related by blood or marriage to a present member and be approved by a majority vote of the membership, where their effect was to bar Negroes from an all-white union.[27] The court found the pre-Act nepotism rule was motivated in part by racial considerations and served no significant trade-related purpose. Once a court has made the factual finding that a nepotism rule is racially based, the rest is easy. But absent such a finding, I

[23] Brotherhood of Ry. Trainmen v. Howard, 343 U.S. 768 (1952).

[24] *See* UAW v. Hoosier Cardinal Corp., 383 U.S. 690 (1966).

[25] *But cf.* Packinghouse Workers v. N.L.R.B. [Farmers Cooperative Compress] 70 L.R.R.M. 2489 (D.C. Cir. Feb. 7, 1969) (unilateral employer discrimination on ground of race may violate § 8(a)(1) of the NLRA).

[26] Dobbins v. IBEW Local 212, 292 F. Supp. 413 (S.D. Ohio 1968).

[27] Asbestos Workers Local 53 v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

find the nepotism question troubling. Section 703 forbids discrimination "because of . . . race," not discrimination "because of . . . blood or marriage." A few unions do indeed regard membership as a prized possession to be passed on from father to son, from father to son. This may be quite wrong-headed in a democratic society (although lawyers, especially, should be prepared to sympathize a bit with the sentiment), but surely this "inclusionary" attitude toward family relations raises quite different policy issues from an "exclusionary" attitude toward race.

Most unions practicing nepotism probably exhibit a strong ethnic flavor. I suspect that careful investigations would reveal that many have not remained unvaryingly true to their nepotic standards, but have now and then made exceptions for a "good fellow" with the right national background. Whenever that can be proved, then the union has discriminated "because of . . . national origin," also a violation of section 703. Unless such a showing can be made, however, I find it hard to see how nepotism in its pure form can be covered by section 703's prohibition of discrimination on the basis of "race," even if the effect is to exclude Negroes. The effect is to exclude all the rest of us, too, regardless of race.

One court has placed itself firmly in the camp of the "strict" constructionists by its handling of job qualifications under the Act. In *Griggs v. Duke Power Co.*,[28] the court upheld an employer's continuation of a pre-Act requirement of a high school diploma for new hires and for inter departmental transfers, although no such requirement existed for promotions within a given department. The plaintiff's argument was that these rules tended to keep the older black employees (hired before a diploma was demanded) in the previously segregated, lower-paid labor department, while the older white employees lacking high school diplomas could advance to better-paying jobs within each of the other individual departments. A case like this calls for the closest scrutiny of the basis for the employer's requirements. Why, for example, should a diploma be necessary for transfer to a particular position from another department, but not for promotion to the selfsame position from within the department?

B. Employment Tests

While the Civil Rights Bill was pending in Congress, Illinois FEPC proceedings involving the Motorola Company focused attention on the question of "culturally biased" employment tests.[29] According to many experts,

[28] 292 F. Supp. 243 (M.D. N.C. 1968).

[29] *See* Motorola, Inc. v. Illinois FEPC, 51 CCH Lab. Cas. ¶ 51,323 (Ill. Cir. Ct. 1964), *rev'd*, 34 Ill. 2d 266, 215 N.E.2d 286 (1966) (state law).

minority groups suffering from cultural deprivation are placed at a competitive disadvantage in taking standard aptitude tests. Congress was not sympathetic, however, to the notion that an employer would violate the statute by giving an otherwise fair test which some groups might find easier than others. Senators Clark and Case commented:[30]

> "There is no requirement in title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign and promote on the basis of test performance."

To clarify this matter, Congress included in section 703(h) a provision that it would not be unlawful for an employer to give a "professionally developed ability test" provided it is not "designed, intended or used to discriminate because of race . . . ."

One court has held that a union qualification exam, though administered evenhandedly to whites and blacks, may violate Title VII if it has no reasonable relationship to the abilities needed for a particular trade in actual practice, and instead is intended to "chill" the interest of Negro applicants.[31] In view of the motivation behind the test, this decision seems self-evident. But other issues regarding testing procedures are considerably more difficult.

The Equal Employment Opportunity Commission has published guidelines interpreting a "professionally developed ability test" to mean "a test which fairly measures the knowledge or skills required by the *particular job or class of jobs which the applicant seeks.*"[32] In *Griggs v. Duke Power Co.*,[33] the court disagreed with this ruling and held an employer is entitled to rely on general intelligence tests. Moreover, the court refused to accept

---

[30] 110 Cong. Rec. 7213 (1964). See also 110 Cong. Rec. 7218 (1964) (remarks of Sen. Clark).

[31] Dobbins v. IBEW Local 212, 292 F. Supp. 413 (S.D. Ohio 1968).

[32] EEOC, Guidelines on Employment Testing Procedures, September 21, 1966, CCH Employment Prac. Guide ¶ 16,904. (Emphasis supplied.)

[33] 292 F. Supp. 243 (M.D. N.C. 1968). See also United States v. H. K. Porter Co., 59 CCH Lab. Cas. ¶ 9204 (N.D. Ala. Dec. 30, 1968); U.S. v. IBEW Local 38, 59 CCH Lab. Cas. ¶ 9226, 70 L.R.R.M. 3019 (N.D. Ohio 1969). A consent order entered in a Justice Department suit against Sinclair Refining Co. and OCAW required extensive revision of existing testing procedures, and included a provision for variable cut-off scores for different ethnic groups. See 71 Lab. Rel. Rep. 319 (July 7, 1969).

the contention that an employer may not lawfully use an aptitude exam until it has been scientifically validated as a predictor of performance on the job.

On the face of it, the court in *Griggs* would appear to have the better of the argument with EEOC. The Commission is pursuing a hard line on testing that Congress seems deliberately to have eschewed. Yet I should think there is a proper role for EEOC to play in fleshing out the statutory skeleton. What is needed is a factual demonstration that tests unrelated to the skills required for a particular cluster of jobs almost invariably have a racially discriminatory purpose. This sort of demonstration might well support a presumption of illegality, in any case where such tests were at issue. It would then be up to the employer or union to prove a nonracial basis for its insistence on an over-qualified work force. In any event, the Commission should profit from the example of the NLRB,[34] and be wary about substituting *per se* analysis for a careful weighing of the evidence in each individual case.

IV. CONCLUSION

Title VII of the Civil Rights Act of 1964 may provide a classic confrontation between law and policy—between the rule which a lawyer, applying the traditional tools of legal analysis, would conclude the Congress has laid down, and the rule which an omniscient sage would conclude was best calculated to do justice in the affected community. The lawyer would insist that Congress did not intend to reach the post-Act effects of pre-Act racial discrimination in employment. The sage would maintain that a whole generation of black workers cannot be left hobbled by the wrongs of the past. In today's climate of judicial activism, one might assume, as I have suggested earlier, that the sage would prevail over the lawyer with ease.

Yet perhaps there is room for a small quibble. If the lawyer can make any unique contribution to society, it surely is his notion of fair procedure. I do not think he can claim any special wisdom in the formulation of substantive standards. But I do think he has a peculiar sense of the need for effective participation by all interested groups in the development and application of those standards. In our country today, with its sadly increasing polarization of attitudes, I suspect no group feels more alienated and spiritually dispossessed than the lower-middle class working whites. Not only does the current moral revolution imperil the ancient values of

[34]*See, e.g.*, Teamsters Local 357 v. NLRB, 365 U.S. 667 (1961); Carpenters Local 60 v. NLRB, 365 U.S. 651 (1961).

this generally conventional class; now, in addition, its hard-won material prosperity seems threatened by the taxes needed to finance our burgeoning welfare programs, and its precious job security appears jeopardized by an influx of newcomers to the labor market. At least in relation to the great engines of the federal government, even the disadvantaged black worker has more reason at this moment to regard himself as part of the powerful forces that shape history.

There is, however, an ominous message in all this. As Bayard Rustin has told us, the civil rights movement through the years has invariably depended for broad political support upon the labor movement, and the backbone of the labor movement is lower-middle class. If a wedge is finally driven between the labor movement and the civil rights movement, and if the lower-middle class white worker turns sharply toward the right in politics, then I think disaster awaits today's progressive racial and social legislation. In the long run, we need not fear the romantic revolutionary, whether black or white; he has neither enough votes nor enough guns. The real threat to an enlightened society would be a reactivated right—hurt, resentful, and hungering to repeal the 1960's. In my view, an unduly extended interpretation of Title VII helps to fuel the bitterness of the working class white, and to hasten the day of a resurgent right.

Now, I should be naive to think that the white worker would be all that gracious about accepting displacement from his position on the seniority ladder, if only he could be persuaded that it was truly the intent of Congress! Most laymen are far more concerned about the impact of the law than about the integrity of legal doctrine. Even so, it remains part of my lawyer's faith that one of the greatest functions of the law is to teach—among other things, to teach our vast pluralistic community of the necessity for a rational accommodation of diverse interests. I have seen both unions and management come to accept the initially unpalatable, once they were convinced of the essential fairness of the process by which they lost. But the critical element is that the game be played according to the rules. In applying a federal statute, I take it the central rule is not to fly in the face of a clearly expressed congressional intent. With all deference to those who disagree, I think that is the basic issue here. And so I must take my stand with the lawyer, not the sage, and conclude, almost shamefacedly, that the writ of the Civil Rights Act runs back to July 2, 1965, but not beyond.