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The Supreme Court's Interpretation of the Civil Rights Act of 1964: Liberty, Equality and the Limitation of Judicial Power

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COMMENTS

The Supreme Court's Interpretation Of The Civil Rights Act of 1964: Liberty, Equality, and the Limitation of Judicial Power†

Enactment of the Civil Rights Act of 1964[1] marked the beginning of a new era in the history of antidiscrimination law in America. Described as "the most comprehensive piece of civil rights legislation ever proposed,"[2] the Act declared that "[n]o person in the United States shall"[3] be denied the right to vote,[4] to use public accommodations,[5] facilities,[6] or schools,[7] to enjoy the benefits of federally funded programs,[8] or to have employment opportunities[9] "because of such individual's color, religion, sex, or national origin."[10]

Congress defined the Civil Rights Act's purpose as being "to assure the existing right to equal treatment."[11] This principle of

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1. Pub. L. No. 88-352, 78 Stat. 241 (current version at 42 U.S.C. §§ 1971, 2000a to 2000h-6 (1976)).

2. CIVIL RIGHTS AND THE AMERICAN NEGRO 524 (A. Blaustein & R. Zangrardo eds. 1968).

3. 42 U.S.C. § 2000d (1976). *Accord, id.* § 2000a ("All persons shall be entitled to" enjoyment of public accommodations); *id.* § 2000e-2(a)(1) (unlawful "to discriminate against any individual").

4. *Id.* § 1971 (title I).

5. *Id.* §§ 2000a to 2000a-6 (title II).

6. *Id.* §§ 2000b to 2000b-3 (title III).

7. *Id.* §§ 2000c to 2000c-9 (title IV).

8. *Id.* §§ 2000d to 2000d-6 (title VI).

9. *Id.* §§ 2000e to 2000e-17 (title VII).

10. *Id.* § 2000e-2(a)(1). *Accord, id.* § 2000a(a) (all persons entitled to enjoy public accommodations "without discrimination or segregation on the ground of race, color, religion, or national origin"); *id.* § 2000b (protecting persons deprived of equal protection of laws "on account of [their] race, color, religion, or national origin"); *id.* § 2000d (no person shall be excluded from participation in federally assisted programs "on the ground of race, color, or national origin").

11. 110 CONG. REC. 1519 (1964) (remarks of Rep. Celler). *Accord, id.* at 7207 ("What Title VII seeks to accomplish, what the civil rights bill seeks to accomplish is equal treatment for all.") (Justice Department interpretative memorandum); *id.* at 12,614 ("Every

individual equality provided a basis for a "meeting of the minds" and a common national purpose "in the long struggle to eliminate social prejudice and the effects of prejudice."[12] Thus, under the aegis of an equal treatment value, the 1960's saw the elimination of the most flagrant forms of racial discrimination.[13]

When it became apparent that equal treatment would not entirely eradicate the effects of past discrimination, the suggestion that the law adopt an equal status or equal results value became more insistent.[14] Some commentators warned that adherence to an absolutist view of equality threatened libertarian values.[15] To some degree, the development of antidiscrimination law has reflected the tension between libertarian and egalitarian points of view. In general, however, the courts have favored more and more equality.[16]

American citizen has the right to equal treatment—not favored treatment, not complete individual equality—just equal treatment.") (remarks of Sen. Muskie).

Congressmen also frequently stated that the Act would be colorblind in its application, *see, e.g., id.* at 5253 (remarks of Sen. Humphrey); *id.* at 6564 (remarks of Sen. Kuchel), and that it would not permit differences in treatment on the basis of race, *see, e.g., id.* at 5611-13 (remarks of Sen. Ervin); *id.* at 5863-64, 5866 (remarks of Sen. Humphrey). *See also* T. EASTLAND & W. BENNETT, COUNTING BY RACE 113-14, 143, 205-208 (1979); N. GLAZER, AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY 4, 43-45 (1975).

12. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 416 n.19 (1978) (Stevens, J., concurring in part and dissenting in part).

13. Brest, *The Supreme Court, 1975 Term—Foreward: In Defense of the Antidiscrimination Principle,* 90 HARV. L. REV. 1, 2 (1976).

14. *See, e.g.,* Affeldt, *Title VII in the Federal Courts—Private or Public Law,* 15 VILL. L. REV. 1, 3, 5-6, 9, 17 (1969); Blumrosen, *Seniority and Equal Employment Opportunity: A Glimmer of Hope,* 23 RUTGERS L. REV. 268, 280-84 (1969) [hereinafter cited as Blumrosen, *Seniority*]; Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination,* 71 MICH. L. REV. 59, 66-75 (1972) [hereinafter cited as Blumrosen, *Employment Discrimination*]; Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion,* 82 HARV. L. REV. 1598, 1673-78 (1969).

This Comment uses the terms "equal treatment" and "equal status" consistently with their use by Professor Owen Fiss in Fiss, *Groups and the Equal Protection Clause,* 5 PHILOSOPHY & PUB. AFF. 107 (1976) [hereinafter cited as Fiss, *Groups*]. Equal treatment is sometimes referred to as "equality of opportunity," equal status as "equal achievement" or "equality of results." *See also* Comment, *Proof of Racially Discriminatory Purpose Under the Equal Protection Clause:* Washington v. Davis, Arlington Heights, Mt. Healthy, *and* Williamsburgh, 12 HARV. C.R.-C.L. L. REV. 725, 727-28 & n.21 (1977) [hereinafter cited as *Proof of Purpose*].

15. *See, e.g.,* D. SCHAEFER, THE NEW EGALITARIANISM (1979).

16. *See, e.g.,* United Steelworkers of America v. Weber, 443 U.S. 193 (1979) (authorizing voluntary preferential treatment in employment); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (consideration of race in admissions decisions permitted in some circumstances); Beer v. United States, 425 U.S. 130 (1976) (approving race-conscious measures remedying de facto discrimination); Swann v. Charlotte-Mecklenburg

While the academic community has been at the forefront, the law's gradual shift in emphasis from equal treatment to equal status has been aided greatly by reliance on interpretative guidelines and regulations issued by federal agencies.[17] These developments pose significant questions about the roles of the respective coordinate branches in the development of civil rights policy. The issue of separation of powers looms particularly large in attempting to delineate the limits of judicial power to interpret civil rights legislation. This Comment examines the Supreme Court's use of statutory interpretation in developing liability and remedy theories in the Civil Rights Act cases.

In interpreting the Civil Rights Act, members of the Supreme Court have frequently disagreed on whether an equal treatment or equal status value should be implemented. After contrasting the general interpretative approach of the Justices who advocate equal status with the approach of those who favor equal treatment, this Comment evaluates the policies that underlie each approach in light of traditional democratic theory. Part I of the Comment reviews the ideological tension between the values of liberty and equality which has figured prominently in the formulation of antidiscrimination law. The Court's treatment of the issues presented in the Civil Rights Act cases generally falls under the rubric of one or the other of these two values, as is shown in part II. Part III summarizes the interpretative techniques that characterize the results reached in the cases. Finally, an interpretative approach that emphasizes the legislative role is defended against arguments that favor a judicial role in the formulation of civil rights policy.

I. Impact of Liberty and Equality on Antidiscrimination Law

A. The Ideology of Equality

Primacy of the individual is classical liberalism's fundamental tenet. In this tradition, individuals, rather than groups, are the most important unit in society; consequently, the primary function of societal arrangements is to allow the individual max-

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Bd. of Educ., 402 U.S. 1 (1971) (busing).

17. *See* T. Eastland & W. Bennett, *supra* note 11, at 11-12, 131-36; N. Glazer, *supra* note 11, at 45-66; G. Orfield, The Reconstruction of Southern Education 33-46 (1969).

imum freedom to fulfill his or her own purposes.[18] Inequality among individuals is justified as a natural consequence of a system of liberty.[19] So long as an individual in acquisition of society's goods does not purposefully disadvantage another, he is entitled to do with his property as he chooses. Because differences among individuals are essentially the product of "congenital," rather than environmental, factors,[20] resulting inequalities are not morally suspect.

Given a diversity of temperaments and desires, the essential role of law is to provide neutral rules and procedures whereby members of society have an equal opportunity to accomplish their individual purposes. The libertarian ethic rejects the notions "that skin color and ethnicity [are] relevant in any public or private consideration of the worth of an individual."[21] Similarly, equal treatment demands that such matters as race, religion, sex, and national origin be irrelevant to law.

"[I]n formal contradiction to the principle of individualism," modern equalitarianism makes a claim for "group rights."[22] Accordingly, the primary function of societal arrangements is to insure that no group in society is significantly worse off than any other group. Even inequalities that result from natural abilities and talents (as opposed to those that result from historical and social fortune) are morally unjustified. The distribution of society's goods that results from such abilities is, according to John Rawls, "the outcome of the natural lottery; and this outcome is arbitrary from a moral perspective."[23] In addition, "[i]t is impossible in practice to secure equal chances of achievement and culture for those similarly endowed" because of the institution of the family: "Even the willingness to make an effort, to try, and so to be deserving in the ordinary sense is

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18. Bell, *On Meritocracy and Equality*, PUBLIC INTEREST, Fall 1972, *reprinted in* D. SCHAEFER, *supra* note 15, at 29. *See generally* 2 F. HAYEK, LAW, LEGISLATION, AND LIBERTY (1976); H. JAFFA, THE CONDITIONS OF FREEDOM (1975); Frankel, *Equality of Opportunity*, 81 ETHICS 191 (1971).

19. F. HAYEK, THE CONSTITUTION OF LIBERTY 85-93 (1960).

20. *Id.* at 86.

21. T. EASTLAND & W. BENNETT, *supra* note 11, at 10. Professor Bell notes that "[t]he liberal principle accepts the elimination of social differences in order to assure an equal start, but it justifies *unequal result* on the basis of natural abilities and talents." Bell, *supra* note 18, at 41 (emphasis in original). *See also* F. HAYEK, *supra* note 19, at 85-86, 92.

22. Bell, *supra* note 18, at 44. *See generally* R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

23. J. RAWLS, A THEORY OF JUSTICE 74 (1971).

itself dependent upon happy family and social circumstances. . . . [T]herefore we may want to adopt a principle which recognizes this fact and also mitigates the arbitrary effects of the natural lottery."[24] The rule that Rawls would have guide the law requires equal distribution of social and economic goods: "no one gains or loses from his arbitrary place in the distribution of natural assets or his initial position in society without giving or receiving compensating advantages in return."[25] Similarly, equal status requires that the law take account of religion, ethnicity, class, and color, in order to insure "equality as a fact and as a result."[26]

Like their philosophical counterparts, equal treatment and equal status are fundamentally at odds. Like liberty, the equal treatment principle is "process-oriented." Its implementation in antidiscrimination law "emphasizes the purification of the decisional process."[27] Equal status, on the other hand, is "result-oriented." Its implementation, similar to Rawls' theory of equality, "emphasizes the achievement of a certain result, improvement of the economic and social position of the protected group."[28] In short, equal treatment seeks to assure procedural equality; equal status, substantive equality.

B. Application of Equal Treatment and Equal Status Principles to Antidiscrimination Law

The conflict between liberty and equality readily appears as these values are applied in moral and political philosophy. Similarly, the ideas of equal treatment and equal status have engendered conflicting theories of liability and opposing remedies in antidiscrimination law.

1. Equal treatment

a. Liability theory. The equal treatment value embodies the right to be treated as an equal; it seeks to protect individuals

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24. *Id.*

25. *Id.* at 102. *See also* R. DWORKIN, *supra* note 22, at 272-74.

26. Address by President Lyndon B. Johnson, Howard University Commencement (June 4, 1965), *quoted in* THE NEGRO IN TWENTIETH CENTURY AMERICA 226 (J. Franklin & I. Starr eds. 1967).

27. Fiss, *The Fate of an Idea Whose Time Has Come: Antidiscrimination Law in the Second Decade After* Brown v. Board of Education, 41 U. CHI. L. REV. 742, 764 (1974).

28. *Id.*

from discrimination on the basis of color, religion, sex, or national origin. However, equal treatment does not protect individuals from discrimination on such bases as merit or ability. Therefore, a test that eliminates a disproportionate number of black or Spanish-American applicants would not violate equal treatment principles if it legitimately measured suitability for a particular job requirement; it would violate those principles, however, if it were used as a pretext to eliminate them because of their color or ethnicity.[29] Therefore, liability for a violation of the right to equal treatment arises only when the plaintiff shows that the defendant purposefully disadvantages him because of his membership in a proscribed class.[30] Accordingly, a court's use of language emphasizing purpose or motive indicates its adherence to the equal treatment value.

b. Remedial theory. Race-conscious remedies awarded pursuant to findings of unlawful discrimination do not necessarily violate equal treatment principles. In the case of a court-ordered remedy, race "is being used symptomatically . . . to identify the victims" of an unlawful practice. Therefore, "the benefits are not being conferred because of their race but because they are victims of discrimination."[31] A remedial order may be transformed into a "mechanism for securing not equal but preferential treatment," however, when the benefit awarded exceeds the harm done.[32] But, "[n]otwithstanding the outward appearance of unequal treatment," when a court grants compensation only for the injury inflicted, "the beneficiaries are merely

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29. "Equal treatment," as it is used in this Comment, does not call for strict color-blindness. Rather, the appropriate inquiry under this concept is whether the challenged practice is based on a proscribed criterion or some other factor, and whether the conferral of a benefit constituted preferential or equal treatment.

30. "A discriminatory purpose test is closely related to the value of equal treatment, for it attempts to proscribe explicit consideration of race." *Proof of Purpose, supra* note 14, at 731. Equal treatment does not necessarily require proof of "evil motive" or "mens rea." *See* Blumrosen, *Employment Discrimination, supra* note 14, at 66-67. *Accord,* SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 70-73 (1966). *Compare* Bonfield, *The Substance of American Fair Employment Practices Legislation I: Employers,* 61 NW. U.L. REV. 907, 955-56 (1967) *and* Note, *An American Dilemma—Proof of Discrimination,* 17 U. CHI. L. REV. 107, 109 (1949) *with* Comment, *Burden of Proof in Racial Discrimination Actions Brought Under the Civil Rights Act of 1866 and 1870: Disproportionate Impact or Discriminatory Purpose?,* 1978 B.Y.U. L. REV. 1030, 1035-37 [hereinafter cited as *Burden of Proof*].

31. Fiss, *A Theory of Fair Employment Laws,* 38 U. CHI. L. REV. 235, 307-08 (1971) [hereinafter cited as Fiss, *Fair Employment Laws*].

32. *Id.* at 307. *Accord,* Seelman, *Employment Testing Law: The Federal Agencies Go Public With the Problems,* 10 URB. LAW. 1, 63 (1978).

treated equally."[33]

The fact that a remedy awarded to a discrimination victim may deprive an innocent third person of a benefit does not violate equal treatment so long as the victim is given only his due. Equal treatment requires that a court "eliminate only that portion of the [harm] attributable to past discrimination."[34] Efforts by courts to limit remedies in this fashion therefore evidence endorsement of equal treatment.

So-called benign discrimination violates equal treatment because the essential mutuality between wrongdoer and beneficiary is lacking.[35] Unless the race-conscious measure is linked to an identified, individualized harm, there is no justification for preferring one person over another.[36] This does not imply that only courts are capable of ascertaining the victims of discrimination, the extent of the injury, and the consequent harm.[37] Equal treatment does require, however, that these determinations comport with principles of procedural fairness.[38]

2. *Equal status*

a. Liability theory. The equal status value embodies the right to be treated unequally in order to achieve equal results; it protects individuals against any device that causes inequality, regardless of the intent with which the device is used.[39] Prima facie liability for a violation of the right to equal status arises

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33. Fiss, *Fair Employment Laws*, *supra* note 31, at 308.

34. *Id.* at 307.

35. *See* Brest, *supra* note 13, at 39-43.

36. For an overview of the relationship between equal treatment, equal status, and preferential treatment, see EQUALITY AND PREFERENTIAL TREATMENT (M. Cohen, T. Nagel & T. Scanlond eds. 1977).

37. "We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of *judicial, legislative, or administrative* findings of constitutional or statutory violations." Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) (Powell, J.) (emphasis added).

38. Justice Powell suggests that only certain governmental bodies can perform this function without violating the principle of equal treatment:

> [I]solated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria. Before relying upon these sorts of findings in establishing a racial classification, a governmental body must have the authority and capability to establish, in the record, that the classification is responsive to identified discrimination.

Id. at 309 (citations and footnote omitted).

39. *See* cases cited in *Proof of Purpose*, *supra* note 14, at 728 n.24.

any time a practice has a disparate impact on members of certain classes.[40]

Disparate impact analysis has emerged as one of the principal means for implementing an equal status value.[41] In the 1960's this new theory was developed in response to efforts by the Equal Employment Opportunity Commission (EEOC), the Departments of Justice and Labor, the NAACP, the Legal Defense and Education Fund, Inc., and other plaintiffs' counsel to formulate a concept of discrimination that would accelerate the economic progress of minority groups.[42] Disparate impact analysis accomplishes this result in two ways. First, plaintiffs are aided by a presumption that differential impact is the functional equivalent of discrimination according to race or some other forbidden criterion.[43] In short, a showing of disparate impact shifts the burden of production.[44] Second, the rebuttal burden is set so high under an equal status standard that it is rarely met. Consequently, plaintiffs will usually prevail merely by showing adverse impact.[45] Use of disparate impact analysis, then, indicates adherence to an equal status standard.

b. Remedial theory. Preferential treatment[46] abrogates the

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40. *See* Seelman, *supra* note 32, at 55-56; *Proof of Purpose, supra* note 14, at 729 & n.27.

41. *See generally* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 65-75 (1976); Perry, *The Disproportionate Impact Theory of Racial Discrimination,* 125 U. PA. L. REV. 540, 553-62 (1977); Shoben, *Differential Pass-Fail Rates in Employment Testing: Statistical Proof under Title VII,* 91 HARV. L. REV. 793 (1978); Shoben, *Probing the Discriminatory Effects of Employee Selection Procedures with Disparate Impact Analysis Under Title VII,* 56 TEX. L. REV. 1 (1977); Note, *Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal,* 89 HARV. L. REV. 387 (1975).

42. Blumrosen, *Employment Discrimination, supra* note 14, at 69-70, 71, 74 & n.44. *See also* Seelman, *supra* note 32, at 4. In 1968, Professor Blumrosen suggested "that the objective criterion to which the civil rights interest is moving is the number of minorities employed in various job classifications . . . . The reduction of differential unemployment rates between the minority and majority requires that employers hire greater proportions of minorities." Blumrosen, *The Duty of Fair Recruitment Under the Civil Rights Act of 1964,* 22 RUTGERS L. REV. 465, 504 (1968) [hereinafter cited as Blumrosen, *Fair Recruitment*]. *See generally* sources cited note 14, *supra.*

43. Fiss, *Fair Employment Laws, supra* note 31, at 290-304. *See also Burden of Proof, supra* note 30, at 1051 & n.110.

44. One commentator charges that the implementation of equal status through the allocation of burden of proof has allowed "the manipulation of the courts to favor minorities." Producing evidence of disparate impact in testing cases, he suggests, "is no more difficult than picking up stones from a gravel road. Plaintiffs utilizing adverse impact evidence, thus, have no real burden of proof." Seelman, *supra* note 32, at 55.

45. *Id.* at 55-56.

46. The literature on preferential treatment is extensive. *See, e.g.,* Ely, *The Consti-*

mutuality principle. Commensurate with the idea of equal status, race-conscious remedial measures need not be granted solely to identified victims of purposeful discrimination, nor need they be paid for by adjudged wrongdoers. Favorable treatment is frequently justified under a group theory or an individual theory of compensation. Under a group theory preferential treatment is morally justified because of the individual's membership in a group that has been treated unfairly in the past. Under an individual theory, compensation is justified because the individual presumably has been treated unfairly at some point in his own past.[47]

In the final analysis, the validity of race-conscious treatment under the equal status value does not depend on the legitimacy of these moral claims. Given absolute repudiation of inequality, equal status is its own justification for preferential treatment. These theories are the product, however, of the "major new effort to provide a philosophical foundation—a conception of justice as fairness—for a communal society,"[48] a society founded on the equal status principle. Courts that authorize preferential treatment implement equal status. Moreover, pursuant to its focus on substantive equality, equal status does not require any particular procedural safeguards prerequisite to implementing remedial measures, and private individuals or institutions may grant preferential treatment as readily as courts or other governmental bodies.[49]

II. The Civil Rights Act Cases: Equal Treatment or Equal Status?

Antidiscrimination cases generally fall into two classes:

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tutionality of Reverse Racial Discrimination, 41 U. Chi. L. Rev. 723 (1974); Harkins, *Affirmative Action: The Constitution, Jurisprudence and the Formulation of Policy*, 26 Kan. L. Rev. 85 (1977); Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 Nw. U.L. Rev. 363 (1966).

47. *See generally* Equality and Preferential Treatment, *supra* note 36.

48. Bell, *supra* note 18, at 35. Bell describes the impetus for this effort as follows:

> If equality of result is to be the main object of social policy . . . it will demand an entirely new political agenda for the social systems of advanced industrial countries. But no such political demand can ultimately succeed without being rooted in some powerful ethical system . . . .

Id. *See also* Kristol, *About Equality*, Commentary, Nov. 1972, *reprinted in* D. Schaefer, *supra* note 15, at 219.

49. *See* United Steelworkers of America v. Weber, 443 U.S. 193 (1979). *See generally* Sedler, *Beyond* Bakke: *The Constitution and Redressing the Social History of Racism*, 14 Harv. C.R.-C.L. L. Rev. 133 (1979).

those involving disparate treatment and those involving disparate impact.[50] Disparate treatment means treating "some people less favorably than others because of their race, color, religion, sex, or national origin." Disparate impact involves "practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another."[51] Because the civil rights cases generally involve both a finding of liability and the determination of an appropriate remedy, the Supreme Court may adopt equal treatment and equal status theories in the same case. For example, the Court may decide in a disparate impact case that disparate impact evidence alone establishes liability. However, the Court, consistent with the equal treatment principle, may limit the remedy to neutralizing the discriminatory effects of the facially neutral criteria. Where this occurs, the liability and remedy issues are discussed separately, according to the value implemented in deciding each issue.[52]

A. The Equal Treatment Cases

1. Developing a theory of liability in disparate treatment cases: McDonnell Douglas, Teamsters, *and* Furnco

Most cases brought in the early years following enactment

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50. These terms are often used to define the standard of proof required to trigger "strict scrutiny" under the equal protection clause, *see Proof of Purpose, supra* note 14, at 726 & n.19, 730-31 & n.28, or to establish a prima facie violation of the Civil Rights Act.

This Comment does not discuss cases that deal with procedural aspects of the Civil Rights Act. For an example of a procedural case, see Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (title VII action not foreclosed by prior arbitral decision).

51. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

52. *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). In the early cases the issue of which value is protected by the Civil Rights Act was not as sharply framed as it later came to be. *Compare* McDonnel Douglas Corp. v. Green, 411 U.S. 792 (1973), *and* Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1973), *with* General Electric Co. v. Gilbert, 429 U.S. 125 (1976). Dicta in these cases indicated that the Court believed equal treatment was intended though the holdings indicated the contrary. Griggs v. Duke Power Co., 401 U.S. 424 (1971), for example, held that evidence of disparate impact establishes a prima facie case, but stated that "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." *Id.* at 431. Consequently, *Griggs* has been cited in cases endorsing equal treatment as well as in cases implementing equal status. *Compare* United Steelworkers of America v. Weber, 443 U.S. 193, 218 (1979) (Burger, C.J., dissenting); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 579 (1978); City of Los Angeles, Dep't of Water and Power v. Manhart, 435 U.S. 702, 709 (1978); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279 (1976); *and* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) *with* Nashville Gas Co. v. Satty, 434 U.S. 136, 141 (1977); Dothard v. Rawlinson, 433 U.S. 321, 329-30 (1977); *and* Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975).

of the Civil Rights Act involved disparate treatment.[53] Usually the alleged discriminatory conduct did not challenge the traditional standards for allocating the burden of proof. As the most flagrant discriminatory practices were eliminated,[54] however, burden of proof more frequently became an issue.[55] The Court first formulated a detailed test for proof of racial discrimination in disparate treatment cases in *McDonnell Douglas Corp. v. Green*.[56] Green was a mechanic and long-time civil rights activist who was laid off in the course of a general reduction in McDonnell Douglas Corporation's work force. In protesting his discharge, Green participated in an illegal "stall-in" and, as McDonnell Douglas alleged, a "lock-in." Three weeks later, when the company advertised for qualified mechanics, Green applied for reemployment. According to McDonnell Douglas, Green's application was rejected because of his participation in the illegal activities.[57]

The Supreme Court stated that a plaintiff could establish a prima facie case of discrimination by proving four facts:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of

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53. *See, e.g.*, Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) (refusal to serve blacks); Daniel v. Paul, 395 U.S. 298 (1969) (refusal to serve blacks); United States v. Johnson, 390 U.S. 563 (1968) (conspiracy to injure blacks in the exercise of their right to patronize restaurant); Hamm v. City of Rock Hill, 379 U.S. 306 (1964) (blacks convicted for participating in "sit-ins" at lunch counters); Katzenbach v. McClung, 379 U.S. 294 (1964) (refusal to serve blacks); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (refusal to accommodate blacks).

The first title VII case to reach the Supreme Court, Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971), involved disparate treatment. Martin Marietta had refused job applications from women with pre-school-age children, but had employed men with pre-school-age children. The Supreme Court, in a per curiam opinion, stated that the Civil Rights Act of 1964 required that similarly situated persons "be given employment opportunities irrespective of their sex." Section 703(a) did not permit "one hiring policy for women and another for men—each having pre-school-age children." The Court remanded for the trial court to determine whether "conflicting family obligations" justified the disparate hiring policies under the bona fide occupational qualification exemption of § 703(e). *Id.* at 544.

54. *See* Brest, *supra* note 13, at 2.

55. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971); United States v. DeRosie, 473 F.2d 749 (5th Cir. 1973); Dean v. Ashling, 409 F.2d 754 (5th Cir. 1969).

56. 411 U.S. 792 (1973).

57. *Id.* at 794-96.

complainant's qualifications.[58]

Establishment of a prima facie case constitutes the first step in the Court's liability formula. As to this first step, the Supreme Court found, as did the lower court,[59] that Green had met his burden of proof. In the second step, the burden of going forward shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the [plaintiff's] rejection."[60] The Supreme Court held that McDonnell Douglas had met its burden under this second step.[61] The Court also defined a third step, that of shifting the burden back to Green to prove that the employer's stated reasons for refusing to employ him were in fact a pretext.[62]

International Brotherhood of Teamsters v. United States,[63] decided four years after *McDonnell Douglas*, involved two "pattern or practice"[64] actions against T.I.M.E.-D.C. Trucking Company and the Teamsters Union, challenging purposeful disparate

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58. *Id.* at 802.

59. Green v. McDonnell Douglas Corp., 463 F.2d 337 (8th Cir. 1972), *vacated and remanded*, 411 U.S. 792 (1973).

60. 411 U.S. at 802.

61. The Court of Appeals for the Eighth Circuit partly based its formulation of the allocation of proof on Griggs v. Duke Power Co., 401 U.S. 424 (1971), a disparate impact case involving standardized tests and educational requirements. *See* Green v. McDonnell Douglas Corp., 463 F.2d at 352 (revised majority opinion); 463 F.2d at 350, 355 (Johnsen, J., dissenting). *Griggs* held that plaintiffs had established a prima facie case of discrimination under title VII by showing that the challenged selection criterion had an adverse racial impact. The burden then shifted to the defendant to prove that the requirements "bear a demonstrable relationship to successful performance of the jobs" for which they are used. 401 U.S. at 431.

On appeal of *McDonnell Douglas*, however, the Supreme Court refused to extend the *Griggs* burden of proof formulation to Green. Instead, Justice Powell emphasized dictum in *Griggs* indicating that title VII prohibits " 'preference for any group, minority or majority.' " He also noted that "[t]here are societal as well as personal interests on both sides of [the employment application] equation." 411 U.S. at 800-01 (quoting Griggs v. Duke Power Co., 401 U.S. at 430). What title VII requires is that employment decisions be "racially neutral." However, the Court did accept the *Griggs* definition of title VII's purpose, "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *Id.* at 800.

62. 411 U.S. at 804. The Court did not suggest that the plaintiff must provide evidence of subjective intent. Indeed, citing Blumrosen, *Employment Discrimination*, *supra* note 14, the Court went so far as to note that statistics "may be helpful" in meeting this burden. 411 U.S. at 805 & n.19. However, the Court warned against overreliance on statistical data: "We caution that such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to hire." *Id.* at 805 n.19.

63. 431 U.S. 324 (1977).

64. *See id.* at 366 n.16.

treatment in the hiring, assignment, and promotion of minority employees. The Supreme Court held that defendants had violated title VII by purposefully treating minority members less favorably than white persons. The Court refined the *McDonnell Douglas* liability theory by noting that in disparate treatment cases "[p]roof of discriminatory motive is critical."[65]

In reaffirming the equal treatment conception of proof of discriminatory motive, however, the Court clearly was not requiring "direct proof of discrimination."[66] Rather, the Court engaged the use of an inference that a "decision was based on a discriminatory criterion" when the plaintiff shows that his rejection was not legitimately based on lack of qualification, the absence of a vacancy, or some other legitimate reason.[67]

The trend toward reinforcement of an equal treatment interpretation of title VII, at least in disparate treatment cases, continued in the following term. In *Furnco Construction Corp. v. Waters*,[68] the Supreme Court rebuffed a lower court attempt to shift the focus toward equal status. *Furnco* involved the alleged discriminatory refusal to hire three black bricklayers. The Court of Appeals for the Seventh Circuit, in construing the *McDonnell Douglas* test, required the employer to show that the hiring method chosen "maximize[d] hiring of minority employees"[69] in order to rebut the prima facie finding of discrimination. The Seventh Circuit's liability formula incorporated equal status values by requiring employers not only to consider race in developing its hiring policies, but to choose a policy that would promote the employment of the largest number of minority applicants.

The Court rejected this approach as without "support either in the nature of the prima facie case or the purpose of Title VII."[70] Reaffirming the *Teamsters* case's equal treatment concept of discrimination, Justice Rehnquist noted that *McDonnell Douglas* did not abrogate the plaintiff's burden of proving dis-

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65. *Id.* at 335 n.15.

66. *Id.* at 358 n.44.

67. *Id.* at 358 & n.44.

68. 438 U.S. 567 (1978).

69. *Id.* at 577-78. The court of appeals also "apparently equat[ed] a prima facie showing . . . with an ultimate finding of fact as to discriminatory refusal to hire under Title VII." *Id.* at 576. Such a standard of proof allows a plaintiff to establish a violation of title VII merely by means of a presumption, rather than by proof of discrimination. *See id.* at 577.

70. *Id.* at 577.

criminatory intent.[71] As long as an employer shows " 'some legitimate, nondiscriminatory reason for the [applicant's] rejection,' " the burden remains on the plaintiff to "introduce evidence that the proffered justification is merely a pretext for discrimination."[72] Moreover, the Court reaffirmed the equal treatment principle "that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force."[73]

In allocating the burden of proof in the disparate treatment cases reviewed above, the Court has recognized the realities of proof in modern discrimination cases without compromising the equal treatment value. In light of the subtle forms in which racial discrimination can manifest itself,[74] the Court has assisted the plaintiff by presuming, in the absence of legitimate explanations to the contrary, that acts of disparate treatment "are more likely than not based on the consideration of impermissible factors."[75] Nevertheless, attempts to dilute the equal treatment value were firmly rebuffed in *Furnco*. However, it is unclear to what extent the Court's commitment to equal treatment in these cases resulted from deference to traditional standards of proof in

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71. *Id.*

72. *Id.* at 578 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. at 802). The Court went on to note that statistical proof of a balanced work force was probative of a nondiscriminatory "motive" and "not wholly irrelevant on the issue of intent." Therefore, such evidence could be used to rebut the inference of "discriminatory animus" created by evidence of disparate treatment. *Id.* at 580.

73. *Id.* at 579. The Court reaffirmed its intention to maintain an equal treatment approach in disparate treatment cases in Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978). In a per curiam opinion, with four Justices dissenting, the Court remanded a decision by the Court of Appeals for the First Circuit "[b]ecause [it] appears to have imposed a heavier burden on the employer than *Furnco* warrants." *Id.* at 25. The First Circuit described the employer's burden under *McDonnell Douglas* as "requiring the defendant to prove absence of discriminatory motive, [thus] plac[ing] the burden squarely on the party with the greater access to such evidence." Sweeney v. Board of Trustees of Keene State College, 569 F.2d 169, 177 (1st Cir.), *vacated,* 439 U.S. 24 (1978). Such a standard, the Court noted, "would make entirely superfluous the third step in the *Furnco-McDonnell Douglas* analysis, since it would place on the employer at the second stage the burden of showing that the reason for rejection was not a pretext, rather than requiring such proof from the employee as a part of the third step." Board of Trustees of Keene State College v. Sweeney, 439 U.S. at 24 n.1. Justice Stevens, dissenting, argued that the "Court's action implies that the recent opinion in [*Furnco*] made some change in the law as explained in [*McDonnell Douglas*]." *Id.* at 26.

74. *See, e.g.,* International Bhd. of Teamsters v. United States, 431 U.S. at 365 n.51.

75. Furnco Constr. Co. v. Waters, 438 U.S. at 577. *Accord,* International Bhd. of Teamsters v. United States, 431 U.S. at 358 n.44.

disparate treatment cases or from a conviction that such standards are mandated by the terms of the Civil Rights Act.

2. McDonald—*an equal treatment view of section 703(a)*

Dicta in *McDonnell Douglas, Teamsters*, and *Furnco* suggest that the Court recognized in the Civil Rights Act a congressional intent to implement equal treatment.[76] However, in formulating the liability theory developed in these cases, the Court did not expressly interpret any prohibitory provision of the statute. In *McDonald v. Santa Fe Trail Transportation Co.*,[77] the Court interpreted section 703(a), one of title VII's prohibitory sections. In doing so, the Court for the first time appeared to expressly adopt an equal treatment interpretation of the Civil Rights Act.[78]

Section 703(a) prohibits an employer from discharging "any individual . . . because of such individual's race."[79] In *McDonald*, three employees, one black and two white, were charged with stealing sixty one-gallon cans of antifreeze from a Santa Fe Trail Transportation Company shipment. The two white employees were discharged, while the black was retained. The lower court dismissed the case on the ground that the disparate treatment "[did] not raise a claim upon which Title VII relief may be granted."[80] The Supreme Court reversed, however, holding that "Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be appli-

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76. In *McDonnell Douglas*, the Court noted that "[n]othing in Title VII compels an employer to absolve and rehire one who has engaged in the . . . deliberate, unlawful activity against it." 411 U.S. at 803. In several cases, the Court has made reference to title VII's "purpose." *See, e.g.*, Furnco Constr. Corp. v. Waters, 438 U.S. at 577; International Bhd. of Teamsters v. United States, 431 U.S. at 335 n.15 ("Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII").

77. 427 U.S. 273 (1976).

78. *See id.* at 278-85.

79. 42 U.S.C. § 2000e-2(a) (1976) provides:

It shall be an unlawful employment practice for an employer—

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

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

80. 427 U.S. at 278.

cable were they Negroes."[81]

Justice Marshall began his analysis of the statute by noting that the terms of section 703(a) "are not limited to discrimination against members of any particular race."[82] The Civil Rights Act prohibits " '[d]iscriminatory preference for *any* [racial] group, *minority* or *majority*.' "[83] However, Justice Marshall went even further in substantiating title VII's equal treatment value by citing "uncontradicted legislative history."[84] Moreover, the Court expressly rejected the notion that benign discrimination against whites in "isolated cases" was acceptable under title VII.[85] Relying on the *McDonnell Douglas* case's liability theory, the Court found that because the criteria for discharge had not been " 'applied alike to members of all races,' " the petitioners' title VII claims had to be reinstated.[86]

3. Teamsters *and the perpetuation of effects of past discrimination: an equal treatment view of section 703(h)*

Section 703(h) permits an employer "to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system."[87] Seniority systems frequently have a disproportionate adverse impact on minority employees because they perpetuate the effects of prior discriminatory employment practices. Because they are race-neutral, however, seniority systems do not normally give rise to liability under an equal treatment theory. By contrast, *Griggs v. Duke Power Co.*,[88] which involved stan-

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81. *Id.* at 280.

82. *Id.* at 278-79.

83. *Id.* at 279 (quoting Griggs v. Duke Power Co., 401 U.S. at 431) (emphasis in original).

84. *Id.* at 280. Compare the Court's use of title VII's legislative history here with that in United Steelworkers of America v. Weber, 443 U.S. 193, 203-07 (1979).

85. 427 U.S. at 280-81 n.8. However, the Court distinguished "isolated" acts of discrimination against whites from judicially imposed remedies or affirmative action programs "otherwise prompted." *Id.*

86. *Id.* at 283, 285 (quoting 411 U.S. at 804).

87. 42 U.S.C. § 2000e-2(h) (1976). The section provides in relevant part:

> 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 . . . system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.

88. 401 U.S. 424 (1971).

dardized tests and educational requirements, implemented an equal status value in a disparate impact setting. The *Griggs* Court held that "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."[89] The lower courts in *Teamsters*, applying the *Griggs* rationale, found that a competitive seniority system contained in a collective bargaining agreement between the Teamsters and T.I.M.E.-D.C. violated title VII because it "locked" minorities into inferior jobs and perpetuated prior discrimination by discouraging transfers to higher paying jobs.[90] The Supreme Court conceded that "[w]ere it not for § 703(h), the seniority system in this case would seem to fall under the *Griggs* rationale."[91] But the Court held that "Congress considered [the perpetuation] effect of many seniority systems and extended a measure of immunity to them."[92] Consequently, for the

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89. *Id.* at 430.

90. 431 U.S. at 343-46.

91. *Id.* at 349.

92. *Id.* at 350. The Court rejected the government's theory that the perpetuation of prior discrimination through the operation of a race-neutral seniority system constituted a continuing violation of title VII. *Id.* at 345-54.

The Court distinguished in its analysis between pre- and post-Act discrimination. The government had argued that a seniority system which perpetuates the effects of prior discrimination—pre-Act or post-Act—could never be "bona fide" under 703(h). The Court noted, however, that post-Act discriminatees could obtain full "make whole" relief under the Court's prior holding in Franks v. Bowman Transp. Co., 424 U.S. 747 (1976), "without attacking the legality of the seniority system as applied to them." 431 U.S. at 347.

The Court's analysis of the pre- and post-Act issue, as Justice Marshall notes in dissent, is not based on the legislative history of section 703(h). *Id.* at 383-84 (Marshall, J., concurring in part and dissenting in part). Justice Marshall's contention that the section does not legalize seniority systems which perpetuate post-Act discrimination assumes, however, that Congress intended the Act to proscribe neutral systems that result in discriminatory effects. The legislative history is directly to the contrary. As the Justice Department Memorandum placed in the Congressional Record by Senator Clark indicates, title VII proscribes unequal treatment, not unequal effects:

> Title VII is directed at 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.* Of course, if the seniority rule itself is discriminatory, it would be unlawful under Title VII. If a rule were to state that all Negroes must be laid off before any white man, such a rule [would be unlawful] . . . . Any difference in treatment based on established seniority rights would not be based on race and would not be forbidden by the title.

110 CONG. REC. 7207 (1964) (emphasis added). *Accord, id.* at 7217 (remarks of Sen. Clark); *id.* at 6549 (remarks of Sen. Humphrey); *id.* at 6563-64 (remarks of Sen. Kuchel).

first time in a disparate impact context, the Court refused to implement equal status.

The Court's analysis of the legislative history relied heavily on several memoranda entered into the Congressional Record in response to criticism that title VII would destroy existing seniority rights.[93] Although these memoranda were entered before section 703(h) was adopted, the Court found that the chronology of events leading up to the addition of section 703(h) indicated that the memoranda were "authoritative indicators of that section's purpose."[94] The "unmistakable purpose of § 703(h)," the Court concluded, "was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII."[95] In light of the purpose exhibited in the legislative history, the Court rejected arguments that no seniority system that tends to perpetuate pre-Act discrimination can be "bona fide."[96] Similarly, it rejected a reading of the words "an intention to discriminate" to mean the *effect* of the application of a seniority system rather than the *purpose* or intent for which it is used.[97]

Justice Marshall, joined by Justice Brennan, dissented, arguing that Congress did not expressly consider whether neutral systems that perpetuated the effects of prior discrimination violated the Civil Rights Act. Reading the legislative history very narrowly, he concluded that the "only evils" that Congress addressed were seniority systems that were fictional or nonremedial or that had a disparate impact on newly hired mi-

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In United Airlines v. Evans, 431 U.S. 553 (1977), handed down on the same day as *Teamsters*, the Court rejected a reading of section 703(h) that would immunize attacks on seniority systems based on the consequences of acts that occurred prior to the enactment of title VII, but would allow such attacks when the consequences resulted from post-Act discrimination. *Id.* at 560.

93. 431 U.S. at 350-51 (interpretative memorandum by Senators Clark and Case); *id.* at 351 (interpretative memorandum by Justice Department); *id.* at 351 n.36 (questions and answers prepared by Sen. Clark).

94. *Id.* at 352. Justice Marshall, in dissent, noted that the three documents concerning seniority introduced by Senator Clark were written "many weeks" before section 703(h) was introduced: "Accordingly, they do not specifically discuss the meaning of the proviso." *Id.* at 382 & n.6 (Marshall, J., concurring in part and dissenting in part). The Court in response, stated that "[i]t is inconceivable that § 703(h), as part of a compromise bill, was intended to vitiate the earlier representations of the Act's supporters by increasing Title VII's impact on seniority systems." *Id.* at 352.

95. *Id.* at 352.

96. *Id.* at 353.

97. *Id.* at 353 n.38. *Compare id.* at 381 (Marshall, J., dissenting) *with* Seelman, *supra* note 32, at 25 & n.115, 35-36, 51-52.

nority employees.[98] Since, as the Court acknowledged, " 'there seem[ed] to be no explicit reference in the legislative history to pre-Act discriminatees already employed in less desirable jobs,' [o]ur task . . . is 'to put to ourselves the question, which choice is it the more likely that Congress would have made' had it focused on the problem."[99] Justice Marshall approached this problem by first examining "the devastating impact" the Court's holding would have on minority groups. Noting remarks by several legislators, Marshall in effect concluded that Congress wanted to achieve economic equality—"to enable black workers to assume their rightful place in society."[100]

Justice Marshall bolstered his finding of this congressional purpose with two post-enactment developments: EEOC interpretations invalidating seniority systems that perpetuate prior discrimination[101] and legislative history accompanying the Equal Employment Opportunity Act of 1972.[102] The materials Justice Marshall found persuasive included committee reports citing lower court decisions and law review articles approving the "perpetuation principle."[103] In addition, he cited a canon of statutory interpretation authorizing reliance on subsequent legislation to interpret prior legislation on the same subject matter.[104]

In responding to these arguments, the Court disapproved the use of subsequent legislative interpretations of the 1964 Act:

> [T]he section of Title VII that we construe here, § 703(h), was enacted in 1964, not 1972. The views of members of a later Congress, concerning different sections of Title VII, enacted after this litigation commenced, are entitled to little if any weight. It is the intent of the Congress that enacted § 703(h) in 1964, unmistakable in this case, that controls.[105]

The Court's refusal to extend the *Griggs* rationale to neutral

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98. 431 U.S. at 385-86 (Marshall, J., concurring in part and dissenting in part).

99. *Id.* at 386-87 (quoting Burnet v. Guggenheim, 288 U.S. 280, 285 (1933)).

100. *Id.* at 389.

101. On this point, Justice Marshall concedes that the Court "may have retreated" from its prior view that the interpretations of the EEOC are " 'entitled to great deference.' " *Id.* at 390 (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975)). *Compare* General Electric Co. v. Gilbert, 429 U.S. 125, 141-42 (1976), *with* Albemarle Paper Co. v. Moody, 422 U.S. 405, 430-31 (1975), *and* Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971).

102. Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. § 2000e (1976)).

103. 431 U.S. at 391-92 & n.21 (dissenting opinion).

104. *Id.* at 393-94.

105. *Id.* at 354 n.39.

systems that perpetuate the effects of prior discrimination, particularly in light of the overwhelming judicial and academic opinion to the contrary,[106] reflects a decided deference to the equal treatment mandate.

4. Albemarle, Franks, *and the scope of the remedy under section 706(g): equal treatment or equal status?*

Section 706(g), title VII's remedial provision, authorizes a court to "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay."[107] Congress amended Section 706(g) in 1972.[108] Accordingly, the Court relied extensively on the 1972 amendments to construe the section in *Albemarle Paper Co. v. Moody.*[109]

In *Albemarle,* a class of present and former black employees sought injunctive relief from the discriminatory effects of the plant's testing practices and seniority system. Five years after the complaint was filed, the class moved to add a backpay demand. The district court found that Albemarle's seniority system violated title VII, but refused to order backpay because the company had not acted in bad faith.[110] The Supreme Court held that the absence of bad faith is not a sufficient reason for denying backpay. Citing *Griggs,* the Court noted that "Title VII is not concerned with the employer's 'good intent or absence of discriminatory intent' for 'Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.' "[111]

The Court noted that in amending section 706(g), the Senate rejected several amendments that would have restricted that section's backpay provision.[112] In addition, the Court supported its reading of the statute with other statements from the legislative history[113] and with contemporaneous interpretations of the

106. *See id.* at 378-80 and accompanying notes (Marshall, J., concurring in part and dissenting in part).

107. 42 U.S.C. § 2000e-5(g) (1976).

108. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. § 2000e-5(g) (1976)).

109. 422 U.S. 405 (1975).

110. *Id.* at 410.

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

112. 422 U.S. at 414 n.8, 420 & n.13.

113. *Id.*

National Labor Relations Act's backpay provision,[114] after which section 706(g) was expressly modeled.[115] While the Court's strict holding on the backpay issue is not inconsistent with equal treatment, its reasoning and statutory interpretation were heavily influenced by the *Griggs* equal status analysis.

In *Franks v. Bowman Transportation Co.*,[116] the Court held that persons to whom the defendant had wrongfully denied employment were presumptively entitled to a full competitive, as well as a benefit, kind of seniority applied retroactively to the date of their initial job application.[117] Because the plaintiffs in *Franks* were individually identified victims of the employer's discriminatory practices, the Court's holding need not be seen to violate the principle of equal treatment. As in *Albemarle,* however, the Court's interpretative approach leaves substantial doubt that the result was reached by reference to an equal treatment purpose. The misgivings expressed in separate opinions by Chief Justice Burger and Justice Powell suggest that it was not.

While agreeing that seniority relief should be available, Justice Powell, dissenting in part, did not agree with the Court's interpretation of section 706(g) as "presumptively" requiring retroactive seniority relief.[118] He argued that the Court improperly relied on language from and citations to lower court decisions contained in Committee Reports to the 1972 amendments,[119] and he criticized the Court's heavy reliance on Labor Board practice.[120] In conclusion, Justice Powell insisted that the Court's approach renders "largely meaningless the discretionary authority vested in district courts by § 706(g) to weigh the equities of the situation."[121]

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114. *See* 29 U.S.C. § 160(c) (1976).

115. 422 U.S. 419-21 & n.11. *See generally* Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972,* 40 GEO. WASH. L. REV. 824, 880-84 (1972).

116. 424 U.S. 747 (1976).

117. *See id.* at 766-70, 779; *id.* at 782 n.1 (Powell, J., concurring in part and dissenting in part).

118. *Id.* at 784-86, 788 n.6, 790-91, 796 n.18.

119. *Id.* at 796 n.18.

120. *Id.*

121. *Id.* at 782.

B. The Equal Status Cases

1. Formulation of a liability theory in disparate impact cases: Griggs *and* Albemarle

As the Court's first definitive expression on the nature and scope of the Civil Rights Act's prohibition of racial discrimination,[122] *Griggs v. Duke Power Co.*[123] has profoundly influenced the development of antidiscrimination law. Blacks in that case challenged the power company's requirement that applicants have a high school diploma or pass an intelligence test in order to be considered for employment or for transfer to higher paying jobs. The company contended that its testing practices were specifically authorized under section 703(h) of the Civil Rights Act.[124] Section 703(h) permits employers to use "any professionally developed ability test" that "is not designed, intended or used to discriminate because of race, color, religion, sex or national origin."[125] The lower courts essentially adopted an equal treatment interpretation of the Act by holding that job qualification criteria which were fairly applied to all racial groups and which were implemented without an intent to discriminate against minority employees would not be invalidated merely because a disproportionate number of minority applicants failed to satisfy the criteria.[126]

The Supreme Court, however, took an equal status approach. "[G]ood intent or absence of discriminatory intent" was essentially irrelevant, inasmuch as "Congress directed the thrust of the [Civil Rights] Act to the *consequences* of employment practices, not simply the motivation."[127] Reversing the lower courts, the Supreme Court formulated a two-part theory of liability for disparate impact cases under title VII. First, the plaintiff had to show that the challenged employment practice had a disproportionate impact on minority groups. Because the Civil

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122. Blumrosen, *Employment Discrimination, supra* note 14, at 62.

123. 401 U.S. 424 (1971).

124. *Id.* at 427-28, 433.

125. Section 703(h) provides in pertinent part:

> Notwithstanding any other provision of this subchapter, it shall not 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) (1976).

126. 401 U.S. at 428-29.

127. *Id.* at 432 (emphasis in original).

Rights Act "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation,"[128] a showing of disproportionate impact established a prima facie case of liability. Second, the Court held that "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."[129]

In establishing the relevance of disproportionate impact evidence to title VII law, the Court reasoned that the objective of Congress in the enactment of title VII was plain from the language of the statute: "It was to achieve equality of employment opportunities . . . ."[130] "Equality," however, required not merely race neutral treatment, but race conscious treatment, *i.e.*, "the posture and condition of the jobseeker [must] be taken into account."[131] Since, as the Court noted, the fact that whites performed better on the tests than blacks "appear[s] to be directly traceable to race,"[132] the use of such tests was prima facie unlawful.

Aside from its interpretation of the legislative objective, the Court's definition of a prima facie case may have been influenced by the EEOC's construction of the Civil Rights Act.[133] In its Guidelines on Employee Selection Procedures,[134] the EEOC states that "[t]he use of any test which adversely affects hiring . . . constitutes discrimination unless . . . the test has been validated."[135] "[H]igher rejection rates for minority candidates than

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128. *Id.* at 431.

129. *Id.* at 432.

130. *Id.* at 429.

131. *Id.* at 430-31.

132. *Id.* at 430. The Court found that the disproportionate impact evidence adduced in the case was directly related to prior societal discrimination.

133. *See* T. EASTLAND & W. BENNETT, *supra* note 11, at 11-12; N. GLAZER, *supra* note 11, at 51-57. *See generally* Note, *Testing for Special Skills in Employment: A New Approach to Judicial Review*, 1976 DUKE L. J. 596; Note, *Application of the EEOC Guidelines to Employment Testing Validation: A Uniform Standard for Both Public and Private Employers*, 41 GEO. WASH. L. REV. 505 (1972).

134. 29 C.F.R. § 1607 (1979). The Equal Employment Opportunity Commission, created by the Civil Rights Act in 1964, Pub. L. No. 88-352, § 705, 78 Stat. 258 (1964) (codified at 42 U.S.C. § 2000e-4 (1976)), was not given authority to promulgate substantive regulations. *See* General Elec. Co. v. Gilbert, 429 U.S. 125, 141 & n.20 (1976); 42 U.S.C. § 2000e-12 (1976). The Commission formulated its first set of employment testing guidelines, without seeking public comment, in 1966. Seelman, *supra* note 32, at 4 & n.21. The guidelines were subsequently revised—again without comment—in 1970. *Id.* at 4.

135. 29 C.F.R. § 1607.3 (1979).

nonminority candidates" are an indication of "possible discrimination."[136] Validation requires proof "that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated."[137] Accordingly, the Supreme Court expressly approved the EEOC's validation requirement.[138] Relying on the canon that administrative interpretations by an enforcing agency are entitled to "great deference," the Court found that the section's language and "legislative history support[ed] the Commission's construction, . . . afford[ing] good reason to treat the guidelines as expressing the will of Congress."[139]

In *Albemarle*, the Court refined the *Griggs* two-step theory of liability. The Court defined the prima facie case as a showing by "the complaining party or class . . . that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants."[140] In step

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136. *Id.* § 1607.4(a).

137. *Id.* § 1607.4(c). In addition to validity, the EEOC also ruled that procedures having a disparate impact would be deemed to be unlawful unless they "evidence[d] a high degree of utility" and "the person giving or acting upon the results of the particular test [could] demonstrate that alternative suitable hiring, transfer or promotion procedures [were] unavailable for his use." *Id.* § 1607.3. According to Seelman, the EEOC guidelines do not compare with the statute they interpret. Seelman, *supra* note 32, at 10-39.

138. 401 U.S. at 433 n.9, 436.

139. *Id.* at 434. The Court also stated that "[f]rom the sum of the legislative history relevant in this case, the conclusion is inescapable that the EEOC's construction of § 703(h) to require that employment tests be job related comports with congressional intent." *Id.* at 436.

140. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). *Accord,* General Elec. Co. v. Gilbert, 429 U.S. 125, 136-37 & n.14 (1976). In these cases, the Court essentially adopted the EEOC standard.

The cases following *Griggs* and *Albemarle* suggest that statistical proof alone of adverse impact can establish a prima facie case. *See* Nashville Gas Co. v. Satty, 434 U.S. 136 (1977); Dothard v. Rawlinson, 433 U.S. 321 (1977); Hazelwood School Dist. v. United States, 433 U.S. 299 (1977). *But see* Seelman, *supra* note 32, at 52 n.232 ("[W]hether adverse impact evidence alone is sufficient to establish a prima facie case of unlawful discrimination in a case involving the more common kinds of selection factors is still a question which the Court must decide finally.").

The only authority the *Albemarle* Court cited in support of its definition of a prima facie case in a disparate impact context was McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). 422 U.S. at 425. *McDonnell Douglas* was a disparate treatment case. Consequently, it did not decide whether evidence of disparate impact establishes prima facie liability under title VII. The *Griggs* analysis of § 703(h) focused on the job-relatedness issue. Relying on the Clark-Case Memorandum, *Griggs* held that title VII required the employer to show that the test has "a manifest relationship to the employment in question." 401 U.S. at 432, 434. The fact that title VII permits employers to use tests

two, the burden shifts to the employer to show job-relatedness.[141] In the event the employer meets this burden, the Court added a third step: "[I]t remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' "[142]

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which measure "applicable job qualifications," *id.* at 434 n.11, does not mean that a title VII plaintiff establishes a prima facie case of discrimination merely by showing that proportionately fewer blacks than whites can meet the applicable standards. Indeed, in the paragraph immediately preceding the one on which the Court relies, Senator Case noted the following:

> Whatever its merit as a socially desirable objective, title VII would not require, and no court could read title VII as requiring, an employer to lower or change the occupational qualifications he sets for his employees simply because proportionately fewer Negroes than whites are able to meet them. Thus, it would be ridiculous, indeed, in addition to being contrary to title VII, for a court to order an employer . . . to lower his requirements . . . because . . . prior cultural or educational deprivation of Negroes prevented them from qualifying.

110 CONG. REC. 7246-47 (1964). And in the sentence immediately following that quoted by the Court, the Senator stated that "Title VII would in no way interfere with the right of an employer to fix job qualifications." *Id.* at 7247.

However, Senator Clark did not deny that tests might be used as a pretext for racial discrimination. Yet he emphasized that traditional disparate treatment standards governed such practices. Where "it could be demonstrated that such tests were used *for the purpose* of discriminating against an individual because of his race," then the Act would proscribe their use. "[I]t is not enough," however, "that the *effect* of using a particular test is to favor one group above another, *to produce a violation of the act;* an act of discrimination must be taken with regard to an *individual,* 'because of such individual's race, color, religion, or national origin.' " *Id.* at 9107 (emphasis added). *See also* Seelman, *supra* note 32, at 50.

The Court also relied on the fact that Senator Tower's original amendment authorizing " 'professionally developed ability tests' " was rejected because, as Senator Case put it, it might allow employers to use tests as a "guise" for discrimination. 401 U.S. at 435 (quoting 110 CONG. REC. 13,504 (1964) (remarks of Sen. Case)). In opposing the amendment, however, the senators supporting enactment of the civil rights bill did not advocate a change in the traditional burden of proof. *See* SOVERN, *supra* note 30, at 71-73; Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964,* 31 BROOKLYN L. REV. 62, 71 (1965); Bonfield, *supra* note 30, at 955-58; Gardner, *The Development of the Substantive Principles of Title VII Law: The Defendant's Views,* 26 ALA. L. REV. 1, 55-80 (1973); Lamb, *Proof of Discrimination at the Commission Level,* 39 TEMP. L.Q. 299, 301 (1966); Seelman, *supra* note 32, at 42-62. As Senator Humphrey stated, these tests "are legal unless used for the *purpose* of discrimination." 110 CONG. REC. 13504 (1964) (emphasis added).

141. Albemarle Paper Co. v. Moody, 422 U.S. at 425.

142. *Id.* (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973)). In *Albemarle,* the Court also stated that proof of suitable alternative selection criteria would constitute evidence that the employer was using its tests merely as a "pretext" for discrimination. *Id. McDonnell Douglas* defined the process of proving pretext as follows: "In short, on the retrial respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were

The liability issue in *Albemarle* concerned only the question of what an employer must show "to establish that pre-employment tests . . . are sufficiently 'job related' to survive challenge under Title VII."[143] In answering this question, the Court again endorsed, virtually without modification, the EEOC's construction of title VII.[144]

Justice Blackmun, concurring in the judgment, warned that "a too-rigid application of the EEOC Guidelines" might lead to "a subjective quota system of employment selection," a result "far from the intent of Title VII." He suggested that the guidelines deserved only "that deference normally due agency statements based on agency experience and expertise."[145]

Chief Justice Burger, dissenting, would have accorded even less deference to the EEOC standards for proving job relatedness: "[S]lavish adherence to the EEOC Guidelines regarding test validation should not be required; those provisions are, as their title suggests, guides entitled to the same weight as other well-founded testimony by experts in the field of employment testing."[146] The Chief Justice also noted that the *Griggs* endorsement of the guidelines extended only to the proposition that tests must be demonstrated to be job related under section 703(h), not to the EEOC's "methods for *proving* job relatedness." The EEOC's definition of test discrimination, he asserted, "interpret[s] no section of Title VII and [is] nowhere referred to in its legislative history."[147]

2. Washington v. Davis: *retreat from equal status?*

In *Washington v. Davis*,[148] police department applicants in the District of Columbia alleged that Test 21, a test designed to measure verbal ability, vocabulary, reading, and comprehension, had a highly discriminatory impact in screening out black appli-

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in fact a coverup for a racially discriminatory decision." 411 U.S. at 805. *Accord*, Dothard v. Rawlinson, 433 U.S. 321, 328-30 (1977).

In its guidelines, the EEOC placed the burden of showing that "alternative suitable hiring, transfer or promotion procedures are unavailable for [the employer's] use" on the employer. 29 C.F.R. § 1607.3 (1979). The Court's dictum on the suitable alternative burden appears to have rejected this approach.

143. 422 U.S. at 408.

144. *See id.* at 430-36.

145. *Id.* at 449.

146. *Id.* at 452.

147. *Id.* at 451-52 (emphasis in original).

148. 426 U.S. 229 (1976).

cants and bore no relationship to job performance. The test was developed by the Civil Service Commission (CSC) and was generally used throughout the federal service. Plaintiffs claimed that use of the test violated their fifth amendment rights.[149] The Court of Appeals for the District of Columbia, applying the *Griggs* rationale, held that proof of disproportionate impact alone was sufficient to establish a constitutional violation.[150] In a landmark decision, the Supreme Court reversed, holding that proof of discriminatory purpose was required in actions brought under the fifth and fourteenth amendments.[151]

The Court appeared to retreat from the wholehearted endorsement it had given the EEOC Guidelines in *Albemarle*. In promulgating testing guidelines, the CSC's interpretation of the Civil Rights Act had consistently tended to implement the equal treatment principle, while the EEOC's interpretation had tended toward equal status.[152] In *Washington v. Davis*, the plaintiffs argued that the CSC's test had to meet the job-relatedness standards developed under the EEOC guidelines,[153] which required evidence that test performance relate to success on the job.[154] The defendants argued, on the other hand, that the guidelines developed by the CSC, which permitted tests that *predicted* "[s]uccess in training,"[155] were more consistent with title VII's legislative intent.[156]

The court of appeals, persuaded that the EEOC interpretation was correct, held that the defendants had failed to "satisfy what it deemed to be the crucial requirement of a direct relationship between performance on Test 21 and performance on the policeman's job."[157] The Supreme Court disagreed, noting

149. *Id.* at 233-36.

150. Davis v. Washington, 512 F.2d 956 (D.C. Cir. 1975), *rev'd*, 426 U.S. 229 (1976). Although title VII was then inapplicable to the Federal Government, the parties assumed they were subject to Civil Rights Act standards. Washington v. Davis, 426 U.S. at 238 n.8, 249 & n.15. The extent to which lower courts accepted this assumption is an indication of the influence *Griggs* has exerted in the development of antidiscrimination law. *See id.* at 236 & n.6, 237, 238 & n.10, 244 & n.12. *See generally* Schwemm, *From* Washington *to* Arlington Heights *and Beyond: Discriminatory Purpose in Equal Protection Litigation*, 1977 U. ILL. L.F. 961, 987-1000; *Burden of Proof*, *supra* note 30, at 1037-39.

151. 426 U.S. at 238-40.

152. *See* Seelman, *supra* note 32, at 3-9, 53-62.

153. *See id.* at 26.

154. *See* Washington v. Davis, 426 U.S. at 265 (Brennan, J., dissenting).

155. *Id.* at 250 n.16.

156. *See id.* at 232 & n.1; Seelman, *supra* note 32, at 26.

157. 426 U.S. at 249-50.

that the CSC's guidelines seemed "the much more sensible construction of the job-relatedness requirement."[158]

Justice Brennan, dissenting, argued that the Court was retreating from its earlier definition of discrimination, noting that the Court's holding was "distinctly opposed" to the EEOC's construction of title VII.[159] The Court's approach, he charged, contradicted the view of Congress' intent expressed in *Griggs* and *Albemarle*. Deference to the EEOC's interpretation was warranted, he argued, because Congress failed to alter or disapprove the guidelines in 1972 when it amended title VII.[160] Finally, in support of his argument that the Court's interpretation was "inconsistent with clearly expressed Congressional intent," Justice Brennan relied on committee reports accompanying the 1972 legislation.[161]

Although it did not purport to modify any Civil Rights Act precedents, *Washington v. Davis* represented a significant setback to the complete implementation of the equal status value in antidiscrimination law. For the time being, at least, the equal status tide seemed to be turning.[162]

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158. *Id.* at 249-51. *But see* Nashville Gas Co. v. Satty, 434 U.S. 136, 142 n.4 (1977); Dothard v. Rawlinson, 433 U.S. 321, 332 & n.15, 334 n.19 (1977).

The EEOC Guidelines came under further attack in General Elec. Co. v. Gilbert, 429 U.S. 125 (1976). In 1972, the EEOC promulgated a regulation requiring employers to include pregnancy-related disabilities in their employee health and disability insurance plans. In rejecting this rule, the Court noted that EEOC Guidelines were " 'not controlling upon the courts by reason of their authority.' " The weight they should be given is dependent " 'upon the thoroughness evident in [their] consideration, the validity of [their] reasoning . . . and all those factors which give it power to persuade, if lacking power to control.' " *Id.* at 142 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)). *See also* Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 719 n.36 (1978).

The Court also rejected the EEOC Guidelines because they conflicted with regulations promulgated by the Wage and Hour Administrator. *See* 429 U.S. at 144-45.

159. 426 U.S. at 266.

160. *Id.* at 264. Deference was also due, he argued, because Congress recognized the need for expert assistance in the area of employment discrimination. *Id.* at 264 n.8.

161. *Id.* at 268-69.

162. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976), International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977), and United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977) significantly retarded the full implementation of equal status.

In General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), the Court upheld a disability plan challenged under § 703(a) of title VII, because it excluded disabilities arising from pregnancy from its coverage. The Court, analyzing *Gilbert* as a disparate treatment case, *id.* at 133-37, compared § 703(a)'s nondiscrimination prohibition with the fourteenth amendment's proscription against sex-related discrimination as interpreted in Geduldig v. Aiello, 417 U.S. 484 (1974). It noted the "similarities between the congressional language" of § 703(a) and cases construing the fourteenth amendment. It also noted that

3. Bakke *and* Weber: *reaching the limits of equal status*

Although federal agencies had endorsed the concept of preferential treatment as early as the mid-1960's,[163] the Court did not squarely face the issue until 1978 and the case of *Regents of the University of California v. Bakke*.[164] Before *Bakke*, signals respecting the Court's view on the controversial reverse discrimination issue had been mixed.[165] The reason for this became apparent in *Bakke*. Justices Powell, Brennan, White, Marshall, and Blackmun concluded that title VI of the Civil Rights Act[166] did not have independent statutory force, but proscribed only those racial classifications that would violate the equal protection clause.[167] Consequently, for these five justices the ultimate

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because the concerns Congress manifested in enacting title VII were similar to the concerns manifested in the Court's interpretation of the fourteenth amendment, the Supreme Court cases "afford an existing body of law" relevant to and helpful in interpreting § 703(a). 429 U.S. at 133. At one point the Court virtually admitted that Congress incorporated constitutional (equal treatment) standards into title VII:

> The concept of "discrimination," of course, was well known at the time of the enactment of Title VII, having been associated with the Fourteenth Amendment for nearly a century, and carrying with it a long history of judicial construction. When Congress makes it unlawful for an employer to "discriminate . . . because of . . . sex . . .," without further explanation of its meaning, we should not readily infer that it meant something different from what the concept of discrimination has traditionally meant.

Id. at 145 (citations omitted). Justice Brennan objected to this inference. *Id.* at 153-54 & n.6 (Brennan, J., dissenting).

163. *See generally* T. EASTLAND & W. BENNETT, *supra* note 11, at 11-12, 133-36.

164. 438 U.S. 265 (1978). *Bakke* has generated considerable commentary. *See, e.g.*, Ely, *The Supreme Court 1977 Term—Foreward: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978); Tribe, *Perspectives on* Bakke: *Equal Protection, Procedural Fairness, or Structural Justice*, 92 HARV. L. REV. 864 (1979); Voros, *Three Views of Equal Protection: A Backdrop to* Bakke, 1979 B.Y.U. L. REV. 25.

165. In the early disparate impact cases, the Court exhibited a willingness to consider the effects of historical discrimination in determining liability under the Civil Rights Act. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. at 430. In later cases, however, the Court emphasized that title VII focuses on the individuals, not classes. Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 708 (1978). Moreover, the Court had decided in 1976 that title VII "proscribes racial discrimination . . . against whites on the same terms as racial discrimination against non-whites." McDonald v. Santa Fe Trail Transp. Co., 427 U.S. at 279.

166. Bakke's original complaint alleged that the University of California's special admissions program violated title VI of the Civil Rights Act, as well as the equal protection clause and the privileges and immunities clause of the California State Constitution. While the trial court based its decision on all three grounds, the California Supreme Court held for Bakke only on equal protection grounds. Consequently, the parties neither briefed nor argued the applicability of title VI. Nevertheless, the Supreme Court requested the parties and the Justice Department to submit supplementary briefs on the statutory issue. *See* A. SINDLER, *Bakke, DeFunis, and* MINORITY ADMISSIONS 259 (1978).

167. 438 U.S. at 284-87 (Powell, J.); *id.* at 328-55 (Brennan, J., concurring in part

meaning of the Civil Rights Act was not a question of statutory interpretation, but one of constitutional interpretation. Of these five, only Justice Powell's view of the constitution harmonized with the equal treatment value.[168] Chief Justice Burger and Justices Stevens, Stewart, and Rehnquist concluded that the Civil Rights Act "may independently proscribe conduct that the Constitution does not," and therefore expressly adopted an equal treatment interpretation of the Act.[169] For these four justices, the meaning of the Civil Rights Act was a question of statutory interpretation.

In support of their conclusion that title VI incorporated nothing more than a constitutional standard, Justices Powell and Brennan offered two arguments. First, they argued that "supporters of Title VI repeatedly declared that the bill enacted constitutional principles."[170] Second, they noted that Congress refused to define the term "discrimination," favoring instead "broad language that could be shaped by experience, administrative necessity, and evolving judicial doctrine."[171] Therefore, Congress intended to delegate to the courts the task of updating the Act's meaning.

Justice Stevens believed that the language of section 601 was "perfectly clear,"[172] *i.e.*, "[n]o person in the United States shall, on the ground of race . . . be excluded from participation in . . . any program . . . receiving Federal financial assistance."[173] The university excluded Bakke because of his race. It received federal financial assistance; therefore, in Justice Stevens' view, "[t]he plain language of the statute" resolved the issue: "A different result cannot be justified unless that language misstates the actual intent of the Congress that enacted the statute . . . ."[174] After examining the statute's context,[175] its leg-

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and dissenting in part).

168. *See id.* at 287-305 (Powell, J.).

169. *Id.* at 417 (Stevens, J., concurring in part and dissenting in part).

170. 438 U.S. at 285 (Powell, J.); *accord, id.* at 328-36 (Brennan, J., concurring in part and dissenting in part).

171. *Id.* at 337; *accord, id.* at 286-87 (Powell, J.).

172. *Id.* at 414 (Stevens, J., concurring in part and dissenting in part).

173. 42 U.S.C. § 2000d (1976).

174. 438 U.S. at 412-13 (Stevens, J., concurring in part and dissenting in part).

175. "The statutory prohibition against discrimination in federally funded projects contained in § 601 is more than a simple paraphrasing of . . . the Fifth or Fourteenth Amendment . . . [Section] 601 has independent force, with language and emphasis in addition to that found in the Constitution." *Id.* at 416.

islative history,[176] and the Supreme Court's prior interpretations of the Act, Justice Stevens concluded that nothing justified "the conclusion that the broad language of § 601 should not be given its natural meaning."[177] Implicit in Justice Stevens' analysis is an assumption that the doctrine of separation of powers requires courts to defer to the policy choices expressed through the democratic process: "As with other provisions of the Civil Rights Act, Congress' expression of its policy to end racial discrimination may independently proscribe conduct the Constitution does not."[178] He concluded that in such circumstances it was not the Court's task in interpreting the statute, " 'to consider whether Congress [in 1964] was mistaken' " in its view of equality; " '[r]ather, we must construe the statute in light of the impressions under which Congress did in fact act.' "[179]

Responding to Justice Stevens' analysis, Justice Brennan offered an additional reason for rejecting the argument that Congress intended to enact an independent and "colorblind" rule of statutory law. His argument proceeded essentially as follows:

> *First Premise:* "The legislative history of Title VI, as well as the statute itself, reveals a desire to induce voluntary compliance with the requirement of nondiscriminatory treatment."
>
> *Second Premise:* "[V]oluntary compliance with the requirement of nondiscriminatory treatment" involves "voluntary efforts to eliminate the evil of racial discrimination."
>
> *Third Premise:* The elimination of the evil of racial discrimination compels the "use of race-conscious remedies to cure acknowledged or obvious statutory [and constitutional] violations."
>
> *Fourth Premise:* An equal treatment "reading of Title VI . . . would require recipients guilty of discrimination to await the imposition of [race-conscious] remedies by the Executive [or Judicial] Branch."
>
> *Fifth Premise:* "Surely Congress did not intend to . . . [require] the recipient to await a judicial adjudication of [liability] and the judicial imposition of a racially oriented remedy."

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176. "[N]othing in the legislative history justifies the conclusion that the broad language of § 601 should not be given its natural meaning. We are dealing with a distinct statutory prohibition, enacted at a particular time with particular concerns in mind; neither its language nor any prior interpretation suggests that its place in the Civil Rights Act, won after long debate, is simply that of a constitutional appendage." *Id.* at 418.

177. *Id.*

178. *Id.* at 417.

179. *Id.* at 416 n.18 (quoting Moor v. County of Alameda, 411 U.S. 693, 709 (1973)).

Conclusion: Therefore, title VI permits recipients of federal funds to exclude persons on racial grounds from their programs in order to cure acknowledged violations of the Act.[180]

On the face of the argument, it is not apparent that Congress' intent to induce voluntary compliance with title VI's requirement of "nondiscriminatory treatment" (first premise) is equivalent to an intent to induce individual recipients of federal funds to grant preferential treatment (second and third premises). Consequently, Justice Brennan simply asserts that the two are equivalent (fifth premise). In essence, Justice Brennan's voluntary compliance argument does no more than beg the ultimate question—what did Congress intend?

In the final analysis, Justice Brennan's interpretative approach rests on a presumption that "remedial statutes designed to eliminate discrimination against racial minorities" contain an equal status purpose.[181] Therefore, whenever a literal application of the statutory language would lead to results directly contrary to this purpose, that application "must fail."[182] Concededly, his formulation of purpose is not without support, particularly in the sources on which he relies most heavily—judicial decisions and executive and congressional action subsequent to the enactment of the Civil Rights Act.[183] In this respect, Justice Brennan's opinion in *Bakke*, more than any of the Civil Rights Act decisions to date, contains a fully elaborated application of an interpretative theory involving contemporaneous construction.[184]

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180. 438 U.S. at 336-37 (Brennan, J., concurring in part and dissenting in part). Contrary to Justice Brennan's equal status approach, Justice Powell argued that abrogation of equal treatment's due process limitations would "convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination." *Id.* at 310. *See also id.* at 296 & n.36. *Cf.* United Steelworkers v. Weber, 443 U.S. 193, 218-19 (1979) (Burger, C.J., dissenting) ("Voluntary compliance" not equivalent to preferential treatment).

181. 438 U.S. at 355 (Brennan, J., concurring in part and dissenting in part).

182. *Id.* at 340. In formulating the purpose of the Act, Justice Brennan relies heavily on subsequent congressional and executive action. *See id.* at 341-50. The conclusion that the Act authorizes preferential treatment follows automatically from the assumption that it embodies an equal status value. *See id.* at 336, 366-68 & n.42.

183. *Id.* at 341-55.

184. Contemporaneous construction techniques were also utilized by some justices in International Bhd. of Teamsters v. United States, 431 U.S. 324, 390-94 (1977) (Marshall, J., dissenting); General Elec. Co. v. Gilbert, 429 U.S. 125, 154-60 (1976) (Brennan, J., dissenting); Washington v. Davis, 426 U.S. 229, 268-69 (Brennan, J., dissenting); Franks v. Bowman Transp. Co., 424 U.S. 747, 763-70 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-23, 433-36 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 433-

Justice Brennan also utilized a presumption favoring equal status in *United Steelworkers v. Weber*.[185] Weber, a white production worker, challenged an affirmative action plan included in a master collective bargaining agreement entered into by Kaiser Aluminum & Chemical Corporation and the United Steelworkers of America. The plan required that at least fifty percent of the trainees accepted into Kaiser's craft training program be black. Since trainees were selected by seniority, the plan required the maintenance of separate seniority lists for black and white workers. Consequently, several of the most junior black trainees selected for the program had less seniority than several white production workers whose bids for admission were rejected.[186] Justice Brennan, writing for the Court, noted that sections 703(a) and (d) of title VII "make it unlawful to 'discriminate . . . because of . . . race' in hiring and in the selection of apprentices for training programs." However, because "a literal interpretation" would conflict with the "purpose of the statute,"[187] Justice Brennan relied on the "rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."[188] The Court found that the purpose of the statute was to promote the "integration of blacks into the mainstream of American society."[189] This could be accomplished through voluntary race-conscious efforts to improve the " 'relative position of the Negro worker' " in American society.[190] The Court bolstered its finding of purpose by examining the language and legislative history of Section 703(j),[191] which analysis essentially follows Justice Brennan's voluntary compliance argument in *Bakke*.

Justice Blackmun, concurring, virtually admitted that the Court's interpretation abrogated the legislative "bargain struck when Title VII was enacted"[192] by lowering the threshold for

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34 (1971).

185. 443 U.S. 193 (1979). *See* Neuborne, *Observations on Weber*, 54 N.Y.U. L. REV. 546, 554-56 (1979).

186. 443 U.S. at 199.

187. *Id.* at 201-02.

188. *Id.* at 201 (quoting Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892)).

189. *Id.* at 202.

190. *Id.* (quoting 110 CONG. REC. 6547 (1964) (remarks of Sen. Humphrey)).

191. *Id.* at 204-08.

192. *Id.* at 213.

permissible remedial treatment and expanding the measure of the remedy even beyond the bounds established in the Court's prior holdings. Nevertheless, Justice Blackmun joined the Court's opinion as well as its judgment in the belief that "additional considerations, practical and equitable, only partially perceived, if perceived at all, by the 88th Congress, support the conclusion reached by the Court."[193]

The Court measured an individual's elibigility for preferential treatment, Justice Blackmun observed, "solely in terms of a statistical disparity."[194] Employers would be authorized under the Court's formula to prefer minorities whenever a job category had been "traditionally segregated."[195] According to Justice Blackmun,

> the Court considers a job category to be "traditionally segregated" when there has been a societal history of purposeful exclusion of blacks from the job category, resulting in a persistent disparity between the proportion of blacks in the labor force and the proportion of blacks among those who hold jobs within the category.[196]

In other words, mere evidence of statistical disparity conclusively authorized remedial measures.[197] Even the cases following *Griggs*, which indicate that disparate impact evidence alone may establish a prima facie case of liability,[198] did not go this far. Moreover, as Justice Blackmun observed, the Court further reduced the threshold by allowing disparate impact to be proved by comparison of the composition of the employer's workforce with "the composition of the labor force as a whole, in which minorities are more heavily represented," rather than the traditional requirement of a comparison with the composition of the pool of workers who meet valid job qualifications.[199]

In addition, Justice Blackmun commented, the Court expanded the scope of the statute's remedial provisions by authorizing remedial measures that lie "wholly outside the bounds of

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193. *Id.* at 209. Justice Blackmun advocates a theory of "arguable violations" which would allow an employer to institute preferential treatment "whether or not a court . . . could order the same step as a remedy." *Id.*

194. *Id.* at 213.

195. *Id.*; *see id.* at 209 & n.9.

196. *Id.* at 212.

197. *Id.* at 212-15.

198. *See* note 140 *supra*.

199. 443 U.S. at 214 (Blackmun, J., concurring).

Title VII."[200] For example, under the Court's holding, preferential treatment may be afforded on the basis of discrimination which entirely predates the Act,[201] notwithstanding the Court's prior cases holding that title VII provides no remedy for pre-Act discrimination.[202] More significantly, however, the Court for the first time under the statute upheld the principle of preferential treatment.[203] Trainees selected for Kaiser's craft program were not identified victims of discrimination, but were selected solely because of membership in the disadvantaged class.[204]

Justice Blackmun attempted to allay misgivings about the Court's statutory interpretation by noting that "if the Court has misperceived the political will, it has the assurance that because the question is statutory Congress may set a different course if it so chooses."[205] Chief Justice Burger suggested, however, that in failing to defer to the legislative will, the Court had exceeded the limits of its constitutional authority.[206] The Chief Justice and Justice Rehnquist charged, in essence, that in order to achieve "what it regards as a desirable result,"[207] the Court read into the Civil Rights Act a "purpose" entirely at variance with the purpose as conceived by the 88th Congress.[208] Justice Rehnquist described these two conflicting purposes—the contemporary purpose as conceived by the Court and the original congressional purpose—as follows:

> There is perhaps no device more destructive to the notion of equality than the *numerus clausus*—the quota. Whether described as "benign discrimination" or "affirmative action," the racial quota is nonetheless a creator of castes, a two-edged

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200. *Id.*

201. *Id.*

202. *See* Hazelwood School Dist. v. United States, 433 U.S. 299, 309-10 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

203. *See* 443 U.S. at 225 n.6 (Rehnquist, J., dissenting). *But see* Regents of the Univ. of Cal. v. Bakke, 438 U.S. at 363-66 (1978) (Brennan, J., concurring in part and dissenting in part) (upholding preferential treatment under fourteenth amendment).

204. *See* 443 U.S. at 198-99.

205. *Id.* at 216 (Blackmun, J., concurring).

206. *Id.* at 218 (Burger, C.J., dissenting). "The Court reaches a result I would be inclined to vote for were I a Member of Congress considering a proposed amendment of Title VII. I cannot join the Court's judgment, however, because it is contrary to the explicit language of the statute and arrived at by means wholly incompatible with long-established principles of separation of powers." *Id.* at 216.

207. *Id.* at 216. The Court, according to the dissenters, in effect concluded that adopting an equal status interpretation of title VII was the only "fair" interpretation of the Act.

208. *Id.* at 230-55 (Rehnquist, J., dissenting).

> sword that must demean one in order to prefer another. In passing Title VII Congress outlawed *all* racial discrimination, recognizing that no discrimination based on race is benign, that no action disadvantaging a person because of his color is affirmative.[209]

The interpretative approach urged by the dissent relies principally on the language of the statute. Justice Rehnquist, for example, cited the rule that " '[w]hen words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn . . . from any extraneous source.' "[210] Consequently, legislative history provides only secondary evidence of congressional intent, and then principally to resolve difficulties caused by "imprecise drafting or because legislative compromises have produced genuine ambiguities."[211] This approach accords with Justice Stevens' interpretation of title VI in *Bakke,* which reached a similar equal treatment interpretation of the Civil Rights Act. In these two most recent pronouncements by the Court, where the inclination to expand the reach of the equal status value has appeared more strongly than before, the division over the proper interpretative approach to the Civil Rights Act has been the most dramatic.

III. Democratic Theory and Judicial Interpretation of Civil Rights Legislation

Principles of statutory construction influence the definition of substantive rights guaranteed under the Civil Rights Act in much the same way the Court's equal protection analysis defines the scope of the substantive rights guaranteed under the fourteenth amendment.[212] Unlike the field of constitutional law, however, "we lack a fully developed, modern theory of the judicial role in interpreting statutes."[213] As one commentator has noted:

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209. *Id.* at 254.

210. *Id.* at 228 n.9 (quoting Caminetti v. United States, 242 U.S. 470, 490 (1917)).

211. *Id.* at 217 (Burger, C.J., dissenting). Justice Rehnquist noted that he had examined the legislative history in order to "expose the magnitude of the Court's misinterpretation of Congress' intent." *Id.* at 231. (Rehnquist, J., dissenting).

212. *See, e.g.,* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection,* 86 Harv. L. Rev. 1 (1972).

213. Gerwirtz, *The Courts, Congress, and the Executive Policymaking: Notes on Three Doctrines,* 40 L. & Contemp. Prob. 46, 65 (1976). *See also* 2A C. Sands, Statutes and Statutory Construction § 45.13 (4th ed. 1973).

> Such a theory, of course, would inquire into the various ways courts identify legislative purpose by examining text, legislative history, etc. But it would also identify, evaluate and propose policies, external to the legislative purpose identified from text and immediate context, which enter into the judicial activity of interpretation—policies which shape the meaning given to a statute even when those policies cut somewhat against the legislative purpose narrowly defined. That such external policies (sometimes embodied in so-called canons or principles of statutory construction) do influence the construction given statutes cannot be doubted . . . ."[214]

Although not always expressly articulated, it is apparent in the cases reviewed above that certain external policies have influenced the construction of the Civil Rights Act. Professor Neuborne suggests that these policies are "determined by reigning political theory."[215] These policies become apparent in reviewing the characteristic interpretative approaches adopted by the Court's equal status and equal treatment advocates. This is the subject of part A below. Part B indicates how the conflicting policies summarized in part A rest on competing assumptions about the roles of the legislature and judiciary in formulating civil rights policy.

A. Interpreting the Civil Rights Act: Original Versus Current Understanding

1. Ascertaining the original understanding

The most distinctive feature of the interpretative approach exhibited in the equal treatment opinions is a decided deference to the intentions of the original draftsmen. This is not determined solely, nor even primarily, by reference to the legislative history, since the same parts of it are sometimes cited by members of the Court to support conflicting conclusions about the Civil Rights Act's meaning.[216] Rather, the language and structure of the statute is foremost in the analysis of the equal treatment proponents. This was particularly apparent in Justice Rehnquist's opinion in *Weber,* which relied on the canon, de-

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214. Gerwirtz, *supra* note 213, at 65.

215. Neuborne, *supra* note 185, at 555 n.32.

216. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. at 286 (Powell, J.); *id.* at 332-33 (Brennan, J., concurring in part and dissenting in part); *id.* at 418 n.21 (Stevens, J., concurring in part and dissenting in part) (quoting statement by Sen. Humphrey, 110 CONG. REC. 6544 (1964)).

scribed in *Caminetti v. United States,* that "the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms."[217]

References to the "plain meaning" or "plain language" of the statute were made by Chief Justice Burger and Justice Rehnquist in *Weber*[218] and by Justice Stevens in *Bakke.*[219] Their analysis reveals, however, that they were not referring to the so-called "rule of literal meaning" under which "a judge puts on blinders, so to speak, in order to obscure from view everything but just the text of the statute whose effect on the matter at issue is in question."[220] On the contrary, their approach seeks to ascertain and apply the meaning intended by the legislature, even though another interpretation might be more desirable or confer greater benefits on the statute's intended beneficiaries.[221] This is accomplished not merely by examination of the immediately applicable section, but by reference to the section's statutory context. Justice Powell made the point in *Franks,* for example, that read alongside other sections of title VII, the language of section 706(g) indicates that competitive-type seniority should not be granted indiscriminately.[222]

Another feature of this approach is the reluctance to give great weight to subsequent interpretations made by administrative agencies, legislative committees, or courts whose views do not comport with the statute's original meaning. Justice Blackmun, for example, objected in *Albemarle* to "the Court's apparent view that absolute compliance with the EEOC Guidelines is a *sine qua non* of pre-employment test validation."[223] In addition, Chief Justice Burger charged that the Court misapplied *Griggs* in according the guidelines " 'great deference.' "[224] Similar skeptical treatment of administrative interpretations was ex-

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217. Caminetti v. United States, 242 U.S. 470, 485 (1917).

218. 443 U.S. at 217 (Burger, C.J., dissenting); *id.* at 230 (Rehnquist, J., dissenting).

219. 438 U.S. at 412 (Stevens, J., concurring in part and dissenting in part); *see id.* at 414 (language of section "is perfectly clear"); *id.* at 418 (meaning of statute "is crystal clear") (language should be given its "natural meaning").

220. 2A C. SANDS, *supra* note 213, § 46.02.

221. *See* R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 231-32 (1975).

222. Franks v. Bowman Transp. Co., 424 U.S. 747, 791-93 & n.9 (1976).

223. Albemarle Paper Co. v. Moody, 422 U.S. 405, 449 (1975) (Blackmun, J., concurring).

224. *Id.* at 451-52 (Burger, C.J., concurring in part and dissenting in part).

hibited by Justice Powell in *Franks*,[225] by the Court in *Teamsters*,[226] and by Justice Stevens in *Bakke*.[227] Likewise, in *Franks* and *Teamsters*, equal treatment proponents gave short shrift to legislative materials generated in 1972 which purported to modify or reinterpret the 1964 Act.[228] In *Teamsters*, for instance, notwithstanding over thirty decisions by six courts of appeals to the contrary, the Court refused to extend the *Griggs* rationale to alleviate the discriminatory effects that resulted from the utilization of a bona fide seniority system.[229]

2. *Assigning the current understanding*

Reliance on postenactment developments is one of the most distinctive features of the interpretative approach that characterizes an equal status analysis. The principal materials and canons that have been relied on to support an equal status interpretation of the Civil Rights Act are administrative interpretations, reenactment after contemporaneous interpretation, legislative silence as implied approval of a contemporaneous interpretation, legislative interpretations of prior enactments, interpretation by reference to related statutes, and equity of the statute.

a. Administrative interpretations. Section 602 of title VI[230] and section 713 of title VII[231] authorized certain federal departments and agencies to issue regulations to "effectuate" and "carry out" respective provisions of the Civil Rights Act. These delegations were bitterly contested by certain members of Congress,[232] who accurately predicted that the agencies would

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225. 424 U.S. 747, 796-99 (1976) (Powell, J., concurring in part and dissenting in part).

226. The majority of the Court in *Teamsters* ignored Justice Marshall's citation to "an unbroken line of cases" in which the EEOC had concluded that "§ 703(h) did not immunize seniority systems that perpetuate the effects of prior discrimination." 431 U.S. at 378-80 & n.4 (Marshall, J., concurring in part and dissenting in part).

227. 438 U.S. 265, 418 n.22 (1978) (Stevens, J., concurring in part and dissenting in part).

228. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 354 n.39 (1977); Franks v. Bowman Transp. Co., 424 U.S. 747, 796 n.18 (1976) (Powell, J., concurring in part and dissenting in part).

229. *See* 431 U.S. 324, 378 & n.2 (1977) (Marshall, J., concurring in part and dissenting in part).

230. 42 U.S.C. § 2000d-1 (1976).

231. *Id.* § 2000e-12 (1976).

232. *See, e.g.*, 110 CONG. REC. 5253 (1964) (remarks of Sen. Talmadge); *id.* at 5863-65 (remarks of Sen. Eastland); *id.* at 5606-7 (remarks of Sen. Ervin).

exceed the congressional intent in implementing the "objectives of the statute."[233] Regulations and decisions promulgated by two agencies in particular have played a prominent role in the interpretation of the Civil Rights Act: those of the Department of Health, Education and Welfare (HEW) and those of the EEOC.

In *Bakke,* Justice Brennan relied extensively on HEW regulations that were promulgated in 1973.[234] The regulations provide that recipients of federal funds "may properly give special consideration to race, color, or national origin to make the benefits of its program more widely available to such groups, . . . [e]ven in the absence of . . . prior discrimination."[235] These views, Justice Brennan argued, as well as the views of the Solicitor General, who was charged by the President with enforcement powers under title VI, "are entitled to considerable deference in construing" the statute.[236]

HEW regulations were also heavily relied upon in *Lau v. Nichols,*[237] a title VI disparate impact case challenging the San Francisco school system's failure to provide English language instruction to students of Chinese ancestry. The Court held, on the basis of the regulation, that since the failure to provide language instruction had the effect of discriminating between English-speaking and Chinese-speaking students, the Board of Education was obligated under title VI to correct the deficiency.[238] Significantly, in *Bakke,* Justice Brennan cited *Lau* for the proposition that title VI allows the voluntary use of race to remedy "the lingering effects of past societal discrimination."[239]

The Court also gave substantial deference to EEOC interpretations of title VII in *Griggs, Albemarle,* and *Dothard v. Rawlinson.*[240] In addition, Justices Brennan and Marshall strongly objected to the Court's failure to defer to the EEOC's point of view in *General Electric Co. v. Gilbert*[241] and

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233. *See* United Steelworkers of America v. Weber, 443 U.S. at 244 n.23 (Rehnquist, J., dissenting).

234. *See* 438 U.S. at 341-45 (Brennan, J., concurring in part and dissenting in part).

235. 45 C.F.R. §§ 80.3(b)(6)(ii), 80.5(j) (1979).

236. 438 U.S. at 342, 345 n.19 (Brennan, J., concurring in part and dissenting in part).

237. 414 U.S. 563 (1974). *See generally* D. HOROWITZ, THE COURTS AND SOCIAL POLICY, 15-17 (1977).

238. 414 U.S. at 567-69.

239. 438 U.S. at 352 (Brennan, J., concurring in part and dissenting in part).

240. Dothard v. Rawlinson, 433 U.S. 321 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

241. 429 U.S. 125, 155-58 (1976) (Brennan, J., dissenting).

Teamsters.[242]

b. Reenactment after contemporaneous interpretation. Congress expanded the EEOC's enforcement powers in 1972, authorizing it to prevent unlawful employment practices as defined in sections 703 and 704 of the 1964 Act.[243] Justice Marshall argued in *Teamsters* that Congress "effectively re-enacted [sections 703 and 704] and the judicial gloss that had been placed on them."[244] He referred specifically to lower court decisions finding that seniority systems which perpetuated the effects of past discrimination were unlawful. Of course, as Justice Marshall's use of the word "virtually" implies, Congress did not "re-enact" title VII's prohibiting sections in the 1972 Equal Employment Opportunity Act. It amended them, adding "applicants" for employment and union membership to the persons protected under section 703, and adding "joint labor-management committees controlling . . . training programs" to those subject to the prohibitions of section 704. In *Albemarle*, the Court utilized the reenactment canon in determining that "backpay may be awarded on a class basis under Title VII without exhaustion of administrative procedures by the unnamed class members."[245] There, however, Congress had expressly reenacted title VII's backpay provision.[246]

c. Legislative silence as implied approval of a contemporaneous interpretation. Justice Brennan cited the rule in *Bakke* that "the construction of a statute by those charged with its execution is particularly deserving of respect where Congress has directed its attention to the administrative construction and left it unaltered."[247] Justice Brennan noted that in 1977 Congress considered an amendment to the HEW appropriations bill which would have restricted the remedial use of race in federal programs. However, the amendment "did not challenge the right of federally funded educational institutions to voluntarily extend preference to racial minorities."[248] Therefore, he concluded,

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242. 431 U.S. 324, 390-91 (1977) (Marshall, J., concurring in part and dissenting in part).

243. Equal Employment Opportunity Act, Pub. L. No. 92-261, § 5, 86 Stat. 107 (1972) (codified at 42 U.S.C. § 2000e-6(c), (d), (e) (1976)).

244. 431 U.S. 324, 393 n.24 (1977) (Marshall, J., concurring in part and dissenting in part). *See* 2A C. SANDS, *supra* note 213, § 49.09.

245. 422 U.S. 405, 414 n.8 (1975).

246. *Id.*

247. 438 U.S. at 346 (Brennan, J., concurring in part and dissenting in part).

248. *Id.* at 347.

HEW's construction of title VI as permitting voluntary racial preferences is "particularly deserving of respect."[249]

d. Legislative interpretations of prior enactments. In *Franks*,[250] *Teamsters*,[251] and *Bakke*.[252] Justices Brennan and Marshall relied on statements from Senate, House, and Conference Committee Reports accompanying the 1972 amendments to title VII. However, these statements do not imply that the later Congress shared the same state of mind as the former. For example, the House Report states:

> During the preparation and presentation of Title VII of the Civil Rights Act of 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, due, for the most part, to ill-will on the part of some identifiable individual or organization . . . .
>
> Employment discrimination, as we know today, is a far more complex and pervasive phenomenon. Experts familiar with the subject generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs.[253]

One Senator voiced the general intention that equal status interpretations be made of the Act, noting, for example, that "in any areas where a specific contrary intention is not indicated, it was assumed that the present case law . . . would continue to govern the applicability and construction of Title VII."[254]

e. Interpretation by reference to related statutes. Justice Brennan argued in *Bakke* that Congress' decision in 1977 to require federal agencies to set aside ten pecent of all federal public work project funds for minority business enterprises "reflects a congressional judgment that the remedial use of race is permissible under Title VI."[255] And in *Franks* he cited extensively to interpretations of the National Labor Relations Act (NLRA).[256] In that case, however, the evidence was clear that Congress modeled title VII's remedial provision after section 10(c) of the NLRA.

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249. *Id.* at 346.
250. 424 U.S. 747, 764 n.21 (1976).
251. 431 U.S. at 391-93 (Marshall, J., concurring in part and dissenting in part).
252. 438 U.S. at 353 n.28 (Brennan, J., concurring in part and dissenting in part).
253. H.R. REP. No. 238, 92d Cong., 1st Sess. 8 (1971).
254. 118 CONG. REC. 7166 (1972) (statement of Sen. Williams read into the record).
255. 438 U.S. at 349 (Brennan, J., concurring in part and dissenting in part).
256. 424 U.S. 747, 768-70 (1976).

f. Equity of the statute. In addition to the postenactment developments summarized above, the equal status principle received substantial reinforcement in *Weber* and in Justice Brennan's *Bakke* opinion from the equity of a statute doctrine.[257] The Court stated the rule as follows: "[A] thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers."[258]

It is true that a statute's context may indicate "a legislative purpose that is broader than the literal import of the words used."[259] In such cases, however, the meaning of the statute is broadened "only so far as the words have enough semantic leeway to carry the broadened meaning. Beyond that, the legislative purpose remains unrealized."[260] Even if the context shows that the statute was intended to reach beyond the semantic limits of the words used, "[m]erely manifesting a broader legislative purpose is not enough."[261] In other words, "determination of the equity or [spirit of a statute] involves an original problem of statutory interpretation for which all of the rules of construction may be useful."[262] It is insufficient to merely assign a purpose and to apply it to the case at hand. Such an approach is tantamount to judicial lawmaking.

B. Civil Rights Policy: Legislative Versus Judicial Supremacy

Article I of the Constitution declares: "All legislative Powers herein granted shall be vested in a Congress of the United States . . . ."[263] Thus, in addition to its historical and ideological roots,[264] the principle of legislative supremacy is expressly enshrined in the Constitution. It is true that since *Marbury v. Madison*[265] at least, the judiciary has asserted its power to "say what the law is."[266] Therefore, in this limited sense, the judiciary

257. R. DICKERSON, *supra* note 221, at 213-15; 2A C. SANDS, *supra* note 213, § 54.06.

258. United Steelworkers of America v. Weber, 443 U.S. 193, 201 (1979) (quoting Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892)).

259. R. DICKERSON, *supra* note 221, at 215.

260. *Id.*

261. *Id.*

262. 2A C. SANDS, *supra* note 213, § 54.07.

263. U.S. CONST. art. I, §1.

264. *See* R. DICKERSON, *supra* note 221, at 8 n.3.

265. 5 U.S. (1 Cranch) 137, 176 (1803).

266. *Id.* at 177.

exercises a legislative function.[267] That Congress' legislative power is not exclusive, however, "in no wise detract[s] from the simple assertion that, within [constitutional limitations], any conflict between the legislative will and the judicial will must be resolved in favor of the former."[268] It is particularly significant, in the context of a discussion about equality, to note that the fundamental purpose underlying the separation of powers doctrine is the maintenance of liberty.

The implications of separation of powers in the statutory context are clear. If legislative supremacy in the creation of law is to be maintained, Professor Dickerson notes, "cognition" must precede "creation." Cognition involves the ascertainment of meaning; creation involves the assignment of meaning, or judicial lawmaking. "That differentiation is hard and the area of uncertainty wide offers no exemption from what appears to be a clear constitutional mandate."[269] Notwithstanding the preeminent position the legislature had traditionally held under our system of government in formulating social policy, various arguments have been advanced justifying an expanded judicial role in implementing egalitarian principles. Believing that the courts are more able and ready to advance the cause of equality, egalitarian theorists would institute a presumption favoring judicial creation, or lawmaking, in the interpretation of civil rights legislation, which would effectively replace legislative with judicial supremacy in the promulgation of civil rights policy.

1. *Impossibility of ascertaining legislative intent*

"[M]any respectable scholars" have endorsed the notion that legislative intent is irrelevant, or that it does not exist at all.[270] Consequently, the argument is made that it is unrealistic to derive from the legislative materials anything more than a "broad philosophical concept." It is presumed that because civil rights legislation generally embodies a "legislatively expanded vision of constitutional values," a presumption favoring application of this broad concept would operate in the same fashion as

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267. R. DICKERSON, *supra* note 221, at 13-28.

268. *Id.* at 8.

269. *Id.* at 20-21.

270. *Id.* at 68 n.4. Professor Radin has stated that legislative intention is "undiscoverable in any real sense" because "the chances that of several hundred men each will have the same determinate situation in mind . . . are infinitesimally small." Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930).

the "doctrine of clear statement" operates in constitutional law. In other words, the presumption of a broad civil rights policy such as equal status could be rebutted only by an explicit manifestation of legislative intent indicating a narrower policy.[271] Justice Brennan adopted this approach in *Bakke* and *Weber*, justifying his application of the statute's ostensible "core purpose" with his view that the legislature had not "unequivocally ordered [him] not to."[272]

While the concept of legislative intent has been frequently criticized, it has continued to have faithful adherents in the judiciary as well as in academia. In fact, Sutherland notes the following:

> An almost overwhelming majority of judicial opinions on statutory issues are written in the idiom of legislative intent. The reason for this doubtless lies in an assumption that an obligation to construe statutes in such a way as to carry out the will . . . of the lawmaking branch of the government is mandated by principles of separation of powers.[273]

For this reason, a more careful examination of the concept is needed before rejecting it out of hand.

According to Professor Dickerson, "intent" refers

> to the actual intent of some human being, or group of human beings, respecting what he or they intended to say. It reflects the user's expectation that the reader or hearer will take the language as referring to what the user had in mind. It is, therefore, the specific message that the user intended to convey.[274]

In reality, "legislative intent" is a figure of speech. Intention is a state of mind. Since only individuals, not legislatures, have minds, legislatures cannot have "intentions." Therefore, what is meant by legislative intent is not the collective attitude or view of a group of legislators, but the intention of a few members of the group, which is imputed to the rest who are engaged in the

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271. Neuborne, *supra* note 185, at 555 & n. 33.

272. *Id.* at 554.

273. 2A C. SANDS, *supra* note 213, § 45.05.

With respect to ascertaining title VII's meaning, Mr. Vaas has noted that "[s]eldom has similar legislation been debated with greater consciousness for the need for 'legislative history' or with greater care in the making thereof, to guide the courts in interpreting and applying the law." Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 444 (1966).

274. R. DICKERSON, *supra* note 221, at 69.

legislative process.[275]

This conception of legislative intention "seems to make its discovery near impossible."[276] The realities of the legislative process, however, make intent less obscure than appears. As Professor Bennett indicates:

> Most legislation is shaped by only a few legislators. The device of imputed purpose allows legislative purpose to be defined by the purposes of those few. The common use of committee reports or statements by sponsors of legislation is justifiable on this basis. The legislation itself may state one or more purposes. Even if none is stated, given what will typically be the common understanding of its social and economic context, the words of the legislation will be highly probative not only of legislator goals but even of background attitudes.[277]

Therefore, intent need not be confined to evidence of individual legislators' subjective designs. Intention may be derived from "objective" indicia as well, such as the statutory text and context.[278]

However, even assuming that statutory meaning cannot be ascertained by reference to legislative intent, the separation of powers issue remains. If in proposing that the courts be guided by "a broad philosophical concept," the critics of intent intend to rely on another method for discerning the legislative will, then the objection is merely semantic. Surely the constitutional requirement that cognition precede creation is satisfied by any reliable indicia of the statute's meaning.[279] If by their criticism, the critics suggest that the legislative will is altogether irrelevant, they face the insuperable task of reconciling their suggestion with the constitutional provision of legislative supremacy. What the criticism implies, however, is that because of the nature of the democratic process, legislatures are not capable of resolving the controversial issues that typically arise in formulating civil rights policy.[280] Therefore, legislation should be inter-

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275. *See* Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 CALIF. L. REV. 1049, 1071 (1979).

276. *Id.* at 1072.

277. *Id.* at 1073.

278. *See generally* 2A C. SANDS, *supra* note 213, §§ 47.01-.20.

279. *See* R. DICKERSON, *supra* note 221, at 79-85.

280. Professor Neuborne notes that a legislature "does not and cannot foresee, *much less resolve*, the myriad questions which must arise whenever a broad philosophical proposition is applied to the protean complexity of everyday life." Neuborne, *supra* note 185, at 553 (emphasis added).

preted essentially as a mandate to the courts to resolve these issues.

2. Legislative competence to deal with civil rights issues

The argument that the legislative branch cannot competently protect the civil rights of individuals takes several forms: first, Congress cannot possibly foresee every conceivable contingency in formulating a statutory standard; second, the realities of the political process require that certain issues, even if foreseen, must be compromised or avoided altogether in order to insure passage of the legislation.[281]

Almost all legislation is prospective in nature and the occurrence of unforeseen events is almost always inevitable. This fact alone, nevertheless, would not warrant a presumption favoring judicial policymaking in the civil rights field. Moreover, a statute's sweep is not necessarily frozen as of the date of enactment.[282] The meaning of a particular word or series of words need not be limited to a specific object or denotation, but may be directed toward general ideas or connotations. Therefore, the meaning of a statute may provide ample flexibility for meeting future needs without abrogating separation of powers. Legislatively created civil rights and remedies are distinct and independent of constitutional right and remedies. Therefore, considerations which, in the constitutional context, arguably justify an interpretative mode freed from the constraints of the "original intention" have considerably less force in a statutory context. The fact that courts may more efficiently implement civil rights policy does not warrant setting aside the balances struck by Congress in this area.

3. Disruption of contemporary expectations

The views of legislators concerning certain legislation may change over time: "Initially, legislation may have been passed with one purpose or set of purposes, but may remain on the statute books at any given time for another."[283] In other words, it is conceivable that a current nonrepeal purpose varies from the original purpose for which the statute was enacted.[284] In addi-

281. Bennett, *supra* note 275, at 1091; Neuborne, *supra* note 185, at 553-54.
282. R. DICKERSON, *supra* note 221, at 127-28, 130.
283. Bennett, *supra* note 275, at 1074.
284. *Id.* at 1092.

tion, popular understanding of the meaning of a statute may conflict with the intention of the original framers. Consequently, "[t]here will usually be some disruption, and perhaps a large quantum of disappointed expectations, if the current understanding is rejected."[285] In response to objections that the "rule of law" requires adherence to the original intention, proponents of an expanded judicial role in the interpretation of civil rights statutes answer as follows: "[V]iews of 'law' change just as do those about all aspects of human culture. Perhaps nothing is more likely to change views about 'law' than recurrent disappointment of current expectations caused by adherence to an older view."[286] Even if the intention of the original draftsmen is known, these factors, it is argued, present sufficient justification for allowing the current understanding to prevail.

Professor Bennett recognized the practical difficulties involved in interpreting legislation in terms of an inferred nonrepeal purpose. "[I]ndifference or inertia" as well as changed purposes may motivate nonrepeal. Moreover, nonrepeal is a nonaction and therefore need leave no "trace of its motivation." Furthermore, "nonrepeal requires no vote." Therefore "the justification for imputing the purpose of one legislator to another . . . is also considerably weaker than in the case of original passage." Consequently, Bennett would employ "a strong but not irrebuttable presumption that a statute's original purpose remains its contemporary purpose."[287]

Measuring the meaning of statutes by an inferred purpose or by current expectations not only presents serious difficulties of proof, but raises significant questions about the limits of judicial policymaking. Professor Dickerson illustrates these concerns as follows:

> To read statutes against current, rather than original, usage and environment would subject statutory meanings to uncontrolled and often capricious circumstance. Where the vagaries of usage and environment happened to produce results that were more congenial to current notions of public policy, a court would be tempted to take the present as a base. But what should it do where the results were less congenial? Or should the courts say that they will reflect current conditions where

285. *Id.*
286. *Id.*
287. *Id.* at 1074.

they like the result and reject them where they do not?[288]

The argument that statutes should be interpreted in light of contemporary standards also raises fundamental questions about the respective roles of court and legislature. The argument implies that failure to adhere to current notions of public policy may undermine the rule of law. Arguably, in the constitutional context, where the amendment process often makes changes in the law difficult, this concern may have some relevance.[289] But in a statutory context, widespread disappointment with the results produced by faithful adherence to the original purpose of the law will prompt a change in the law. That, in any case, should be the presumption in a democratic society. Adherence to a contrary presumption is likely to result in a loss of faith in the rule of law.[290] If there is not sufficient popular pressure to change the law through the democratic process, what justifies a change through nondemocratic processes? As Professor Dickerson warned:

> To [those] who believe that it is more wholesome to meet the needs of the future than to honor the dead past, we may reply that, because legislation is almost always pointed to the future, intended future results cannot be assured unless the historical event that an enactment immediately becomes is later honored by the courts. This means honoring the legislative past. To do otherwise would substitute the courts for the legislature in the lawmaking process.[291]

Dickerson suggests that faithfulness to original intention does not necessarily remove all room for judicial response to changing circumstances and attitudes.[292] Nevertheless, the cognitive function is admittedly limited. If it "fails to produce an adequate result," Dickerson concludes, "the responsibility for correcting the matter is the legislature's, not the court's."[293] Respect for the democratic process also means that legislative intent not culminating in an enactment "may be generally ignored;

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288. R. DICKERSON, *supra* note 221, at 126.

289. Bennett, *supra* note 275, at 1092-94.

290. *See generally* R. BERGER, GOVERNMENT BY JUDICIARY 409-12 (1977); D. HOROWITZ, THE COURTS AND SOCIAL POLICY 17-21, 33-56 (1977).

291. R. DICKERSON, *supra* note 221, at 130. *See also* Kernochan, *Statutory Interpretation: An Outline of Method*, 3 DALHOUSIE L.J. 333, 345 (1976).

292. R. DICKERSON, *supra* note 221, at 127-29.

293. *Id.* at 129.

so may postenactment changes in the relevant context."[294] Consequently, Dickerson rejects the idea that failure to amend statutes the courts have interpreted indicates legislative approval of the judicial interpretation. Likewise, subsequent legislative history indicating approval of judicial interpretations is entitled to little weight in interpreting a prior enactment. Reenactment of prior legislation may enhance the evidentiary weight of contemporaneous interpretations or intervening judicial or administrative interpretations. Where the legislature retains the original language, however, the presumption is strong that it also intends to retain the original context.[295]

4. Protection of minority rights

Courts historically have assumed responsibility for protecting minority rights. Since civil rights legislation is designed to protect minority groups, it is argued that the judiciary should be given broad power to construe civil rights legislation in furtherance of this remedial goal, much as the courts have wide discretion to construe constitutional provisions.[296] Implicit in this argument is the assumption that the judiciary, as a nonrepresentative body, is better able to protect minority interests than the legislature. Therefore, by enacting broad remedial measures, Congress should be presumed to have delegated to the courts the power to construe the legislation as broadly as current circumstances require.[297]

However, the notion that a democratic system tends to favor the interests of "some undifferentiated majority" at the expense of discrete minorities has recently come under sharp criticism.[298] One widely accepted theory views legislation as "the outcome of a pure power struggle . . . among narrow interest or pressure groups."[299] Under this "new realism about the political process," as Professor Posner describes it, "the very distinction between 'minority' and 'majority' disappears."[300] If, as Professor

294. *Id.* at 126.

295. *Id.* at 179-83.

296. *See* Neuborne, *supra* note 185, at 555 n.32.

297. *Id.*

298. Posner, *The* DeFunis *Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 30-31.

299. *Id.* at 27. For a review of the literature on the "interest group" theory of legislation, see *id.* at 27 n.50.

300. *Id.* at 28, 30. *See also* Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 212 (1976).

Posner suggests, government by interest group "is an inevitable . . . feature of our society," for a court to undo what the process yields would "condemn as unconstitutional the most characteristic product of a democratic (perhaps of any) political system."[301]

5. *Legislative veto*

It is frequently remarked in the literature on judicial review that statutory decisions are more easily overturned than constitutional decisions.[302] This fact is offered to justify expansive interpretations that "err" in favor of minorities.[303] However, as pointed out earlier, this fact may also justify faithful adherence to the legislative will. Even conceding that erroneous statutory decisions are easier to revise, usurpation is no less usurpation because it appears in a statutory context. Moreover, our system is no less immune from the institutional erosion that inevitably accompanies judicial overreaching because the object of usurpation is statutory rather than constitutional.[304]

IV. CONCLUSION

Perhaps the underlying premise of all the arguments for an interpretative mode that favors judicial creativity in the civil rights field is the feeling that if equal status is to be fully implemented in our society, the courts must do it. That is precisely the point. The deplorable conditions that gave impetus to the inexorable advance of egalitarianism are abating.[305] More importantly, the implementation of equal status results in unequal treatment. The immediate concerns that gave rise to the Civil Rights Act of 1964 have long since been superseded by more ambitious goals—goals that arguably have little if anything to do with "minorities."

The legislature has not proven powerless in achieving social justice.[306] Nor has the idea of equality historically proven so un-

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301. *Id.* at 28. " 'The legislative way of life' " it has been noted, "is the essence of freedom under government." Mendelson, *Mr. Justice Frankfurter on the Construction of Statutes*, 43 CAL. L. REV. 652, 653 (1955).

302. *See, e.g.*, Ely, *supra* note 164, at 9 n.33; Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L. J. 399, 402 (1978).

303. Neuborne, *supra* note 185, at 555-56.

304. *See generally Burden of Proof, supra* note 30, at 1057 n.152.

305. *See* Sowell, *Myths about Minorities*, COMMENTARY, August 1979, at 33; Brest, *supra* note 13, at 2.

306. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. at 348-49 (1978)

persuasive that it need be feared that confining its scope to the constitutional framework will appreciably diminish the sphere of its influence. Resecuring the judiciary to its constitutional moorings in the area of statutory interpretation will not inhibit equality's advocates from implementing this value through the democratic process. On the other hand, failure to observe the strictures of the Constitution in this area may imperil the ability of others to implement equality's rival value—liberty.

Stephen L. Fluckiger

(Brennan, J., concurring in part and dissenting in part) (discussing the 10% "set-aside" by legislatures for public work project funds for minority businesses).