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Seniority Systems and Title VII

Arthur J. Marinelli

SENIORITY SYSTEMS AND TITLE VII

ARTHUR J. MARINELLI*

I. INTRODUCTION

THE CURRENT RECESSION has once again focused attention on the rising unemployment rate among minority members[1] of the work force. The economic slowdown has caused many employees to join the ranks of the unemployed. When an employee is laid off from his job it is generally accomplished according to the employee's seniority. Seniority grants employees a preference in certain phases of their employment, based on the relative length of time they have been employed with a company or within a department of the company.[2] Unions and workers prefer seniority provisions in their collective agreements[3] because they limit an employer's discretion. "More than any other provisions of the collective agreement . . . seniority affects the economic security of the individual employee covered by its terms."[4]

Seniority provisions frequently work to the disadvantage of minorities because earlier employment discrimination, prior to the passage of the Civil Rights Act of 1964,[5] leaves them with fewer years of service. A conflict is thus created between the tradition of seniority and the goals of equal opportunity and affirmative action. The applicability of Title VII to seniority systems and the affirmative action tools for achieving the national policy of equal opportunity will be the focus of this article.

II. BACKGROUND

Seniority provisions in collective bargaining agreements do not grant vested property rights to employees.[6] Seniority provisions are the result of negotiations and may be modified by either of the contracting parties.[7]

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[1] Minority groups affected include blacks, Mexican-Americans, Spanish-surnamed Americans, and other minorities which historically have been the victims of employment discrimination. *See* Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment,* 61 N.W.U. L. Rev. 363 (1966).

[2] *See generally* Comment, *Artificial Seniority for Minorities as a Remedy for a Past Bias vs. Seniority Rights of Non-Minorities,* 9 U.S.F. L. REV. 344, 347 n.8 (1974).

[3] It has been estimated by the Bureau of National Affairs that 88% of the collective bargaining agreements contain some type of seniority provision. 2 BNA COLL. BARG. NEG. & CONTRACTS 75:1 (1978).

[4] Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights,* 75 HARV. L. REV. 1532, 1535 (1962).

[5] 42 U.S.C. §§ 2000e-2000e-15 (1976), as amended by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. §§ 2000e-2000e-17 (1976). [hereinafter referred to as the Act].

[6] Vogler v. McCarthy, Inc., 451 F.2d 1236 (5th Cir. 1971).

[7] Humphrey v. Moore, 375 U.S. 335 (1964); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

As may be expected, it has been left to the courts to resolve the conflict between the discriminatory effects of seniority and the stability and continuity it provides for the workers.[8]

Numerous procedural requirements must be met before an action can be brought under Title VII. An aggrieved party must file a charge with the Equal Employment Opportunity Commission (EEOC) within 180 days of the discriminatory act,[9] and must bring suit within 90 days after receipt of a right-to-sue-letter from the EEOC.[10] In order for a plaintiff to obtain affirmative relief under Title VII, the court must find that the employer discriminated unlawfully against the employee[11] and that the policy in question constitutes a substantive violation of the Act.[12] The burden of proof in a Title VII case initially rests with the plaintiff who must prove a prima facie case by a preponderance of the evidence.[13] Once the plaintiff has proved a prima facie case, the burden shifts to the defendant to show by a preponderance of the evidence that there is a legally acceptable basis for the alleged discrimination.[14]

The Civil Rights Act of 1964 was enacted to eradicate employment discrimination based on race, sex, national origin or religion.[15] The legislative history of the Act demonstrated a congressional intent to assist those minorities who have traditionally been excluded from employment.[16] While one court has held that "the legislative history of Title VII is singularly uninstructive on seniority rights,"[17] the prevailing view among the courts is that the legislative history is essential to an understanding of the Act.[18]

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[8] Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

[9] 42 U.S.C. § 2000e-5(e) (1976).

[10] 42 U.S.C. § 2000e-5(f)(1) (1976).

[11] International Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977).

[12] *See e.g.*, McDonald v. General Mills, Inc., 387 F. Supp. 24, 36-37 (E.D. Cal. 1974).

[13] Albermarle Paper Co. v. Moody, 442 U.S. 405, 433-34 (1975); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

[14] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802; Griggs v. Duke Power Co., 401 U.S. 424, 431-43 (1971).

[15] 42 U.S.C. § 2000e-2(a) (1976) provides:

> (a) 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.

[16] *See generally*, Deutsch, *The Jurisprudence of Affirmative Action: A Post-Realist Analysis*, 65 GEO. L.J. 879, 880 (1970).

[17] Local 189, United Papermakers & Paperworkers v. United States 416 F.2d 980, 987.

[18] *See e.g.*, International Bhd. of Teamsters v. United States, 431 U.S. 324, 352.

For example, section 703(h)[19] exempts bona fide seniority systems from liability under the Act. The legislative history behind this exemption is particularly important in construing the term "bona fide seniority system." The original House bill did not specifically address seniority systems.[20] In response to criticism of this omission, Senator Clark, majority sponsor of the bill, presented two interpretive memoranda to the Senate.[21] The first memorandum, prepared by the Justice Department, explained that present operating seniority systems would not be affected by the Act:

> If . . . a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by Title VII. This would be true even in the case where, owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes.[22]

The second memorandum, prepared by Senator Clark and Senator Case, also indicated that Title VII would have no effect on established seniority rights. The memorandum asserted that Title VII's effect would be prospective and not retrospective.[23] Such information can hardly be called uninstructive.

III. SENIORITY SYSTEMS AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS V. UNITED STATES[24]

An early judicial attempt to grapple with the discriminatory impact of an employer's past hiring practices was *Franks v. Bowman Transportation Co., Inc.*[25] In *Franks,* individuals who had been victims of hiring discrimination sought relief in the form of retroactive seniority, to begin at

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[19] 42 U.S.C. § 2000e-2(h) (1976) provides in pertinent 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 or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . .

[20] H.R. REP. No. 914, 88th Cong., 1st Sess. 10 (1963).

[21] 110 CONG. REC. 7207, 7212, 7216 (1964).

[22] *Id.* at 7207.

[23] The memorandum introduced by Senator Clark read as follows:

> Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a non-discriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier.

110 CONG. REC. 7213 (1964).

[24] 431 U.S. 324 (1977).

[25] 424 U.S. 747 (1976).

the date of the discriminatory act.[26] The employer claimed that section 703(h) of Title VII barred an award of retroactive seniority. Both the district court and the Fifth Circuit Court of Appeals[27] agreed, citing *Local 189, United Papermakers & Paperworkers v. United States,*[28] which had held that once a seniority system was established, an employer's subsequent discriminatory refusal to hire does not extinguish the seniority system's bona fides.[29] The Supreme Court rejected both lower courts' reasoning as "clearly erroneous"[30] and held that section 703(h) of the Act is only "directed toward defining what is and what is not an illegal discriminatory practice in instances in which the post-act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act."[31] The Court concluded that when an award of retroactive seniority is necessary to restore victims of post-act discrimination to their rightful positions, such relief is appropriate.[32] Since the precise question in *Franks* was limited only to an appropriate remedy, the Court did not rule on the issue of whether section 703(h) immunizes seniority systems which perpetuate the effects of past discrimination from Title VII liability.

In *International Brotherhood of Teamsters v. United States*[33] the Court addressed the question left unanswered in *Franks*. The Court held that a seniority system, when applied on a racially neutral basis, is valid under section 703(h) even if the system does not provide for adjustments in seniority for victims of pre-act discrimination.[34] The Supreme Court felt that the legislative history of Title VII indicated that Congress intended to provide a broad exemption for seniority systems.[35]

Teamsters arose as a pattern or practice suit brought by the United States Attorney General, on behalf of Negroes and Spanish-surnamed individuals, charging T.I.M.E.-D.C., Inc., a nationwide common carrier of motor freight, and the Teamsters with discriminatory employment practices.[36] The complaints alleged that minorities were hired only into the less desirable, lower paying local driving positions and were not permitted to transfer into the higher paying long-distance positions without loss of departmental seniority. Two groups were included in the affected class. The

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[26] *Id.* at 758.
[27] 495 F.2d 398 (5th Cir. 1974).
[28] 416 F.2d 980.
[29] 495 F.2d at 417.
[30] 424 U.S. at 757.
[31] *Id.* at 762.
[32] *Id.* at 767-68.
[33] 431 U.S. 324.
[34] *Id.* at 353.
[35] *Id.* at 352.
[36] *Id.* at 328.

first group included those hired prior to the effective date of Title VII. The second included those hired after that date.

The Government challenged the system, which was similar to most others used in the trucking industry,[37] on the ground that it deterred minority employees from transferring from the less desirable positions and thereby continued the effects of prior discrimination in hiring. In reversing the judgments of the district court and court of appeals,[38] the Court agreed that the Government had established a pattern or practice of hiring discrimination by the company.[39] While the Court endorsed the use of statistics to establish a prima facie pattern or practice under Title VII,[40] it refused to strike down the seniority system as a violation of Title VII,[41] holding that section 703(h) excepts all bona fide seniority systems regardless of the impact on minorities.[42] Despite the discriminatory impact of the company's seniority system, the Court determined, based on the language of section 703(h) and the legislative history of Title VII, that Congress intended to uphold such seniority systems. The Court thus denied retroactive seniority to those employees hired prior to the Act, but did grant retroactive seniority, applying the rationale of *Franks,* to the victims of post-act discriminatory hiring practices.

Since section 703(h) provides that it is not an unlawful employment practice to treat employees differently pursuant to a "bona fide" seniority system,[43] the Court was required to define the term "bona fide." The *Teamsters* Court defined "bona fide" broadly to include any seniority system which is neutral on its face and which does not have its "genesis in racial discrimination."[44] The Court held that the "bona fide" seniority system exemption applies only if the seniority system affects minority and nonminority employees equally and is negotiated in a nondiscriminatory atmosphere.[45] If the seniority system meets these two qualifications it remains bona fide regardless of the disparate impact resulting from its operation.[46] However, as Justice Stewart explained in a footnote, a seniority system has its genesis in discrimination (and thus fails the second part of the test) "if an intent to discriminate entered into its very adoption."[47] The Court

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[37] *Id.* at 356.

[38] *Id.*

[39] *Id.* at 357.

[40] *Id.* at 334-43. *See* Note, *The Role of Statistical Evidence in Title VII Cases,* 19 B.C. L. REV. 881 (1978); McGuire, *The Use of Statistics in Title VII Cases,* 30 LAB. L.J. 361 (1979).

[41] 431 U.S. at 352-54.

[42] *Id.*

[43] 42 U.S.C. § 2000e-2(h) (1976).

[44] 431 U.S. at 355-56.

[45] *Id.*

[46] *Id.*

[47] *Id.* at 346 n.28.

mentioned some factors that should be considered in determining whether a system is bona fide: whether the system applies equally to all employees, whether departmental rosters are traditional in the industry, whether there is conformity to National Labor Relations Board precedents, and whether the system is maintained without a discriminatory purpose.

The Supreme Court in *Teamsters* established a narrow approach as to what factors serve to destroy the bona fides of a system, thereby overturning a long series of lower court decisions based on *Quarles v. Philip Morris, Inc.*[48] Where *Quarles* and its progeny had focused on the discriminatory impact of a departmental seniority system, lower courts are now simply considering the neutrality of the seniority system's terms.[49] In *James v. Stockham Valves and Fittings Co.*,[50] the Fifth Circuit Court of Appeals constructed a test based on the four factors it felt the *Teamsters* Court relied upon. The four part test is:

1) whether the seniority system operates to discourage all employees equally from transferring between seniority units;
2) whether seniority units are in the same or separate bargaining units (if the latter, whether that structure is rational and in conformance with industry practice);
3) whether the seniority system had its genesis in racial discrimination; and
4) whether the system was negotiated and has been maintained free from any illegal purpose.[51]

The *Stockham Valve* court interpreted the *Teamsters* case narrowly and found a number of factors that distinguished the seniority system before it from the *Teamsters* system. The court pointed out that the system at Stockham was created in 1949 when racial segregation was a standing procedure in the South, and that the seniority units did not embrace bargaining units for NLRB purposes nor did they conform to industry practice. Where a seniority system has had its genesis in race discrimination, courts have closely followed the *Teamsters* rule and held that the system is not protected by section 703(h) since it is not bona fide.[52]

Even before the question of bona fides is addressed a court must determine whether the particular practice before it constitutes a seniority system under the Act. In *Alexander v. Aero Lodge No. 735, International Association of Machinists and Aerospace Workers*,[53] a job preference bidding system allowed employees to compete for any job in

[48] 279 F. Supp. 505 (E.D. Va. 1968).
[49] Crokes v. Boeing Co., 437 F. Supp. 1138 (E.D. Pa. 1977).
[50] 559 F.2d 310 (5th Cir. 1977).
[51] *Id.* at 352.
[52] Sears v. Atchison, Topeka & Santa Fe R.R., 454 F. Supp. 158 (D. Kan. 1978).
[53] 565 F.2d 1364 (6th Cir. 1978).

the plant by filling out a preference card. The system gave priority to those who had experience in a particular occupation and thus its impact was to exclude a disproportionate number of blacks. The Sixth Circuit Court of Appeals felt that such job equity procedures come within the protection of section 703(h). The Fifth Circuit, however, in *Parson v. Kaiser Aluminum & Chemical Corp.*,[54] struck down a ten-day bottom entry requirement that had a discriminatory impact, holding that the probationary period was not protected by section 703(h) and the employer would have to defend the policy under the business necessity doctrine as to safety and efficiency. The Ninth Circuit has determined that a forty-five week trial period was not protected under *Teamsters*[55] because it was not a seniority system.

The *Teamsters* decision applies to areas of civil rights law beyond Title VII. In *United States v. East Texas Motor Freight System, Inc.*,[56] the Fifth Circuit held that a seniority system valid under Title VII cannot be invalidated by Executive Order 11246.[57] Another basis for challenging seniority systems is section 1981 of the Civil Rights Act of 1866,[58] which requires that all persons shall enjoy the same rights as white citizens. In *Johnson v. Ryder Truck Lines, Inc.*,[59] the Fourth Circuit held that a bona fide seniority system exempted under Title VII is also exempted under section 1981. The Fifth Circuit, in a footnote in *Pettway v. American Cast Iron Pipe Co.*,[60] agreed that where a challenged seniority system is racially neutral, it is beyond the scope of section 1981. However, section 1981 may still be used in some circuits to attack seniority systems. The Third Circuit in *Bolder v. Pennsylvania State Police*[61] indicated via dictum that Title VII and section 1981 provide *overlapping* remedies against discrimination.

IV: Voluntary Affirmative Action and United Steelworkers of America v. Weber[62]

The *Teamsters* decision was a major setback to those wishing to challenge existing seniority systems. On the other hand, the very foundation

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[54] 575 F.2d 1374 (5th Cir. 1978).

[55] Bryant v. California Brewers Assn, 585 F.2d 421 (9th Cir. 1978).

[56] 564 F.2d 179 (5th Cir. 1977).

[57] 3 C.F.R. 169 (1974) *reprinted in* 42 U.S.C. § 2000e (1976) implemented, 41 C.F.R. 869 (1978).

[58] 42 U.S.C. § 1981 provides in pertinent part:

> All persons . . . shall have the same right . . . to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

[59] 575 F.2d 471 (4th Cir. 1978).

[60] 576 F.2d 1157, 1191 n.37 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979).

[61] 578 F.2d 912 (3rd Cir. 1978).

[62] 443 U.S. 193 (1979).

of labor-management relations would have been undermined had the Supreme Court decided otherwise, since the stability of seniority expectations has been a traditional union strength. To avoid such an effect, probably, the Supreme Court blocked one avenue for achieving equal opportunity. Voluntary affirmative action, however, remains a viable alternative for achieving the national goal of equal opportunity.[63] Voluntary affirmative action provides both the employer and the union with the opportunity to eliminate discrimination and its effects.

In *United Steelworkers of America v. Weber* the United States Supreme Court offered broad freedom to employers to take steps necessary to eliminate manifest racial imbalances in traditionally segregated job categories.[64] The Court held that the voluntary implementation of an affirmative action plan by an employer and union, even absent any judicial determination of employment discrimination, did not violate Title VII of the Civil Rights Act of 1964.[65] The Court described the program at issue, the Kaiser plan, as one designed to abolish "traditional patterns of racial segregation"[66] and "to eliminate conspicuous racial imbalances in the Kaiser's then almost exclusively white craft work forces."[67]

Brian Weber, a white production employee with more seniority than some black workers selected, was denied admission to an employee training program because of a quota agreement. He instituted a class action suit alleging that Kaiser and the union unlawfully discriminated against him on the basis of race. The quota agreement was based on the seniority system incorporated into the collective bargaining agreement between Kaiser Aluminum and Chemical Corporation and the United Steelworkers of America. The plan required dual seniority lists so that for each of two training vacancies, one black and one white employee would be selected on the basis of seniority within the respective racial group. The plan was to continue until the percentage of black skilled craft workers in the Gramercy, Louisiana plant approximated the percentage of blacks in the local labor force.[68]

Blacks had long been excluded from craft unions[69] and Kaiser's policy was to only hire craft workers who had prior experience. Only five out of 273 skilled workers (1.83%) at the Gramercy plant were black, even

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[63] *See e.g.*, Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of* 1964, 31 VAND. L. REV. 905, 952-54 (1978), Ely, *The Constitutionality of Reverse Racial Discrimination,* 41 U. CHI. L. REV. 723 (1974).

[64] 443 U.S. at 198.

[65] *Id.*

[66] *Id.* at 200.

[67] *Id.* at 198.

[68] *Id.*

[69] The Supreme Court took judicial notice of the exclusion of blacks from the crafts on racial grounds. *Id.* at 198, n.1.

though the work force in the Gramercy area was approximately 39% black.[70] This significant statistical disparity was undoubtedly a result of the historical discrimination against blacks by the building trades that denied them the opportunity to get the necessary training and experience.[71]

The company was aware of the severe underrepresentation of minorities in the skilled craft positions.[72] Kaiser and the Steelworkers negotiated the labor agreement at issue in *Weber* to avoid possible Title VII actions brought by either the Equal Employment Opportunity Commission or by black employees alleging discrimination in craft employment.[73] Kaiser was also concerned about possible federal sanctions imposed by the Office of Federal Contract Compliance (OFCC) for failure to meet its affirmative action obligations as a government contractor under Executive Order 11246.[74] The parties to the labor agreement entered into a "Memorandum of Understanding" which established a goal of 39% minority representation in the craft positions at the Gramercy plant.[75] The labor agreement provided for new on-the-job training programs for which prior experience would not be a requirement.[76] Under the agreement's dual seniority selection provisions, some black employees were admitted to the craft training programs with less plant seniority than their white counterparts.[77]

The Supreme Court, in a five-to-two decision and speaking through Justice Brennan, found the affirmative action plan permissible.[78] The Court, following traditional patterns of judicial self-restraint, found it unnecessary to

> define in detail the line of demarcation between permissible and impermissible affirmative action plans. It suffices to hold that the challenged Kaiser - USWA affirmative action plan falls on the permissible side of the line.[79]

The case did not involve state action, and hence did not present a possible violation of the Equal Protection Clause of the Fourteenth Amendment. The decision was limited to what the Court described as "the narrow

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[70] *Id.* at 198.

[71] Weber v. Kaiser Aluminum & Chemical Corp, 563 F.2d 216, 224 n.13 (5th Cir. 1977).

[72] *Id.* at 228.

[73] *Id.* at 229.

[74] *Id.* at 229. Executive Order 11246, 3 C.F.R. 169 (1974), *reprinted in* 42 U.S.C. § 2000e (1976), implemented, 41 C.F.R. § 60 (1978) [hereinafter cited as Executive Order].

[75] Weber v. Kaiser Aluminum & Chemical Corp., 415 F. Supp. 761, 764 (E.D. La. 1976).

[76] Brief for the United States and the Equal Employment Opportunity Commission as Amicus Curiae at 8. These programs were similar to a provision in the 1974 nationwide steel industry consent decree to which the steelworkers union was a party. *See* United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 880 n.87 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

[77] 443 U.S. 193, 198.

[78] *Id.* at 193.

[79] *Id.* at 216.

statutory issue of whether Title VII forbids private employers and unions from voluntarily agreeing upon bona fide affirmative action plans."[80] That narrow issue is nonetheless difficult because it brings into direct conflict two separately justifiable judicial constructions of Title VII. On the one hand, Title VII has been held to prohibit not only blatant discrimination, but also those neutral practices which perpetuate the status quo resulting from prior discrimination.[81] On the other hand, the Supreme Court has held that Title VII protects whites as well as minorities by using "any individual" in section 703(a).[82]

Justice Brennan acknowledged that under a literal interpretation of sections 703(a) and (d) of the Civil Rights Act, Weber's position "is not without force"[83] since *McDonald v. Sante Fe Trail Transportation Co.* forbids discrimination against whites as well as blacks.[84] However, the majority characterized Weber's reliance on *McDonald* and on a literal construction of sections 703(a) and (d) as "misplaced"[85] since the plan is an affirmative action plan voluntarily adopted by private parties to eliminate traditional patterns of racial segregation."[86] Justice Brennan felt that the legislative history and the historical context of the Act indicate that "Congress did not intend wholly to prohibit private and voluntary affirmative action efforts as one method of solving this problem."[87] Clearly the majority of the Court was motivated by an unwillingness to strike down private agreements that would open up job opportunities for minorities.

Justice Blackmun's concurring opinion emphasized the practical problems of administering Title VII and the need for such voluntary agreements:

> I believe that additional considerations, practical and equitable, only partially perceived, if perceived at all, by the 88th Congress support the conclusion reached by the Court today."[88]

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[80] *Id.* at 212.

[81] Griggs v. Duke Power Co., 401 U.S. 424.

[82] McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).

[83] 443 U.S. at 212.

[84] 427 U.S. at 273.

[85] 443 U.S. at 212.

[86] *Id.*

[87] *Id.* at 203. Justice Brennan quotes from the House Report accompanying the Civil Rights Report as follows:

> "No bill can or should lay claim to eliminating all of the causes and consequences of racial and other types of discrimination against minorities. There is reason to believe, however, that national leadership provided by the enactment of Federal legislation dealing with the most troublesome problems *will create an atmosphere conducive to voluntary or local resolution of other forms of discrimination.*" H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963), at 18, U.S. Code & Admin. News 1964, pp. 2355, 2393 (Emphasis supplied.).

Id.

[88] 443 U.S. at 209.

Blackmun pointed out that if Title VII were read literally, the union and the employer would be liable for past discrimination against blacks and equally liable to whites for voluntary preferences given blacks. Quoting from Judge Wisdom's dissent in the Court of Appeals, Blackmun concluded that this anomaly places employers and unions on a "high tightrope without a net beneath them."[89]

The majority of the Court rejects any interpretation which would violate the purpose of the statute. Brennan quotes from *Church of the Holy Trinity v. United States* that it is a "familiar 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 is makers."[90] Brennan found Weber's proposed inerpretation of the Act unacceptable because it would prohibit private firms from opening to blacks, jobs from which they were barred in the past. He said:

> It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had been "excluded from the American dream for so long." 110 Cong. Rec. at 6552 (remarks of Sen. Humphrey) constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.[91]

Justice Brennan also found justification for his position in the language and legislative history of section 703(j) of Title VII which provides that nothing in Title VII shall be interpreted to *require* any employer to grant any preferential treatment to any individual or to any group because of a racial imbalance in an employer's work force. He urged that Congress' use of "require" rather than "require or permit" shows that Congress did not intend to "prohibit all race-conscious affirmative action."[92] He also found further support in the fact that Title VII was approved by legislators who had traditionally resisted federal regulation of private business only upon the condition that "management prerogatives and union freedoms . . . be left undisturbed to the greatest extent possible."[93]

The Court did place certain limitations on employers and unions, but these are not terribly restrictive under the ad hoc approach adopted by the Court. The plan, Justice Brennan noted, "does not necessarily trammel the interests of the white employees."[94] The plan does not require

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[89] *Id.* at 210, quoting from 562 F.2d at 230.

[90] 143 U.S. 457, 459 (1892).

[91] 443 U.S. at 204.

[92] *Id.* at 206.

[93] *Id.* quoting H.R. REP. No. 914, 88th Cong., 1st Sess., Pt. 2, at 29, *reprinted in* [1964] U.S. CONG. & AD. NEWS 2391.

[94] 443 U.S. at 208.

the discharge of white workers, nor does it absolutely bar the advancement of white employees; it is but a temporary measure to be discontinued once the percentage of black skilled workers approximates the percentage of blacks in the local labor force. A plan that does those things that the Court was so careful to note were not done by the Kaiser plan, would apparently be unacceptable.

Justice Rehnquist's lengthy dissent identifies the most troublesome aspects of the Court's treatment of the language and legislative history of the Act:

> Thus, by a *tour de force* reminiscent not of jurists such as Hale, Holmes and Hughes, but of escape artists such as Houdini, the Court eludes clear statutory language, "uncontradicted" legislative history, and uniform precedent in concluding that employers are, after all, permitted to consider race in making employment decisions.[95]

Quoting at length from the legislative history and debates Justice Rehnquist argued that quotas were not permitted by Title VII. Rehnquist also attacked the majority reading of section 703(j) by pointing out that "not once during the 83 days of debate in the Senate did a speaker, proponent or opponent, suggest that the bill would allow employers voluntarily to prefer racial minorities over white persons."[96] Rehnquist also took issue with the majority opinion's characterization of Kaiser's plan as voluntary when Kaiser was pressured by the Office of Federal Contract Compliance to adopt it.[97] Rehnquist's historical analysis is persuasive and consistent with the literal language of the Act. It fails, however, to deal with the practical discriminatory effects likely to result from its application.

The practical effects of the majority decision are difficult to predict. Brennan's opinion lacks the clarity and candor that might have provided a basis for determining the real limits of the rule it propounds. The Court's emphasis on the legislative history of Title VII and the economic plight of blacks suggests that the preferences given to blacks might be distinguishable from those given to other protected groups, such as women or Hispanics. Thus although the *Weber* opinion speaks of traditionally segregated job categories, voluntary preference programs in favor of other minority groups might not receive the judicial protection of the *Weber* doctrine.

The Court's repeated emphasis on the voluntary nature of the Kaiser plan gives rise to an issue which the Court is sure to face in the future: Whether an involuntary plan is beyond the protection of *Weber?* There is little to prevent the Office of Federal Contract Compliance or the Equal Employment Opportunity Commission from reading the *Weber* opinion as

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[95] *Id.* at 222.

[96] *Id.* at 244.

[97] *Id.* at 246.

a blanket endorsement of affirmative action. This interpretation could lead to pressures on employers to implement discriminatory quotas. The EEOC has maintained that employers must comply with Title VII without awaiting agency or judicial action and should take voluntary affirmative action, including preferential treatment of minorities.[98] The outcome of a case may depend on a factual determination as to whether the plan is voluntary or involuntary. The disagreement between Brennan and Rehnquist in *Weber* illustrates that reasonable minds can differ as to whether a plan is voluntary or involuntary. The Kaiser plan was the result of collective bargaining and the Court relied heavily on that fact in determining that the plan was voluntary.

It must also be noted that the employee's seniority rights were not affected by the collective bargaining agreement because, "the craft training program is new and does not involve an abrogation of pre-existing rights."[99] Such a limitation, preventing the abrogation of existing seniority rights, may well prove to be significant to both union and employer in future collective bargaining plans which incorporate affirmative action provisions.

In affirming the validity of racial quotas, the *Weber* Court has exposed itself to the charge of usurping the legislative function of the Congress.[100] The *Weber* ruling does serve to assist employers and unions in establishing affirmative action plans without undue fear of discrimination suits in the federal courts. Whether private parties can be compelled to develop and adopt affirmative action plans in the absence of proven past discrimination remains to be seen. Joint efforts by union and management to improve minority work opportunities have now been given clear Court approval.

V. CONCLUSION

While the *Teamsters* decision closed one avenue, the *Weber* decision kept another one open to reach the goals established by Title VII. The self-corrective plan implemented in *Weber* is a reasonable one. Such agreements between employers and unions are necessary if discrimination in employment is to be eliminated.

With the Supreme Court's recognition of the right of the employer and union to modify seniority standings through collective bargaining agreements, it has opened the door to voluntary changes in seniority status of employees. Since unions have the responsibility to represent the rights of

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[98] 44 Fed. Reg. 4422 (1979); *see generally* Note, *Title VII and Preferential Treatment: A Response to EEOC Affirmative Action Guidelines*, 67 GEO. L.J. 855, 862 (1979), U.S. EQUAL EMPLOYMENT - A GUIDEBOOK FOR EMPLOYERS 12-13 (1964).

[99] 443 U.S. at 215 (Justice Blackman's concurring opinion).

[100] *See* Chief Justice Burger's dissent, 443 U.S. at 216.

all employees fairly,[101] the minority employee may be able to require his union to negotiate for affirmative action changes in the employer's seniority system.

Voluntary plans can overcome the perpetuation of pre-Act discrimination. Exactly what responsibility unions have in pursuing voluntary programs in accordance with their duty of fair representation is now uncertain. Only years of litigation in the area of seniority rights will define the full reach of the *Teamsters* and *Weber* decisions.

[101] *See, e.g.*, Vaca v. Sipes, 386 U.S. 171 (1967).