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Labor Unions and Title VII: A Bit Player at the Creation Looks Back

Theodore J. St. Antoine

During the debates over what became Title VII (Equal Employment Opportunity) of the Civil Rights Act of 1964,¹ I was the junior partner of the then General Counsel of the AFL-CIO, J. Albert Woll. There were only three of us in the firm. The middle partner, Robert C. Mayer, handled the business affairs of the Federation and our other union clients. Bob was also the son-in-law of George Meany, president of the AFL-CIO, which gave us a unique access to Meany's thinking. The Federation had only one in-house lawyer, Associate General Counsel Thomas Everett Harris. Tom was an aristocratic Southerner and a brilliant lawyer who had clerked for Justice Harlan Fiske Stone on the U.S. Supreme Court. He and I were the labor law technicians, and we briefed and occasionally argued the court and administrative cases in which the Federation became involved, usually in an amicus capacity.

The often-fraught relationship of organized labor and the civil rights movement is a well-known story.² Before Title VII, African Americans were openly excluded from membership in most railroad unions, and their numbers were sharply limited in the skilled construction trades, even though all those unions eventually had the legal obligation to provide "fair representation" of any minorities who did manage to get jobs

within the unions' jurisdiction.³ Given the mores and culture of that time, it was probably inevitable that many if not most rank-and-file union workers placed their perceived economic self-interest above any concerns about promoting racial equality. Yet the story is more complicated than that of white workers simply taking advantage of discrimination against black workers, and the other side of the story needs to be remembered. Union leadership took a more principled position, and ultimately the official policy of the AFL-CIO was to support passage of the Civil Rights Act, including the prohibition of discrimination in employment by both employers and unions.

The initial bill proposed by the Kennedy administration would have concentrated on voting rights, access to public accommodations, and public school desegregation.⁴ A fair employment practices (FEP) provision was considered too controversial and likely to doom the entire package. Two very different men, Walter Reuther and George Meany, played the key roles in shaping organized labor's response and helping to secure the addition of the Title VII that was finally adopted. Reuther, president of the United Automobile Workers and head of the AFL-CIO's Industrial Union Department (largely the former CIO unions before the merger), had long been a champion of black workers' civil rights, including equal job rights, and was a member of the NAACP's board of directors. He was an eloquent speaker and a charismatic, sometimes imperious leader who on occasion could strain the patience even of his natural allies. On June 13, 1963, he and other labor leaders met with President Kennedy, and Reuther made an "impassioned plea" for the inclusion of an FEP title in the administration's civil rights bill.⁵ About a week later, Reuther joined a group of top civil rights leaders to see the president at the White House to reiterate the demand.⁶ Reuther also participated in the March on Washington in August 1963, becoming the sole white union speaker when Martin Luther King delivered his famous "I Have a Dream" oration.⁷

In personality, AFL-CIO President George Meany and Walter Reuther were almost polar opposites. Reuther resonated to abstract principles and noble causes. Meany, who hailed from the Plumbers Union in New York City, was a cautious, crafty politician, struggling to hold together a highly divergent coalition of labor adherents. In contrast to Reuther's vaulting, evangelical speaking style, Meany's oral presentations were clear, methodical, down-to-earth. Yet Meany could also be moved by the plight of black workers. Although he would not have the AFL-CIO endorse the March on Washington, he set out on his own to convey the message to the White House that an FEP provision was essential, including coverage of labor unions. As reported through my partner,

Bob Mayer, President Kennedy responded: "George, I didn't think we needed one. I thought you could keep your troops in line." At this point Reuther might have delivered a sermon on the evils of racial discrimination. Meany's riposte was characteristically hard-nosed and lacking in self-righteousness: "Mr. President, that's exactly the problem. I *can't* keep the troops in line. I need a law I can *blame!*" More formally, Meany told the Senate Labor and Public Welfare Committee in July 1963: "We need the power of the federal government to do what we are not fully able to do [by ourselves]."⁸

It can be argued whether the Meany or Reuther style was ultimately more effective. It is certainly true that at least for some significant listeners, Reuther's moralistic hectoring could wear thin over time. When the March on Washington leaders met afterward with president Kennedy, Martin Luther King modestly sought to divert attention from his own great speech by asking the president whether he had heard Reuther's excellent address. Kennedy replied dryly, "Oh, I've heard him plenty of times."⁹ Numerous persons who found Reuther more congenial philosophically wound up fonder of Meany personally. How might that affect persuasiveness? What is most important in the long run, however, is that these two men, Meany and Reuther, in their diverse ways, united in getting the labor movement officially to back the cause of an equal employment opportunity title. It is still debatable just how critical union support was. At least one reasonably disinterested observer, Professor Nelson Lichtenstein, then at the University of Virginia, declared flatly: "The trade union movement, both the AFL-CIO and the UAW, was primarily responsible for the addition of FEPC, now rechristened the Equal Employment Opportunity Commission (EEOC), to the original Kennedy bill."¹⁰ But Herbert Hill, former labor secretary of the NAACP, has bitterly attacked this view, insisting that it exaggerated the position of organized labor as a progressive social force and overlooked massive union efforts to marginalize the effects of Title VII as finally enacted.¹¹

The AFL-CIO's leadership endorsement of an FEP or EEO provision did not end the matter, however, in the eyes of much of the rank-and-file. Senator Lister Hill of Alabama was an ardent segregationist but an economic populist. He somehow obtained the addresses of about seventy thousand local unions affiliated with nationals belonging to the AFL-CIO. He wrote them, warning that passage of the civil rights bill would destroy one of their most prized possessions, seniority. Seniority reflects time with a particular employer or in a particular job or department. It can determine priority in layoffs, recalls, promotions, and fringe benefits like vacations. In many locations, especially in the South, black workers were deprived of access to the better job lines and the seniority

attached to them. As a result of Hill's intervention, AFL-CIO headquarters was inundated with outraged cries from local memberships, protesting this threat to their precious seniority rights. I was assigned to draft the Federation's response.

My thoughts were as follows, although the exact wording was the result of refinement by several hands:

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 nondiscriminatory 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.

That language was later adopted, after extensive negotiations by AFL-CIO representatives and the legislation's sponsors, by Senators Joseph S. Clark (Democrat of Pennsylvania) and Clifford P. Case (Republican of New Jersey), in an "Interpretive Memorandum" on Title VII, for which they were the "bipartisan captains" in the Senate.¹² The Justice Department submitted a rebuttal to the arguments of Senator Lister Hill to the same effect.¹³

Once the 1964 Civil Rights Act was safely passed and Title VII became law, civil rights groups understandably downplayed this particular legislative history and insisted that the "current perpetuation" of past discrimination in seniority constituted a *present* violation of the statute. As one African American lawyer friend put it to me: "Ted, I was not part of whatever compromise may have been struck in getting Title VII enacted, and as a good advocate I am going to push the statutory language as far as I think it should go." As it turned out, that was quite a way. Until the U.S. Supreme Court resolved the issue, six courts of appeals in more than thirty cases held that seniority systems that perpetuated the effects of pre-Act discrimination did violate Title VII.¹⁴ Two other courts of appeals were in accord in dicta.¹⁵ In *International Brotherhood of Teamsters v. United States*,¹⁶ however, a 7–2 Supreme Court majority ruled that § 703(h) of Title VII (and the legislative history previously cited) immunized bona fide seniority systems from liability under the CRA. Naturally, I believe the majority got it right. 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 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...¹⁷

Civil rights proponents protested, not unreasonably, that the inevitable tendency of the seniority cases was to lock a whole generation of African American workers into the less desirable jobs to which pre-Title VII discrimination had confined them. Even if they somehow managed to move into the higher-level jobs that were now theoretically available to them, they would wind up at the very bottom of the seniority ladder for those positions or departments. They would thus risk being the first laid off and the last recalled in the event of any economic downturn, as well as losing other benefit priorities. Those were indeed the regrettable facts.

But labor leaders wishing to support Title VII also faced some harsh realities. The rank-and-file were up in arms over what they perceived (correctly, as it first developed) to be a serious threat to their valuable seniority. Union officials must face elections, and the 1960s were a time of flux, when numerous incumbents were voted out of office. The Kennedy administration was initially opposed to an FEP or EEO title, with the Justice Department calling labor-liberal efforts to add one “a disaster.”¹⁸ Under all those circumstances, it seems entirely sensible for Title VII supporters among the labor leadership to feel they had to mollify their memberships by preserving seniority rights as they did. In effect, postponing for a generation the full promise of Title VII’s nondiscrimination strictures may well have been the price that had to be paid to get an EEO title. By its very nature, of course, a bona fide seniority plan can hold back only about one generation when it is set in the context of a law prohibiting discrimination in hiring, promotions, and other terms and conditions of employment.

Retired federal District Judge Nancy Gertner has asserted: “Federal judges from the trial court to the Supreme Court have interpreted the [Civil Rights] Act virtually, although not entirely, out of existence.”¹⁹ Judge Gertner places much emphasis on the actual experience of discrimination plaintiffs compared to other plaintiffs in the litigation process, from summary judgment through trial through appeal. In what is surely the single most important judicial gloss on Title VII, however, the Supreme Court came out most favorably for alleged victims of discrimination. In *Griggs v. Duke Power Co.*,²⁰ Chief Justice Burger spoke for a unanimous Court in holding that the statute was violated not only by *intentional* discrimination but also by the *use* of any job qualification—such as a high school education or passing a general intelligence test—that disproportionately disqualifies a particular protected group

and is not shown to be significantly related to successful job performance.

Griggs thus introduced the now famous “disparate impact” theory of discrimination, as distinguished from the more conventional “disparate treatment” or intentional theory. Subsequently, the Court acknowledged: “Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII.”²¹ The Court went on to state that disparate impact claims “involve employment practices that are facially neutral in their treatment of different groups, but that in fact fall more harshly on one group than another, and cannot be justified by business necessity....Proof of discriminatory motive...is not required under a disparate-impact theory.”²²

For someone like me, who was concededly only a bit player in this great undertaking but who nonetheless had a ringside seat at it, it is significant that I cannot ever recall during the endless discussions of Title VII any explicit reference to something like the “disparate impact” theory. Moreover, despite the *Griggs* Court’s tussle with the legislative history, I find nothing there that clearly and positively supports disparate impact.²³ Chief Justice Burger invoked a striking image when he said: “Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox.”²⁴ But the artistry cannot conceal the conclusory, unproven nature of the proposition. Section 703(h), the one provision expressly dealing with testing, states in pertinent part:

[N]or shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.²⁵

Chief Justice Burger found comfort in the word “used” in the sentence dealing with ability tests; it does not appear in the part of the same section dealing with seniority and merit systems. That can be scored as a good debater’s point. But in the absence of any further explanation of its significance in the legislative history, one has to wonder about how much weight to attach to that single generalized word. Would Congress have been that indirect or circumspect in promulgating a whole new theory of discrimination?

How necessary was the disparate impact theory, anyway? Section 8(a)(3) of the National Labor Relations Act prohibits “discrimination...to encourage or discourage membership in any labor organization.”²⁶ In

NLRB v. Brown, the Supreme Court concluded that “Congress clearly intended the employer’s purpose in discriminating to be controlling.”²⁷ But then the Court immediately added:

[W]hen an employer practice is inherently destructive of employee rights and is not justified by the service of important business ends, no specific evidence of intent to discourage union membership is necessary to establish a violation of § 8(a)(3). This principle, we have said, is “but an application of the common-law rule that a man is held to intend the foreseeable consequences of his conduct.”²⁸

As I see it, most if not all of what the Court accomplished in *Griggs* through enunciating the new disparate impact theory under Title VII could have been achieved less controversially by an application of the commonsense principle that persons may be held to have intended the natural consequences of their actions.²⁹ Does anyone have any serious doubts about what Duke Power was up to when it instituted new job qualifications on the very day Title VII went into effect? At most, disparate treatment analysis would seem to permit a challenged party one free pass on a claim of business necessity as a defense. Once that defense was overcome and the consequences known, any *continuation* of the practice could appropriately be regarded as an intentional violation.

One can safely say that even the present conservative Supreme Court would be reluctant to back away from the unanimous decision in *Griggs*. Moreover, in the Civil Rights Act of 1991, Congress confirmed the existence of disparate-impact violations by spelling out their manner of proof in a new § 703(k).³⁰ Nonetheless, in a concurring opinion in *Ricci v. DeStefano*, Justice Scalia warned that the Court’s disposition of that case “merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII...consistent with the Constitution’s guarantee of equal protection?”³¹ Justice Scalia elaborated his position:

[T]itle VII’s disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decisionmaking is, as the Court explains, discriminatory.³²

Professor Richard Primus suggests a means of defending disparate impact analysis.³³ He starts by spelling out what he calls the *Ricci* premise: the City of New Haven’s suspension of a written job test because of its disproportionately adverse effect on African American firefighters “would constitute disparate treatment under Title VII unless suspending the test were justified by Title VII’s provisions regarding disparate impact.”³⁴ Primus concedes that if the emphasis is placed on

the race conscious action of a *public* employer (subject to constitutional limitations) in implementing a disparate impact remedy, which is how Justice Scalia sees it, disparate impact doctrine is likely to be in “fatal” conflict with equal protection’s requirement of racial neutrality.³⁵

Primus insists, however, that there are two other ways of viewing the situation. First, there is an *institutional* difference between the roles of public employers and courts.³⁶ Courts are authorized to remedy racial discrimination and they cannot assess any kind of discrimination claim without knowing the race of the parties. Public employers are precluded from such race-conscious decision making. Second, the attention may focus on the *visible victims*.³⁷ In *Ricci*, Primus points out, New Haven’s decision “disadvantaged determinate and visible innocent third parties—that is, the white firefighters,” while “[m]ost disparate impact remedies avoid creating such victims.”³⁸ Primus concludes that the constitutionality of disparate impact doctrine may turn on the particular lens through which the Court subsequently views such equal protection claims—and the skill of advocates in bringing the right case before the Court.³⁹ My own conclusion is that the *Griggs* Court could have avoided these problems by a more generous and realistic reading of Congress’s actual design—to prohibit intentional discrimination in all its manifestations.

The problem of disparate impact pales by comparison with the problem of “affirmative action”—conceptually, ethically, and sociologically. Affirmative action—racial or other preferences among human groups—to achieve some seemingly desirable or compelling public interest is well covered by other contributors to this volume.⁴⁰ I will therefore limit myself to a few brief personal observations. The first and most obvious is that the primary, abiding theme of both the text and the legislative history of Title VII is color-blindness (or equivalent blindness regarding gender and other protected categories). The Clark-Case Memorandum filed by the senators who were in effect floor managers for the EEO provision is replete with such references. It is a model of the “plain meaning” approach to language:

It has been suggested that the concept of discrimination is vague. In fact it is clear and simple and has no hidden meanings. To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section 704 [now 703] are those which are based on any five of forbidden criteria: race, color, religion, sex, and national origin.⁴¹

Congress, like the rest of us promoting equal employment opportunity, was very naïve—or else we all affected naïveté. It was as if the magic

wand of one federal statute could erase three hundred years of bondage, degradation, and exclusion. At least by hindsight, we know it did not work.

Justice Brennan showed more sophistication when he wrote for the Court in the *Weber* case:

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," constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.⁴²

In *Weber*, a 5–2 Court upheld the legality of a union-employer affirmative action plan that reserved 50 percent of the openings in a plant's craft training program until the percentage of black craft workers in the plant was commensurate with the percentage of blacks in the local labor force.⁴³ Yet however much one might wish to applaud the result in *Weber* on the basis of policy, it contained a very serious analytical flaw. Justice Brennan never came to grips with the meaning of the critical word, "discriminate."

The Clark-Case Memorandum equated "discriminate" with "distinguish" on certain specified grounds. That reading, if straightforwardly applied, would have been fatal to the *Weber* approach. But there is another way to interpret "discriminate." One of the great federal judges, Henry Friendly, had this to say: "Although '[i]n common parlance, the word (to discriminate) means to distinguish or differentiate,'...it more often means, both in common and particularly in legal parlance, to distinguish or differentiate *without sufficient reason*."⁴⁴ That could have opened the door to a more capacious interpretation than a strictly literal reading. Once Justice Brennan had accomplished that, his reliance on the spirit rather than the letter of the law, and his use of somewhat strained but favorable portions of legislative history, would have seemed more acceptable.

Another aspect of *Weber* has always seemed anomalous to me as someone who is not a constitutional specialist. Justice Brennan emphasized it right at the outset of his analysis: "Since the Kaiser-USWA plan does not involve state action, this case does not present an alleged violation of the Equal Protection Clause of the Fourteenth Amendment."⁴⁵ The implication is that equal protection would have been a more stringent standard for a valid affirmative action plan. Indeed, subsequent decisions invalidating the plans of governmental bodies appear to bear that out.⁴⁶ Yet it is Title VII that defines the prohibited conduct so explicitly as "to discriminate...because of...race."⁴⁷ Section 1 of the Fourteenth Amendment

does not even mention race and speaks very broadly: “[N]or shall any State...deny to any person within its jurisdiction the equal protection of the laws.”⁴⁸ If one emphasizes the text, “equal protection” is surely the more flexible test. And a philosopher whose mind was uncluttered by vacillating judicial pronouncements might well conclude that a state is not denying equal protection when it treats differently—and preferentially—groups of persons who are in fact differently—and unequally—situated.⁴⁹ Those unequal situations could be the result of hurricanes, earthquakes, plagues, or physical or mental disabilities. Why not generations of racial discrimination?

I hardly expect a return to such a pristine concept at this relatively advanced stage in the development of equal protection theory. But the more we recognize that the equal treatment of *unequals* may *not* be the best way to ensure the “equal protection of the laws,” the more we may be ready to extend such established doctrines as “compelling state interest” as a qualification on the prohibition of racial distinctions.

A half-century ago, many of us, those in the civil rights movement and union supporters alike, shared Martin Luther King’s “dream.” The “dream” was a dream of genuine integration—the existence of all races in our society on a plane of equality. We felt Title VII was our vehicle. Yet fifty years after the passage of Title VII, the median household income of blacks is \$33,321 while that of whites is \$57,009, or 71 percent more.⁵⁰ The unemployment rate of blacks is 12.5 percent, or double that of whites at 6.2 percent.⁵¹ We may have come a long way in certain respects since 1964. But to fulfill that dream, we still have a very long way to go.

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Notes

1. Pub. L. No. 88-352, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. §§ 2000e–2000e-17 (2012)).
2. See generally WILLIAM B. GOULD, *BLACK WORKERS IN WHITE UNIONS: JOB DISCRIMINATION IN THE UNITED STATES* 281–430 (1977); Herbert Hill, *Black Workers, Organized Labor, and Title VII of the 1964 Civil Rights Act: Legislative History and Litigation Record*, in *RACE IN AMERICA: THE STRUGGLE FOR EQUALITY* 263 (Herbert Hill & James E. Jones Jr. eds., 1993); Bayard Rustin, *The Blacks and the Unions*, *HARPER'S MAG.*, May 1971, at 73.
3. See, e.g., *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944) (under Railway Labor Act); *Syres v. Oil Workers Int'l Union, Local No. 23*, 223 F.2d 739 (5th Cir. 1955) (under National Labor Relations Act), *rev'd per curiam*, 350 U.S. 892 (1955);

- cf.* *Oliphant v. Bhd. of Locomotive Firemen and Enginemen*, 262 F.2d 359 (6th Cir. 1958) (denial of union membership not prohibited), *cert. denied*, 359 U.S. 935 (1959).
4. H.R. 7152, 88th Cong. (1963); CHARLES & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 1–2* (1985); BUR. NAT'L AFF., *THE CIVIL RIGHTS ACT OF 1964: TEXT, ANALYSIS, LEGISLATIVE HISTORY* (1964).
 5. NELSON LICHTENSTEIN, *THE MOST DANGEROUS MAN IN DETROIT: WALTER REUTHER AND THE FATE OF AMERICAN LABOR* 382 (1995). *See also* HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960–1972*, at 82–83 (1990).
 6. LICHTENSTEIN, *supra* note 5, at 382.
 7. *Id.* at 386–87.
 8. GRAHAM, *supra* note 5, at 83. *See also* *Hearings before Subcomm. No. 5 of the House Comm. on the Judiciary on Miscellaneous Proposals Regarding the Civil Rights of Persons within the Jurisdiction of the United States*, 88th Cong. 1791 (1963) (statement of George Meany, President, AFL-CIO) (“[W]e need a Federal law to help us do what we want to do—mop up those areas of discrimination which still persist in our own ranks.”).
 9. LICHTENSTEIN, *supra* note 5, at 387.
 10. *Id.* at 387–88.
 11. Compare Herbert Hill, *Lichtenstein’s Fictions: Meany, Reuther and the 1964 Civil Rights Act*, 7 *NEW POLITICS* 82–107 (Summer 1998), and Herbert Hill, *Lichtenstein’s Fictions Revisited: Race and the New Labor History*, 7 *NEW POLITICS* 148 (Winter 1999), with Nelson Lichtenstein, *Walter Reuther in Black and White: A Rejoinder to Herbert Hill*, 7 *NEW POLITICS* 133 (Winter 1999). *See also* Rustin, *supra* note 2, at 76.
 12. 110 CONG. REC. 7212, 7213 (1964). *See also id.* at 7217 (Sen. Clark remarking, “Seniority rights are in no way affected by the bill.”).
 13. *Id.* at 7207 (1964) (“Title VII would have no effect on seniority rights existing at the time it takes effect.”). *See also id.* at 5423, 6549 (remarks of Sen. Humphrey).
 14. *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 378–79 (1977) (Marshall, J., dissenting).
 15. *Id.* at 379.
 16. 431 U.S. 324 (1977). *See also* *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982), where a 5–4 Court held that § 703(h) applied to post–Title VII seniority plans as well as pre–Title VII plans. The dissenters argued that § 703(h) was designed only to protect seniority rights vested at the time Title VII was passed. They would have distinguished between the subsequent application of a preexisting seniority plan and the post–Act adoption of a new plan. The majority declared that § 703(h) evinces no such distinction and that the key is always whether there is an “intention to discriminate” in establishing a seniority plan.
 17. 42 U.S.C. § 2000e-2(h) (2012).
 18. ARTHUR M. SCHLESINGER, JR., *ROBERT KENNEDY AND HIS TIMES* 365 (1978).
 19. Nancy Gertner, *The Court’s Repeal of Johnson/Kennedy Administration’s “Signature” Achievement*, in *A NATION OF WIDENING OPPORTUNITIES? THE CIVIL RIGHTS ACT AT 50* (2014).

20. 401 U.S. 424 (1971). Disparate impact theory also applies to gender discrimination. *Dothard v. Rawlinson*, 433 U.S. 321 (1977).
21. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).
22. *Id.*
23. For contrasting scholarly analyses, see Michael Evan Gold, *Griggs' Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 *INDUS. REL. L.J.* 429, 497–503, 588–98 (1985) (Congress meant to prohibit only intentional discrimination, but a person can be held to intend the natural consequences of one's actions); George Rutherglen, *Disparate Impact under Title VII: An Objective Theory of Discrimination*, 73 *VA. L. REV.* 1297, 1303–11 (1987) (Congress recognized the problem of "pretextual discrimination" but left its solution to the federal courts).
24. *Griggs*, 401 U.S. at 431.
25. 42 U.S.C. § 2000e-2(h) (2012).
26. 29 U.S.C. § 158(a)(3) (2012).
27. 380 U.S. 278, 287 (1965).
28. *Id.* (quoting *Radio Officers' Union v. NLRB*, 347 U.S. 17, 45 (1954)). See also *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33–34 (1967); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 227 (1963).
29. I can think of at least one possible exception. Nepotism was rampant in the skilled construction trades in pre-Title VII days. Jobs were often passed down from father to son. In certain instances, this was truly not a pretextual situation; the actual intent was not to discriminate "because of race" but to discriminate against *everybody* outside the family. Such activity lends itself much more readily to a disparate impact analysis than to a disparate treatment analysis.
30. 42 U.S.C. § 2000e-2(k) (2012).
31. 557 U.S. 557, 594 (2009) (Scalia, J., concurring).
32. *Id.*
33. Richard Primus, *The Future of Disparate Impact*, 108 *MICH. L. REV.* 1341 (2010).
34. *Id.* at 1343–44 (citing *Ricci*, 557 U.S. at 580).
35. *Id.* at 1344.
36. *Id.* at 1344–45, 1364–69.
37. *Id.* at 1345, 1369–74.
38. *Id.* at 1345.
39. *Id.* at 1385–87.
40. See, e.g., Samuel Bagenstos, *On Class-Not-Race*, in *A NATION OF WIDENING OPPORTUNITIES?*; Vicki Schultz, *Reimagining Affirmative Action*, in *A NATION OF WIDENING OPPORTUNITIES?*, *supra*; Patrick Shin, Devon Carbado & Mitu Gulati, *The Diversity Feedback Loop*, in *A NATION OF WIDENING OPPORTUNITIES?*, *supra*.
41. 110 *CONG. REC.* 7213 (1964). Even an employer who had discriminated in the past could not "prefer Negroes for future vacancies." *Id.*
42. *United Steelworkers v. Weber*, 443 U.S. 193, 204 (1979) (citation omitted).
43. *Id.* at 197.

44. NLRB v. Miranda Fuel Co., 326 F.2d 172, 181 (2d Cir. 1963) (Friendly, J., dissenting) (emphasis added).
45. *Weber*, 443 U.S. at 200.
46. See, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007). *But cf.* *Grutter v. Bollinger*, 539 U.S. 306 (2003) (5–4 decision upholding consideration of race and other factors to ensure diversity in higher education as a compelling state interest). Nonetheless, purpose or intent is required for an equal protection violation, while Title VII may also be violated without intent under a disparate impact analysis. *Washington v. Davis*, 426 U.S. 229 (1976).
47. 42 U.S.C. § 2000e-2(a)(1).
48. U.S. CONST. amend. XIV, § 1. See also the Slaughter-House Cases, 83 U.S. 36, 81 (1873) (expressing “doubt” that the provision would ever apply beyond state action dealing with race).
49. See, e.g., Ronald Dworkin, *Bakke’s Case: Are Quotas Unfair?*, in A MATTER OF PRINCIPLE 293 (1985); Thomas Nagel, *John Rawls and Affirmative Action*, 39 J. BLACKS IN HIGHER EDUC. 82 (2003).
50. CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2012, at 5 (2013), available at <http://www.census.gov/prod/2013pubs/p60-245.pdf>.
51. News Release, U.S. Dep’t of Labor, The Employment Situation—November 2013, USDL-13-2315, at Table A-2 (Dec. 6, 2013), available at http://www.bls.gov/news.release/archives/empsit_12062013.pdf.