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CIVIL RIGHTS – SHADES OF RACE: AN HISTORICALLY INFORMED READING OF TITLE VII

INTRODUCTION

This Note will argue that current ‘reverse discrimination’ jurisprudence under Title VII is fundamentally flawed, and that it is flawed because jurists have lost sight of the originating purposes of Title VII as part of the 1964 Civil Rights Act.¹ The Note begins in Part I with an exegesis of a recent case, *Tappe v. Alliance Capital Management*,² in order to examine the theme that all persons, of whatever race, must receive the same prima facie analysis under the *McDonnell Douglas Corp. v. Greene*³ employment discrimination test. Part II will explore the word ‘discrimination’ within the context of this nation’s long history of white oppression of blacks; next, Part III will discuss the history surrounding the adoption of the 1964 Civil Rights Act. This history will go beyond the standard ‘legislative history,’ although it will address that as well, to look to the larger social and cultural events at the time to determine what wrongs the Act was designed to remedy. Part IV presents employment statistics showing what effects Title VII has had over time in opening up employment to African Americans on an equal basis with their white counterparts. Parts V, VI and VII will examine the way the Supreme Court has interpreted the meaning and purpose of Title VII in the context of affirmative action. Part VIII will view and critique the arguments of those opposed to allowing Title VII to recognize race as a legitimate criteria, in certain circumstances, for making employment decisions. Finally, Part IX will argue that the purposes of Title VII and the 1964 Civil Rights Act are frustrated by the jurisprudence of cases like *Tappe*. This Note concludes that a reasonable and just reading of the statute requires that jurists recognize the larger objectives of the Act when they are deciding how to analyze reverse discrimination cases.

I. *TAPPE V. ALLIANCE CAPITAL MANAGEMENT*

In 2000, Wayne Tappe, a white male, brought suit against his

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1. 42 U.S.C. § 2000(e).
 2. 177 F. Supp. 2d 176, 179 (S.D.N.Y. 2001).
 3. 411 U.S. 792 (1973).

employer, Alliance Capital Management, alleging, among other things, that his employer had violated Title VII of the 1964 Civil Rights Act by discriminating against him because of his race.⁴ Alliance had fired Tappe, a portfolio manager in the firm's High Yield group, on December 8, 1999, the day he was to receive his yearly bonus.⁵ At the time, Tappe was thirty-eight years old.⁶ There were four other portfolio managers in the group, none of whom were fired; three of those managers were women, one of the women, black.⁷ The fourth manager was a fifty-five year old white male.⁸ When Tappe asked why he was fired, his superior, Wayne Lyski, told him only that he "did not fit with the profile of the High Yield Group and its strategy going forward."⁹

Tappe filed a complaint against Alliance alleging numerous causes, including that he was discriminated against because of his race and sex in violation of Title VII. In his complaint, Tappe alleged that he was singled out to be fired because each of the other managers was "a member of a protected class by virtue of his or her gender, race and/or age."¹⁰ The only evidence produced by Tappe in support of this allegation was the statement by Lyski that Tappe did not "fit with the profile of the High Yield Group."¹¹ In response to his allegations, Alliance filed a motion to dismiss Tappe's suit for failure to raise a claim for which a court might grant relief.¹²

In analyzing Tappe's claims to determine if they would survive the defense's motion to dismiss, the court used the *McDonnell Douglas* "burden shifting framework" established by the Supreme Court in 1973.¹³ This four-part test allows a plaintiff to establish a prima facie case of discrimination by demonstrating that: (1) he is within a protected group, (2) he is qualified for the position, (3) he was subject to an adverse employment action, (4) and the adverse action occurred under circumstances giving rise to an inference of discrimination based on membership in the protected group.¹⁴

4. *Tappe*, 177 F. Supp. 2d at 179.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* (citing N.Y.C. Admin. Code Section 8-107(a)). The age claim stems from the New York City Human Rights statute. *Id.*

11. *Id.* at 180.

12. *Id.* at 179.

13. *McDonnell Douglas Corp. v. Greene*, 411 U.S. 792, 802 (1973).

14. *Tappe*, 177 F. Supp. 2d at 180. The original test from *McDonnell Douglas* read:

If Tappe failed to meet any one prong of this test, his claims of discrimination would be dismissed. If Tappe could meet the test, then “a presumption of discrimination [would be] created and the burden of production [would] shift[] to the defendant to articulate some legitimate, nondiscriminatory reason for the adverse employment action or termination.”¹⁵ In its motion, Alliance argued that Tappe could not meet the first and fourth prongs of the *McDonnell Douglas* test.¹⁶ Although at first blush it would seem clear that Tappe would never be able to meet the first or fourth prongs of the *McDonnell Douglas* test because he is a white male, the court in fact found that Tappe *was* a member of a protected class and so did meet the first prong of the test.¹⁷

It is worthwhile reviewing the court’s reasoning on this issue, because it lays out a new and apparently unprecedented argument in favor of allowing “majority” plaintiffs like Tappe to be protected in precisely the same way as minority plaintiffs under the *McDonnell Douglas* test for a presumptive violation of Title VII. The first question for the court was “whether a plaintiff in a ‘reverse discrimination’ lawsuit must allege special circumstances to qualify as a member of a protected group”¹⁸ The court in *Tappe* pointed out that the Supreme Court in *McDonald v. Santa Fe Trail Transportation Co.*¹⁹ had said that Title VII “does not distinguish between traditional and non-traditional plaintiffs.”²⁰ And as the court in *Tappe* noted, *McDonald* had held that what was prohibited by Title VII was “discriminatory preference for any [racial] group, minority or majority.”²¹ The *Tappe* court also noted that the *McDonald* Court had found its reverse discrimination case “indistinguishable from *McDonnell Douglas*” in holding that the court must use the same standard to judge “members of all races,”

(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 complainant’s qualifications.

McDonnell Douglas, 411 U.S. at 802.

15. *Tappe*, 177 F. Supp. 2d at 180 (citing *Farias v. Instructional Sys., Inc.*, 259 F.3d 91, 98 (2d Cir. 2001)).

16. *Id.* at 181.

17. *Id.* at 182.

18. *Id.* at 181 (citing *Iadimarco v. Runyan*, 190 F.3d 151, 160 (3rd Cir. 1999)).

19. 427 U.S. 273 (1976).

20. *Tappe*, 177 F. Supp. 2d at 181.

21. *Id.* (quoting *McDonald*, 427 U.S. at 279) (emphasis omitted).

when deciding whether to dismiss their cases.²²

The *Tappe* court said that requiring *Tappe* to meet a standard different than that required by minority plaintiffs, like the commonly applied “background circumstances” test,²³ would subject him to a “higher burden” than a minority plaintiff in a like situation.²⁴ To place similarly situated plaintiffs on different footing would then subject the court’s decision to “heightened constitutional scrutiny.”²⁵ This finding would be unacceptable because “courts . . . must provide equal protection of the laws.”²⁶ While not all racial distinctions are unconstitutional, any such distinctions “raise serious constitutional issues and must first survive a heightened equal protection scrutiny.”²⁷ The court quoted the Supreme Court’s ruling in *INS v. St. Cyr*²⁸ to the effect that an interpretation which avoids serious constitutional problems is the best choice if the statute can be fairly read to avoid such problems.²⁹ Because the court in *Tappe* found that giving all plaintiffs the right to the same standard of pleading is “fairly possible,” all plaintiffs must have the same pleading standard—a result which the court said follows from “Title VII’s plain language as well as the precedent of the Supreme Court and this Circuit.”³⁰ Therefore, said the court, *Tappe* meets the first prong of the *McDonnell Douglas* test.³¹

The fourth prong, however, *Tappe* was not able to fulfill, at least not upon the facts alleged: first, that he had been terminated because “he did not fit with the profile of the High Yield group” and second, that every other member of the High Yield group was a member of a protected group “by virtue of his or her gender, race and/or age.”³² These facts were not enough, according to the court,

22. *Id.* at 181-82. In addition, the *Tappe* court cited a recent Supreme Court decision which held that sex discrimination is also illegal when perpetrated against men as well as women. *Id.* (citing *Oncale v. Sundowner*, 523 U.S. 75, 78 (1998)).

23. *See Parker v. Baltimore & Ohio R.R. Co.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981). In *Parker*, the court found that majority plaintiffs could establish a *McDonnell Douglas* prima facie test if they could show that the “background circumstances [of the case] support the suspicion that the defendant is that unusual employer who discriminates against the majority.” *Id.*

24. *Tappe*, 177 F. Supp. 2d at 182.

25. *Id.*

26. *Id.*

27. *Id.* at 183 (citing *Nguyen v. INS*, 533 U.S. 53 (2001); *Adarand v. Peña*, 515 U.S. 200 (1995)).

28. 533 U.S. 289 (2001).

29. *Tappe*, 177 F. Supp. 2d at 183.

30. *Id.*

31. *Id.*

32. *Id.* at 184.

to establish the fourth prong because if they were enough that “would mean that employees would always have a prima facie case of employment discrimination whenever they lost their jobs.”³³

Tappe’s claims were dismissed because he had “failed to allege that he was terminated ‘under circumstances giving rise to an inference of discrimination.’”³⁴ He was, however, given leave to amend, which he promptly did. Tappe’s second complaint³⁵ [hereinafter *Tappe II*] was sufficient to survive defendant’s 12(b)(6) motion.³⁶ In his amended complaint, Tappe made two additional allegations which the court held would raise an inference of discrimination. First, Tappe claimed that he “performed his job better than anyone in the group.”³⁷ According to the court, this fact alone would have been enough to support his allegation of discrimination because “while employers who impermissibly rely on a protected characteristic may fire their best employee (and him alone), employers motivated by profit or other legitimate reasons do not.”³⁸ Tappe’s second addition was a claim that he had been fired because Alliance was afraid that one of the other members of the group would bring suit for discrimination if they were fired.³⁹ The court said that this too would, by itself, “qualify as unlawful discrimination” because while the “typical Title VII case or claim involves impermissible animus or stereotyping,” Title VII is violated whenever an employee is treated “differently ‘because of’ the person’s race, sex, or other protected characteristic.”⁴⁰

Thus, Wayne Tappe survived dismissal on the pleadings and will have his day in court. On one level, the question this Note will pursue is a simple one: Has Wayne Tappe been discriminated against in a way that Title VII ought to recognize? Or is the result in some way a perversion of the intent of Title VII, a trivialization of the great purpose of the 1964 Civil Rights Act? Would the drafters of Title VII have wanted the law they crafted to be used in this way?

Of course, asking the question in this way implies its own answer. There are, however, deeper issues involved. The result in

33. *Id.* (emphasis omitted).

34. *Id.* at 185 (quoting *Farias v. Instructional Sys. Inc.*, 259 F.3d 91, 98 (2001)).

35. *Tappe v. Alliance Capital Mgmt.*, 198 F. Supp. 2d 368 (S.D.N.Y. 2001) [hereinafter *Tappe II*].

36. *Id.* at 370 (denying defendant’s motion).

37. *Id.* at 376 (emphasis omitted).

38. *Id.*

39. *Id.*

40. *Id.*

Tappe reflects a deep divide within American society; it is part of the larger argument over affirmative action that once again recently found itself before the Supreme Court.⁴¹ In fact, the *Tappe* decision is directly traceable to the argument over affirmative action that has taken place within the Supreme Court itself over the last thirty years. In 1976 the Supreme Court saw its first ‘reverse discrimination’ case under Title VII,⁴² and decided that Title VII’s “terms are not limited to discrimination against members of any particular race.”⁴³ Then in 1979, the Court decided *United Steelworkers of America v. Weber*,⁴⁴ which said that Title VII did not prohibit affirmative action in the private workplace.⁴⁵ At that moment a conflict was born: how can we reconcile the view that Title VII must protect all persons equally with the notion that one may engage in private affirmative action, i.e., that we may treat some persons differently than others? This Note will argue that this conflict can be reconciled by recognizing that, while Title VII protects persons of all races, it need not protect all persons equally and that to hold that Title VII must protect all persons under precisely equal standards undermines Congress’ purpose in passing Title VII in the first place.

II. WHAT IS DISCRIMINATION? A BRIEF REMINDER OF THE HISTORY OF WHITE SUPREMACY IN AMERICA

Not all forms of discrimination are the same. Racial discrimination has long been recognized by the Supreme Court to be a more invidious form of discrimination than discrimination against women,⁴⁶ which in turn the Court sees as more troubling than dis-

41. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

42. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

43. *Id.* at 278-79.

44. 443 U.S. 193 (1979).

45. *Id.* at 208 (“We therefore hold that Title VII’s prohibition in §§ 703(a) and (d) against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans.”).

46. *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (“[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect [and] . . . courts must subject them to the most rigid scrutiny.”). Discrimination based on sex is reviewed under a less rigid “intermediate scrutiny,” which is described by Justice Scalia in *United States v. Virginia*, 518 U.S. 515, 572 (1996) (Scalia, J., dissenting) (noting that there must be some “important governmental objective” to justify the discrimination and the “discriminatory means employed are substantially related to the achievement of those [the government’s] objectives.”).

crimination based on disability.⁴⁷ Until only fifteen years ago, the Court recognized a difference between government action designed to oppress minorities and government action intended to remedy the effects of past unlawful discrimination.⁴⁸ Thus, not all forms of discrimination are necessarily equal in the eyes of the law. This is why it makes sense to ask whether all forms of racial discrimination under Title VII are equivalent, and whether they ought to be treated the same under law.

As every student of American history knows, the “brunt of the burden of racial discrimination” in this country has been borne by African Americans.⁴⁹ But to say that African Americans have borne the brunt of racial discrimination in America is to minimize and dismiss the enormity of the racial oppression inflicted on blacks in this nation. First brought over as slaves, deprived of home, family and identity, black Americans spent two hundred and forty-four years⁵⁰ being worked as one would work oxen. They were, in the eyes of the law, mere chattel, property to be owned by any white man with enough money to buy. After the Constitution was adopted, the status of blacks changed slightly: officially recognized at last,⁵¹ albeit not explicitly, they were now something slightly more than property, and something significantly less than persons. They were three-fifths persons, and their numbers as such were used simply to empower those who enslaved them.⁵² Then came Emancipation, and after the failure of Reconstruction—a failure brought about by the angry resistance of white men and the political compromises⁵³ of the powerful—followed another century or so

47. *Bd. of Trustees v. Garrett*, 531 U.S. 356, 357 (2001) (holding that the disabled are entitled to only the most lenient “rational basis” scrutiny).

48. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 551 (1989) (Marshall, J., dissenting) (“Today, for the first time, a majority of this Court has adopted strict scrutiny as its standard of Equal Protection Clause review of race-conscious remedial measures.”).

49. See 110 CONG. REC. H1599 (1964) (comment of Rep. Minish during debate over passage of the Civil Rights Act of 1964). See also *Croson*, 488 U.S. at 527 (Scalia, J., concurring) (“It is plainly true that in our society blacks have suffered discrimination immeasurably greater than any directed at other racial groups.”).

50. The first ship bringing black slaves to the Colonies arrived in Jamestown, Virginia, in 1619. Robert D. Loevy, *Introduction to THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION 1* (Robert D. Loevy ed., 1997). Abraham Lincoln issued the Emancipation Proclamation on January 1, 1863. *Id.* at 3.

51. Jefferson’s original condemnation of slavery was deleted from the Declaration of Independence so as not to lose southern support for the Revolution. *Id.* at 2.

52. *Id.*

53. *Id.* at 3-4. The author discusses the compromise of 1876 when, in exchange

of legalized segregation⁵⁴ and oppression.⁵⁵ Once again, blacks were 'free' only to the extent that whites allowed them to be free.

It was in this period, the period of Jim Crow, that white racism was most perfidious and least excusable—where African Americans, now nominally free, were forced to abide a systematic, humiliating, and deadly⁵⁶ imposition of racial subjugation by both their fellow private citizens and by the government ostensibly formed to uphold the rights of man.⁵⁷

The Supreme Court of the United States was itself the catalyst for the spread and entrenchment of Jim Crow. In the *Civil Rights Cases*, the Court said that the 14th Amendment did not extend to the acts of private citizens.⁵⁸ The result of the decision was to allow private individuals to "not only discriminate against blacks but . . . actually terrorize them, confident in the knowledge that the power of the United States Government . . . would not be used to punish them."⁵⁹ So long as the States themselves did not discriminate, the

for an agreement that Rutherford B. Hayes would be determined the winner of the disputed election of 1876, Republicans agreed to remove all Union troops from the South. Thus, Reconstruction came to an end. *Id.*

54. *Plessy v. Ferguson*, 163 U.S. 537 (1896); see also Loevy, *supra* note 50, at 8 ("The end result of the *Civil Rights Cases* . . . was to give white individuals almost complete license, including lynching and murder, to personally enforce racial segregation, all of it done without any sense that there would ever be any official punishment."). See also 110 CONG. REC. H1541 (1964) (statement of Rep. Lindsay: "There are instances where the coercive arm of the State has been applied to encourage or to support policies of commercial segregation. . . . They have intimidated, coerced, and arrested those engaged in peaceful picketing to obtain equal rights . . .").

55. Loevy, *supra* note 50, at 8 ("[M]urders and assassinations remained an ever-present personal technique for frightening southern blacks into submission to white supremacy.").

56. See PHILIP PERLMUTTER, *DIVIDED WE FALL: A HISTORY OF ETHNIC, RELIGIOUS, AND RACIAL PREJUDICE IN AMERICA* 151 (1992). The emergence of the Ku Klux Klan and other secret societies after the Civil War led to widespread violence against African Americans:

Blacks were subjected to floggings, house burnings, mutilations, shootings, stabbings, and hangings. In Louisiana, in 1868, 2,000 were killed or wounded in just a few weeks; in Florida, in a single county, more than 150 were murdered in a few months; and in Texas, murders became "so common as to render it impossible to keep accurate accounts of them."

Id.

57. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) ("[T]hat all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . .").

58. *United States v. Stanley*, 109 U.S. 3, 11 (1883) ("Individual invasion of individual rights is not the subject-matter of the amendment.").

59. Loevy, *supra* note 50, at 7. See also MICHAEL R. BELKNAP, *FEDERAL LAW*

14th Amendment provided no protection for blacks from the racism of whites. Thus, “[b]y the early 1890’s a black was lynched in the South an average of every three days.”⁶⁰ Whites made up the juries, and white police officers, “committed . . . to the doctrine of white supremacy,” were free to suppress their black neighbors through violence, confident that no one would do anything to stop or punish them.⁶¹

Plessy v. Ferguson became the law of the land in 1896 and segregation blossomed throughout the South.⁶² Although segregation had long been the norm,⁶³ it now had been challenged in court and had withstood the challenge. By the beginning of the twentieth century, laws banning interracial marriage and mandating separate facilities had appeared in almost every possible incarnation.⁶⁴ There were the infamous separate drinking fountains and bathrooms,⁶⁵ but there were also laws mandating “segregated schools, trains, streetcars, hotels, barbershops, restaurants, and theaters.”⁶⁶ Blacks had different hospitals and mental hospitals, different prisons, different homes for the disabled.⁶⁷ “In New Orleans, prostitutes were separated by race.”⁶⁸ In Atlanta courts, black witnesses were not allowed to swear on the same Bible as white witnesses.⁶⁹ Even in

AND SOUTHERN ORDER: RACIAL AND CONSTITUTIONAL CONFLICT IN THE POST-BROWN SOUTH 11-17 (1987) (discussing the Supreme Court’s refusal to enforce the Ku Klux Klan Act).

60. Loevy, *supra* note 50, at 7. See also RICHARD WORMSER, *THE RISE AND FALL OF JIM CROW* 74 (2003) (Lynchings increased from 113 a year in 1891 to 134 in 1894. “Until 1905, more than one hundred men and women were lynched every year but one.”).

61. Loevy, *supra* note 50, at 8 (“Another part of the system of black oppression was ‘the free white jury that will never convict.’”). See also BELKNAP, *supra* note 59, at 25 (In May of 1947, a jury in Greenville, South Carolina acquitted thirty-one white men of having lynched a black man, “despite the fact that the FBI had obtained confessions from twenty-six of the defendants.”).

62. See *supra* notes 54 & 55 and accompanying text.

63. See PERLMUTTER, *supra* note 56, at 151 (Soon after the end of the Civil War, “Black Codes’ multiplied denying Blacks the right to own weapons, serve on juries, purchase or lease property, be idle, or behave disrespectfully toward Whites.”).

64. ALDON MORRIS, *CENTURIES OF BLACK PROTEST: ITS SIGNIFICANCE FOR AMERICA AND THE WORLD, RACE IN AMERICA, THE STRUGGLE FOR EQUALITY* 41 (Hebert Hill & James E. Jones, Jr. eds., 1993). In fact, interracial marriages had been outlawed in at least seven of the original thirteen colonies as early as 1662. See PERLMUTTER, *supra* note 56, at 74.

65. WORMSER, *supra* note 60, at 105.

66. MORRIS, *supra* note 64, at 41.

67. WORMSER, *supra* note 60, at 105.

68. *Id.*

69. *Id.*

death, blacks and white were interred in separate cemeteries.⁷⁰

Significantly, Jim Crow served to push African Americans into separate and unequal portions of the labor market.⁷¹ Black workers were restricted in the occupations they could undertake, generally being forced into low wage manual labor and prevented from joining skilled crafts and trades by the discrimination of labor unions.⁷² The only option left to many blacks was that of sharecropping, exchanging their labor for a portion of a landlord's crops.⁷³ This exclusion from skilled trades actually caused the numbers of skilled African-American workers in the South to decline by almost 90% in the post-Civil War era.⁷⁴

Jim Crow was a pervasive system that was initiated and designed to ensure white domination in American society.⁷⁵ Under Jim Crow, black Americans were prevented from exercising their votes in numerous ways, including poll taxes, literacy tests, and property requirements.⁷⁶ When these quasi-legal barriers failed to work, whites resorted to the "central weapon . . . in the struggle for white domination," violence.⁷⁷ It is difficult to overstate the level of violence that whites, particularly in the South, were willing to unleash on blacks who insisted on attempting to vote, organize, improve their lot, and gain equality. The Ku Klux Klan "beat, whipped and murdered thousands, and terrorized tens of thousands to prevent them from voting."⁷⁸ The violence was widespread and systemic;⁷⁹ and, when not actually engaging in the violence themselves,⁸⁰ white police did little or nothing to stop the violence.⁸¹

70. *Id.* It is important to note that while segregation reached its pinnacle in the South, it began in the North even before slavery had been abolished. PERLMUTTER, *supra* note 56, at 142.

71. MORRIS, *supra* note 64, at 41-42.

72. *Id.*

73. WORMSER, *supra* note 60, at 36.

74. PERLMUTTER, *supra* note 56, at 173 ("[I]n the South at the close of the Civil War, 100,000 out of 125,000 artisans and craftsmen were Black, but by 1900 the number had decreased to less than 10,000.").

75. MORRIS, *supra* note 64, at 41. See also BELKNAP, *supra* note 59, at 7 ("In 1907 Mississippi's Senator James K. Vardaman declared that every Negro in the state would be lynched if such a slaughter were necessary to maintain white supremacy.").

76. BELKNAP, *supra* note 59, at 7.

77. *Id.*

78. WORMSER, *supra* note 60, at 24.

79. See, e.g., *id.* at 24-25, 30-31, 74, 84-87, 126-28, 130, and 168-69.

80. BELKNAP, *supra* note 59, at 9 ("Indeed, according to Arthur F. Raper, during the period 1930-1933, sheriffs or their deputies planned or participated in nearly half of all lynchings.").

81. *Id.* at 8 (Belknap points out that some southern white sheriffs "courageously

When the civil rights movement began to make serious gains in the 1950s and 1960s, white violence repeatedly met black progress.⁸²

Invidious discrimination was ubiquitous throughout the country in 1963-1964. In the context of Title VII and the 1964 Civil Rights Act, however, it is important to recognize that legal racial discrimination in America was a one-way street. The evil that the Civil Rights Act was designed to end was the evil of white discrimination against other races, and in particular against blacks. This is what the Representatives and Senators who spoke on the floor of Congress meant when they used the term "discrimination;" it seems only reasonable to shade our modern understanding of the term with the inescapable reality of the history of white racism in America.

III. BORN IN FIRE: TITLE VII AND THE 1964 CIVIL RIGHTS ACT

Title VII, in order to be properly understood, must be examined from its genesis: the heated struggle for civil rights in 1963 and 1964.⁸³

In 1963, when the bill which would become the 1964 Civil Rights Act was submitted to Congress, the nation was embroiled in a long, violent, and visible struggle over the inequities caused by racism in America. On June 11, 1963 President Kennedy was forced to deploy National Guard troops to the University of Alabama to impose a desegregation order that Alabama Governor George Wallace had vowed to fight.⁸⁴ For months, Americans had witnessed sweeping demonstrations in Birmingham, Alabama, and other cities throughout the South and across the country. They had watched in April and May as police in Birmingham, led by Theophilus Eugene "Bull" Connor,⁸⁵ turned fire hoses on demonstrators, and met resistance with batons, attack dogs and cattle prods.⁸⁶ They had watched on Good Friday as Martin Luther King, Jr. was led to jail for defying a court injunction forbidding more demonstra-

defended black prisoners from would-be lynchers," but many more stood by and did nothing).

82. Loevy, *supra* note 50, at 23 (white community reacted to the Selma bus boycott by bombing buildings and attacking boycotters).

83. The struggle, and the violent backlash against desegregation, did not begin in 1963. For a history of the violent repression of black southerners during the post *Brown v. Board of Education* era see BELKNAP, *supra* note 59, at 27-52.

84. HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960-1972*, at 75 (1992).

85. *Id.* at 74.

86. *Id.*

tions.⁸⁷ They had watched as nearly a thousand black children, organized by the Southern Christian Leadership Council, were carted off to jail for protesting Birmingham's segregationist policies.⁸⁸ And they had watched as racists reacted to the May 10, 1963 desegregation agreement of Birmingham by setting off bombs.⁸⁹

Birmingham was not the only city in the country torn by racial strife. In April, William L. Moore, a white integrationist who had taken it upon himself to walk from Tennessee to Mississippi to protest segregation, was shot dead on the road in Alabama, only a day after beginning his walk.⁹⁰ Those who tried to finish his walk were repeatedly arrested in order to prevent the completion of the "Freedom Walk."⁹¹ In Baltimore, hundreds of protestors had been arrested for demonstrating against the refusal of the owners of the Northwood Theatre to allow black patrons onto the premises.⁹² In Greenwood, Mississippi, violence erupted in February, March and April as white racists attempted to halt a voter registration drive by bombing, shooting at and otherwise terrorizing workers trying to register Leflore County's black population.⁹³

Later that summer there were demonstrations in the North both in support of and in opposition to the continuing movement for civil rights. In New York, 800 were arrested during an effort to integrate union apprentice programs;⁹⁴ in New Jersey, 128 people were arrested for picketing a discriminatory construction site in Elizabeth;⁹⁵ in Chicago there was a series of anti-integration actions, including a protest by some 4,000 whites opposed to an ordinance barring discrimination in housing;⁹⁶ in Philadelphia, forty-six persons were injured in fighting between protestors and police at pickets against discrimination in city construction projects;⁹⁷ again in Philadelphia, in August, Horace and Sarah Baker, a black couple, were prevented from occupying a home they had bought in a white

87. HARRY S. ASHMORE, *HEARTS AND MINDS: THE ANATOMY OF RACISM FROM ROOSEVELT TO REAGAN* 351-52 (1982).

88. *Id.* at 352.

89. *Id.* at 353.

90. CIVIL RIGHTS 1960-66, at 193 (Lester A. Sobel ed., 1967) [hereinafter *CIVIL RIGHTS*].

91. *Id.* at 194.

92. *Id.* at 195.

93. *Id.* at 192-93 (indicating 64% of Leflore County's population of approximately 45,000 was black but only 250 blacks were registered to vote).

94. *Id.* at 208.

95. *Id.* at 211.

96. *Id.* at 212.

97. *Id.* at 212, 213.

neighborhood by a mob of angry whites who broke windows in their house and later set it on fire;⁹⁸ and in Detroit 125,000 people participated in a city-sanctioned parade opposing discrimination.⁹⁹ All of this culminated in the August March on Washington, where 200,000 people heard Martin Luther King, Jr. give his famous "I Have A Dream" speech. And, only a month later, the 16th Street Baptist Church in Birmingham, Alabama was bombed, killing four little girls, and rousing the disgust of blacks and whites alike.¹⁰⁰ These were only a few of the dozens, if not hundreds of incidents of racial struggle occurring throughout the country in 1963.¹⁰¹

On the evening of June 11th, Kennedy went on national television to address the issue of racial discrimination in America.¹⁰² In his speech, the President reminded Americans of the founding principles of the nation: that "all men are created equal, and the rights of every man are diminished when the rights of one man are threatened."¹⁰³ Kennedy told the country that he was sending proposed legislation to Congress to address some of the issues raised by demonstrators, including protecting the right to vote, ending segregation in the public schools, and dismantling the pervasive Jim Crow laws of the South. The President asked white Americans to imagine themselves constricted by the effects of the kind of pervasive discrimination inflicted on blacks:

If an American, because his skin is dark, cannot eat lunch in a restaurant open to the public; if he cannot send his children to the best public schools available; if he cannot vote for the public officials who represent him; if, in short, he cannot enjoy the full and free life which all of us want, then who among us would be content to have the color of his skin changed and stand in his place?¹⁰⁴

He reminded the country that blacks had been freed from slavery one hundred years prior to his speech that night, and yet still

98. *Id.* at 213.

99. *Id.* at 214.

100. BELKNAP, *supra* note 59, at 121.

101. *See, e.g.*, CIVIL RIGHTS, *supra* note 90, at 168-214; BELKNAP, *supra* note 59, at 119 ("During 1963 ten persons died in circumstances directly related to racial protests, and there were at least thirty-five bombings in the South.").

102. President's Radio and Television Report to the American People on Civil Rights, 237 PUB. PAPERS 468 (June 11, 1963).

103. *Id.*

104. *Id.* at 469.

were not free "from social and economic oppression."¹⁰⁵

On June 19th, the President sent his proposed legislation to Congress.¹⁰⁶ The text of the bill, to be called the "Civil Rights Act of 1963" was divided into eight Titles, each of which dealt with a separate issue, including voting rights, discrimination in public accommodations, desegregation of public schools, and, under Title VII of the proposed act, the establishment of a Commission on Equal Employment Opportunity.¹⁰⁷ Unfortunately, Congress did not take up formal debate on the legislation until January of 1964, so President Kennedy would not live to see his legislation make its way through Congress.¹⁰⁸

On January 31, 1964, Congressman Madden introduced Resolution 616, which called for the House to consider as a body for ten hours of debate what had become H.R. 7152, "The Civil Rights Act of 1963."¹⁰⁹ It is clear from Mr. Madden's introduction of the Act to the House that the Act and all its Titles were intended to work together in order to secure full civil rights for blacks.¹¹⁰ Congressman Madden was also quite clear about whom the employment provision of the bill was designed to help. In criticizing a "watered-down" 1960 civil rights bill, Madden pointed out that the bill "failed to make effective provisions for employment to improve the unemployment situation as it pertained to Negroes."¹¹¹ "In 1947 to 1951, the rate of unemployment for Negro men and women was 50 percent more than it was for whites."¹¹² Even the bill's opponents in the House conceded that the legislation was intended to improve the lives of black Americans.¹¹³ In fact, a reading of the debate on the bill in the House leaves absolutely no doubt in the reader's mind: the Civil Rights Act of 1964 was designed and implemented in response to the growing sense of "moral outrage"¹¹⁴ in the coun-

105. *Id.* Later that night, Medgar Evers, a leader of the Mississippi NAACP, was gunned down outside his house. ASHMORE, *supra* note 87, at 375.

106. CIVIL RIGHTS, *supra* note 90, at 175.

107. 237 PUB. PAPERS at 470.

108. CIVIL RIGHTS, *supra* note 90, at 178.

109. 110 CONG. REC. H1511 (1964) (statement of Rep. Madden).

110. *Id.* at H1512.

111. *Id.*

112. *Id.* As was pointed out earlier, black unemployment has consistently remained nearly double that of whites over the last forty years. *See infra* notes 150-152 and accompanying text.

113. 110 CONG. REC. H1515 (1964) (comments of Rep. Colmer, in stating his belief that the bill was unconstitutional: "Of course, the advocates of this legislation are in favor of helping the Negro. So am I . . .").

114. 110 CONG. REC. H1521 (1964) (comments of Rep. Cellar).

try regarding discrimination against African Americans.¹¹⁵ As Congressman Minish of New Jersey succinctly put it: “No one can deny that Negroes receive the brunt of the burden of discrimination.”¹¹⁶ Or, more eloquently, the words of Congressman Libonati of Illinois:

The loyalty of the American Negro belongs to no other flag. His lineage can be traced to no other nation. He was a captured human being. Yet, 100 years after his emancipation throughout the land he is denied the rights of citizenship and the opportunities of education, employment, and social status enjoyed by his fellow Americans. We can no longer tolerate this condition.¹¹⁷

In particular, there was no doubt that the benefits of Title VII were designed to improve the economic plight of blacks.¹¹⁸

There was no sense in the debates in either the House or the Senate that whites were in need of protection from discrimination, because whites were not suffering from discrimination.¹¹⁹ The bill as understood by its advocates in the House—those who voted it into law—was as a remedial measure¹²⁰ designed to begin the process of overturning a century’s worth of Jim Crow.¹²¹ Both sides in

115. 110 CONG. REC. H1539 (1964) (comments of Rep. Rodino: “For too long Negroes in America have been denied that most fundamental democratic right, the right to vote. . . . And for too long Negroes in America have been denied the equal opportunity to jobs. . . . These wrongs cry out for redress.”). *See also* H.R. REP. NO. 88-914, at 2393 (1964). “Most glaring . . . is the discrimination against Negroes,” the Report stated. “Today, more than 100 years after their formal emancipation, Negroes . . . are by virtue of one or another type of discrimination not accorded the rights, privileges, and opportunities which are considered to be, and must be, the birthright of all citizens.” *Id.*

116. 110 CONG. REC. H1599 (1964) (statement of Rep. Minish).

117. *Id.* (statement of Rep. Libonati).

118. *See, e.g.*, 110 CONG. REC. H1539 (1964) (comments of Rep. Rodino: “[F]or too long Negroes in America have been denied equal opportunity to jobs.”); 110 CONG. REC. H1540 (1964) (comments of Rep. Joelson: “The equal employment features of the bill will serve to give minority groups the economic advantages without which the other advantages would be meaningless.”); 110 CONG. REC. H1583 (1964) (comments of Rep. Berry: “H.R. 7152 deals partially with civil rights, but the bulk of the bill deals with economic rights and social rights for the Negro.”).

119. *See* 110 CONG. REC. H2728 (1964) (amendment by Rep. Dowdy to include a prohibition against discrimination towards Caucasian, white and Protestant Americans was rejected by a voice vote).

120. *See* 110 CONG. REC. H1628 (1964) (comments of Rep. Halpern: “For the first time since the Civil War the American People as a whole have come to realize the desperate plight of the Negro, the basic justice of his demands, and the need for remedial action.”).

121. *See* 110 CONG. REC. H1592 (1964) (comments of Rep. Corman: “A hundred years ago, we took the Negro out of the marketplace as a commodity. It is time we put him back in the marketplace as a customer.”); 110 CONG. REC. H1517 (1964) (com-

the debate understood that the situation as it was would not remain stable, and that in order to secure equal rights for blacks, whites would have to sacrifice some of the privileges they enjoyed because of the history of repression and segregation.¹²² But, as the majority declared, these sacrifices were necessary in order to redress the injustices caused by the repression and segregation of black Americans.¹²³ It was just as clear to these members of Congress that the sacrifices were acceptable in the effort to balance the scales of justice, and that in the end this redressing of grievances and balancing of rights would benefit all Americans, black and white, by securing the fruits of freedom for all.¹²⁴

The mood of the debate on the Senate floor was much more contentious than that in the House; however, there are repeated references in the debates by members of both sides which make it very clear that the Senate, too, believed Title VII was primarily intended to benefit African Americans,¹²⁵ that employment discrimination against whites was simply non-existent,¹²⁶ and that the Act

ments of Rep. Celler: “[W]hat we are considering this day in effect is a bill on a petition in the language of our Constitution for a redress of grievances. The grievances are real and genuine, the proof is in, the gathering of evidence has gone on for over a century.”).

122. See 110 CONG. REC. H1546 (1964) (comments of Rep. Watson: “I believe in respecting the rights of the minorities as much as any man or woman in this body. But at the same time, I believe in respecting the rights of the majority. You cannot give one excessive rights without in turn trampling upon the rights of others.”).

123. 110 CONG. REC. H1517 (1964) (comments of Rep. Celler: “I am not unaware of the price that must be paid by some for the advance of the cause of civil rights . . . I wish truly that it could be otherwise, but unfortunately, it cannot.”).

124. See 110 CONG. REC. H1625-26 (1964). According to Rep. Rooney:

The passage of this bill will not only insure the Negro of his rightful place in American society, but it will also lay to rest many of the unfounded fears which have plagued our national life. We cannot endure, as a free nation, if we are afraid to abide by the concepts of freedom which caused this country to be founded.

Id. See also 110 CONG. REC. H1512 (1964) (comments of Rep. Celler: “[Every American citizen] should realize that freedom for minorities is indivisible with freedom for the majority and that unless everyone enjoys freedom, no one’s freedom is secure.”).

125. 110 CONG. REC. S7253 (1964) (comment of Sen. Ervin: “Why is it necessary to create a new Federal bureaucracy to help 895,000 nonwhites get jobs while the Congress does not concern itself about the 3,629,000 unemployed whites . . . ?”).

126. *Id.* (colloquy between Senators Ervin and Case: Sen. Case: “[T]he rate for Negro unemployment is more than two times as great as for white. The difference indicates something.” Sen. Ervin: “Does the Senator contend that any of these 3,629,000 white [unemployed] individuals denied employment because of their race or color?” Sen. Case then suggested that Sen. Ervin’s question was frivolous. Sen. Ervin responded: “Does the Senator from New Jersey think it is frivolous to those 3,629,000 white individuals without jobs?” Sen. Case responded: “The question was whether

itself was designed to remedy the “injustices suffered by American Negroes and other minority groups”¹²⁷ over the previous three hundred years of slavery and segregation.¹²⁸ What is more, in his introduction of Title VII to the floor of the Senate, Senator Case made it quite plain that Title VII was not only designed to bring down the level of black unemployment,¹²⁹ it was also designed to bring African Americans into the professions.¹³⁰ He stated, “[a]lmost one-half of the white employees of the country are in white-collar jobs,” but “among [nonwhites], service workers and blue-collar workers constitute approximately three-fourths of the total number . . . who are employed.”¹³¹

Finally, it must be said that the opposition in the Senate and the House was not concerned with voluntary affirmative action or diversity in the workplace; the opposition believed that the bill would remove from employers entirely the right to decide whom to hire and whom to fire.¹³² The opposition believed that the Act was being pushed by “militant groups”¹³³ and that the problems facing African Americans were entirely their own fault.¹³⁴ One opponent stated, “Negroes can consider themselves first class citizens if they earn the right to become so, . . . laws passed by the Congress cannot provide the Negro with the future he wants, . . . the answer to the

those whites were unemployed because of discrimination based on their white color. That was a frivolous question. I shall be glad to answer any serious question.”).

127. 110 CONG. REC. S11,053 (1964) (comments of Sen. Humphrey).

128. 110 CONG. REC. S7247 (1964) (comments of Sen. Case: “I find it hard to believe that anyone in his heart of hearts can deny that injustice and suppression have been the lot of generations of Negro Americans.”).

129. 110 CONG. REC. S7240 (comments of Sen. Case: “A fair chance for a decent job—who cannot understand this—for freedom without the means of utilizing and enjoying it is an empty thing.”).

130. 110 CONG. REC. S7241 (comments of Sen. Case).

131. *Id.* In addition, Senator Case discussed income disparities, pointing out that black workers median income was slightly more than half that of white workers, and that a nonwhite man with a college education was likely to earn less over a lifetime than a white with only an eighth grade education. *Id.*

132. *See* 110 CONG. REC. S7074 (1964) (comments of Sen. Stennis); 110 CONG. REC. H1618 (1964) (comments of Rep. Abernethy); 110 CONG. REC. H1645 (1964) (comments of Rep. Alger).

133. 110 CONG. REC. S7022 (1964) (comments of Sen. Holland).

134. 110 CONG. REC. S7020 (1964) (comments of Sen. Holland: “I think the trouble is that no one tells the Negro that he’s responsible for himself—being unemployed.”) (citation omitted). *See also* 110 CONG. REC. H1621 (1964) (comments of Rep. Abernethy: “The present Negro leadership blames every ill on racial discrimination. Every Negro failure, every Negro fault . . . is blamed on the white man’s discrimination . . .”).

Negro's future is hard work"¹³⁵ Other opponents believed that there were no racial problems at all.¹³⁶ The Senators and Congressmen who eventually voted against the Act were terrified of the "Federal Government . . . dictat[ing] which employees [a small businessman] could promote. Federal agents would be looking over his shoulder all the time."¹³⁷ As with every other step in the struggle for civil rights, those intent on maintaining white supremacy, even those in government, resisted any infringement of their domination and were willing to go to almost any length to maintain it.¹³⁸

That the fears of government infringement on the privacy of all Americans through the Civil Rights Act have not come to pass goes without saying, and yet statements made by supporters of the Act to mollify these frankly racist ravings have, in the end, been used by opponents of Title VII to deny the right of employers to hire and fire and promote whom they wish.¹³⁹ This sort of reading not only violates the spirit of Title VII, it grants too much power to those who opposed the Act—those who worked tirelessly against the Act's passage and who would likely never have voted for any kind of civil rights act, no matter how attenuated.

In the end, the report issued to the House, H.R. 914, summed up the purposes of the Act: "Today, more than 100 years after their formal emancipation, Negroes, who make up over 10 percent of our population, are by virtue of . . . discrimination not afforded the rights, privileges, and opportunities which are considered to be, and must be, the birthright of all citizens."¹⁴⁰ Part of the virtue of the Act, according to the report, was that it would do more than deal with "the most troublesome problems" of discrimination, it would

135. 110 CONG. REC. S7020 (1964) (comments of Sen. Holland).

136. See 110 CONG. REC. H1537 (1964) (comments of Rep. Whitener); see also 110 CONG. REC. H1546 (1964) (comments of Rep. Watson).

137. 110 CONG. REC. S7074 (1964) (comments of Sen. Stennis).

138. In 1958, Governor Faubus of Arkansas closed the state's public schools rather than allow integration to go forward. DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE 119 (1988). In 1960, Southern Senators initiated a round-the-clock filibuster to defeat the civil rights bill of that year. See CIVIL RIGHTS, *supra* note 90, at 23 ("In preparation for the filibuster, 40 cots had been moved into the Senate offices and committee rooms for the use of Senators unable to go home to sleep for days at a stretch.").

139. See, e.g., *United Steelworkers of America v. Weber*, 443 U.S. 193, 233 (1979) (Rehnquist, J., dissenting). Justice Rehnquist uses speeches by Senators Lindsay and Minish—given in an attempt to assuage the extremist fears of Southern Senators that the Federal government would be "looking over [every employers] shoulder" and forcing them to hire underqualified blacks—to support his contention that *any* racial preference would be illegal. *Id.*

140. H.R. REP. NO. 88-914, at 2393 (1964).

also “create an atmosphere conducive to voluntary . . . resolution.”¹⁴¹ And in an Additional View Report, several Congressmen noted that the problems of unemployment and poverty caused by discrimination were having broad, invidious effects on the African American community, including a higher infant mortality rate, shorter life expectancy, and a disincentive to achieve in education or the workplace.¹⁴² All this contributed to “deny[ing] to the Nation the full benefit of the skills, intelligence, cultural endeavor, and general excellence which the Negro will contribute if afforded the rights of first-class citizenship.”¹⁴³

The legislative history, especially when viewed in the context of the larger social and historical movements which brought about the legislation in the first place, supports the view that Title VII was directed at improving the position of African Americans in order to benefit all of America.

IV. THE CONTINUING PROBLEM OF RACIAL SEGREGATION IN THE WORKPLACE

The 1964 Civil Rights Act was enacted forty years ago as an enormous omnibus piece of legislation designed to eliminate the most egregious forms of discrimination facing black Americans. Title VII was included as part of that legislation because, as President Kennedy himself said: “There is little value in a Negro’s obtaining the right to be admitted to hotels and restaurants if he has no cash in his pocket and no job.”¹⁴⁴ Or, as Senator Humphrey said in his remarks on the Senate floor, the legislation was needed to “open employment opportunities for Negroes in occupations which have been traditionally closed to them.”¹⁴⁵ So it seems reasonable to ask, forty years later, whether Title VII has opened employment opportunities for black Americans in occupations that had been traditionally closed to them. In attempting to answer that question, this Note examines employment figures in one employment area traditionally closed to African Americans: the Law.

There is some good news to tell: from 1983 to 2000, the percentage of black lawyers in America more than doubled. The bad news is that in 1983, only 2.6% of all lawyers in America were Afri-

141. *Id.*

142. *Id.* at 2514-15.

143. *Id.*

144. 109 CONG. REC. S11,159 (1963).

145. 110 CONG. REC. S6548 (1964) (comment by Sen. Humphrey).

can American. In 2000, the percentage had risen to 5.4%.¹⁴⁶ (African Americans make-up approximately 11.3% of the general American workforce).¹⁴⁷ To understand precisely what these numbers mean, it is necessary to look at the larger economic picture for black Americans in relation to their white counterparts. As of 1999, the median household income in the United States was \$40,816; for whites the figure was \$42,504, while for black Americans the median household income was just \$27,910.¹⁴⁸ And while 11.8% of all Americans were living below the poverty line in 1999, only 9.8% of whites were, while nearly a fourth of all African Americans, or 23.6%, were living below the poverty line.¹⁴⁹

Part of the income disparity is clearly due to the continuing divergence in unemployment between blacks and whites in this country. In 1968, the unemployment rate for white males was 3.0%, while that for “non-white” males (the only other racial category recognized by the census at the time) was more than double, at 7.1%.¹⁵⁰ In 1980, whites were unemployed at a rate of 6.3%; blacks at 14.3%—again more than double the figure for whites.¹⁵¹ In 2000, unemployment had gone down for both groups, but while white unemployment had dropped to 3.5%, black unemployment was at 7.6%.¹⁵² The pattern of unemployment is clear—no matter how well or how poorly the economy is doing, black workers will be unemployed at roughly twice the rate of white workers.

Another part of the income disparity is bound to the kinds of jobs generally held by black workers in comparison to their white counterparts. For example, in 1993 (the latest occupation figures available),¹⁵³ when blacks made up 10.2% of the workforce, the census found there were 529,000 financial managers (Wayne Tappe’s job) in the country.¹⁵⁴ Of these, only 4.4% were black.¹⁵⁵ Of the 605,000 doctors, only 3.7% were black.¹⁵⁶ And of the

146. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 380 (2001) [hereinafter CENSUS 2001].

147. *Id.*

148. *Id.* at 433.

149. *Id.* at 442.

150. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES (1970).

151. CENSUS 2001, *supra* note 146, at 386.

152. *Id.*

153. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES (1994).

154. *Id.* at 407.

155. *Id.*

156. *Id.*

769,000 computer systems analysts in the nation, just 5.8% were black.¹⁵⁷

These figures demonstrate that in highly-skilled professions blacks are, as a percentage of the workforce in relation to their numbers in the general population, severely under-represented. At the other end of the spectrum, in traditionally low and un-skilled jobs, blacks are seriously over-represented. For example, of the nearly two million cooks in the nation, almost 20% were black.¹⁵⁸ Of the three million persons employed in “cleaning and building service occupations” (in other words, janitors and maids), 22.4% were black.¹⁵⁹ And over 30% of the nearly two million nursing aides, orderlies and attendants in 1993 were African American.¹⁶⁰

It is into this picture that one must place the numbers of black lawyers in America. Clearly, things have improved. In 2000, 5.4% of the lawyers in the country were black.¹⁶¹ At a few of the country’s largest law firms, the percentage is higher—in 2000, at two large law firms, 7.3% of the associates were black, fully 50% above the national average.¹⁶² However, after that 7.3%, the numbers drop and the percentage of black associates among all associates at all large law firms combined is only 4.1%, 20% below the national average of all black lawyers.¹⁶³ And of the partners at all large law firms, 96.1% are white, while only 1.9% are black.¹⁶⁴

In terms of erasing the lingering effects of segregation, then, the legal profession has a long way to go. And while it is difficult, if not impossible, to determine how much of the growth that there has been in the number of black lawyers has been due to the positive effects of Title VII and other anti-discrimination legislation, it is clear that Title VII and its brethren have not yet fulfilled their remedial purpose of making black Americans equal players in the employment marketplace.

157. *Id.* These same statistics reveal that African Americans comprised just 3.1% of architects, 3.7% of engineers, 4.8% of university professors, and held only 6.2% of all executive, administrative and managerial positions in the country. *Id.*

158. CENSUS 2001, *supra* note 146, at 409. Interestingly, only 3.8% of the bartenders and 4.6% of the waiters were black. *Id.*

159. *Id.*

160. *Id.* In addition, 14.9% of laborers, 26.8% of the postal clerks, and 27.5% of the nations barbers were black. *Id.*

161. *Id.*

162. Brian Zabcik, *Measuring Up (And Down)*, THE MINORITY LAW JOURNAL, Spring, 2002, available at <http://www.minoritylawjournal.com/spring02/texts/measuring.html> (last visited Nov. 12, 2004).

163. *Id.*

164. *Id.*

V. HISTORICALLY INFORMED JURISPRUDENCE: *UNITED STEELWORKERS OF AMERICA V. WEBER*

The central contextual reading of Title VII was and remains *United Steelworkers of America v. Weber*.¹⁶⁵ Although decided nearly a quarter of a century ago, the Supreme Court's decision in *Weber* remains controversial.¹⁶⁶ It also remains the law of the land, although some commentators call for it to be overturned.¹⁶⁷ Considering the current makeup of the Supreme Court, these commentators may yet see their wish come true. However, it is not difficult to argue that the *Weber* court was right—when read in its proper context, Title VII not only allows for but encourages affirmative action in the workplace. *Weber*'s detractors, exemplified by the angry dissent penned by then Associate Justice William Rehnquist, have simply blinded themselves to the true purpose and intent of Congress in enacting Title VII.

The facts of *Weber* are as follows: in 1974, United Steelworkers of America entered into a collective bargaining agreement with *Weber*'s employer, Kaiser Aluminum & Chemical Corp.¹⁶⁸ As part of this agreement, Kaiser instituted a new training program in an effort to promote more black workers as craftworkers, an area of Kaiser which, before the program was instituted, was less than 2% black at the Gramercy, Louisiana plant where *Weber* was employed.¹⁶⁹ The training program earmarked 50% of the available spots for black workers.¹⁷⁰ *Weber* was a white worker at the Gramercy plant who was denied a place in the craftwork training program despite the fact that he was a more senior employee than all of the black employees selected.¹⁷¹ Thereafter, *Weber* brought suit alleging that the affirmative action program violated § 703(a) of Ti-

165. 443 U.S. 193 (1979). Although *Weber* was concerned with formal affirmative action programs, the analysis of the majority demonstrates the Court's understanding of the history and purposes of Title VII in a manner that is consonant with the purposes of this Note.

166. See, e.g., Ken Feagins, *Affirmative Action or the Same Sin?*, 67 DENV. U.L. REV. 421, 434 (1990). See also Book Note, *Affirmative Action Anonymous*, 104 HARV. L. REV. 967, 969-72 (1991) (reviewing MELVIN UROFSKY, *A CONFLICT OF RIGHTS: THE SUPREME COURT AND AFFIRMATIVE ACTION*) [hereinafter *Affirmative Action Anonymous*].

167. See, e.g., Feagins, *supra* note 166, at 440; *Affirmative Action Anonymous*, *supra* note 166, at 971.

168. *Weber*, 443 U.S. at 197-98.

169. *Id.* at 198.

170. *Id.*

171. *Id.* at 199.

tle VII¹⁷² by promoting junior employees into the training program over more senior employees based solely on their race.¹⁷³ The two lower courts found that the affirmative action program was racially discriminatory, the Fifth Circuit holding that “all employment preferences based upon race, including those preferences incidental to bona fide affirmative action plans, violated Title VII’s prohibition against racial discrimination in employment.”¹⁷⁴

Justice Brennan’s majority opinion relied heavily on “the background of the legislative history of Title VII and the historical context from which the Act arose.”¹⁷⁵ This is because the statute itself, if “literally constructed,” appears to prohibit all forms of racial discrimination in employment.¹⁷⁶ The question the Court wanted to ask, is *why* did Congress intend to eliminate discrimination from the workplace? As we have seen, Title VII, indeed all of the Civil Rights Act of 1964, is a remedial statute—that is, it was designed and intended to remedy a wrong.¹⁷⁷ The Court recognized that the wrong Congress was trying to remedy with Title VII was “the plight of the Negro in our economy.”¹⁷⁸

The majority’s view of the statute seems inescapable when one considers the purposes of the Civil Rights Act itself, which was “the integration of blacks into the mainstream of American society.”¹⁷⁹ For instance, Title II of the Act, a provision almost as controversial in the Congressional debates as Title VII, prohibited owners of res-

172. 42 U.S.C. § 2000e-2(a) (2004).

173. *Weber*, 443 U.S. at 199.

174. *Id.* at 200.

175. *Id.* at 201.

176. *Id.* The section of the statute regarding illegal employment practices, says that

[i]t shall be an unlawful unemployment 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.

42 U.S.C. § 2000e-2(a) (2004). See William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1489 (1987) (“It is . . . plausible to interpret the antidiscrimination rule to penalize only discrimination which is invidious, for the term ‘discrimination’ in common usage means something more than just different treatment.”).

177. See *ASHMORE*, *supra* note 87.

178. *Weber*, 443 U.S. at 202 (citing the remarks of Sen. Humphrey).

179. *Id.*

taurants, hotels and other “public accommodations” from discriminating against people on the basis of color.¹⁸⁰ Title I was designed to eliminate discrimination in voting,¹⁸¹ while Title IV codified the Supreme Court’s decision in *Brown v. Board of Education*¹⁸² outlawing segregation in schools.¹⁸³ All of the provisions of the 1964 Civil Rights Act were designed and implemented to prevent forms of discrimination that were being used by whites against blacks, in order to maintain white supremacy. The provisions were passed as a group in order to effect the broadest, most complete change in the quality of life for black Americans possible.¹⁸⁴ As eloquently described in an Additional Views report accompanying the House Report, the purposes of the Civil Rights Act were clear:

More than a hundred years have elapsed since the Negro has been freed from the bonds of slavery. Yet, to this day, the Negro continues to bear the burdens of a race under the traces of servitude. In employment, education, public service, amusement, housing and citizenship, the Negro has faced the barrier of racial inequality. In [the] titles of this legislation, we have sought to fashion workable tools to correct this inequity.¹⁸⁵

The titles of the Act were therefore designed to work together in order to eliminate these burdens of racism. As the *Weber* Court said: “Congress recognized that [the integration of blacks into mainstream American society] would not be possible unless blacks were able to secure jobs which have a future.”¹⁸⁶ Or, put more bluntly: “There is little value in a Negro’s obtaining the right to be admitted to hotels and restaurants if he has no cash in his pocket and no job.”¹⁸⁷ Viewed in this light—that Title VII was part of a larger package of laws intended to end a century of continuous and systematic discrimination directed against blacks by whites intent on maintaining white supremacy after emancipation—it became in-

180. 110 CONG. REC. H1511 (1964) (statement of Rep. Madden).

181. *Id.*

182. 347 U.S. 483 (1954).

183. 110 CONG. REC. H1511 (1964) (statement of Rep. Madden).

184. 110 CONG. REC. H1529 (1964) (comments of Rep. McCulloch: “Hundreds of thousands of citizens are denied the basic right to vote. Thousands of school districts remain segregated. Decent hotel and eating accommodations frequently lie hundreds of miles apart for the Negro traveler.”).

185. 914 H.R. 2393.

186. *United Steelworkers of America v. Weber*, 443 U.S. 193, 202-03 (1979) (quoting remarks of Sen. Clark) (internal quotes omitted).

187. *Id.* at 203 (quoting President Kennedy’s introductory remarks to the Civil Rights Act in 1963).

cumbent upon the Court to look beyond “the letter of the statute” to find what was “within its spirit [and] within the intention of its makers.”¹⁸⁸ Additionally, when the Court looked to the intention of Title VII’s makers in this way, it said that to interpret Title VII to forbid “all race-conscious affirmative action would bring about an end completely at variance with the purpose of the statute. . . .”¹⁸⁹ The Court thus held that Title VII “[did] not condemn all private, voluntary, race-conscious affirmative action plans,” despite the text’s apparent literal prohibition of discrimination based on race.¹⁹⁰

Title VII “was enacted pursuant to the commerce power,” and so does not “incorporate and particularize the commands of the Fifth and Fourteenth Amendments.”¹⁹¹ What this means is that, particularly in regard to private employment, there is no Equal Protection requirement contained in Title VII.¹⁹² At the same time, the Court recognized that the literal dictates of Title VII cannot be completely ignored. Thus the Court required that affirmative action plans be limited in their impact in order to avoid “unnecessarily trammel[ing] the interests of the white employees.”¹⁹³ Permissible affirmative action plans, according to the Court, cannot require a white person be fired and replaced with a black person.¹⁹⁴ In addition, the plan must be a temporary measure put in place to “eliminate a manifest racial imbalance,” and it cannot “create an absolute bar to the advancement of white employees.”¹⁹⁵ In so finding, the Court tried to balance the protection Title VII affords white employees,¹⁹⁶ while promoting the “ultimate statutory goals” of the 1964 Civil Rights Act.¹⁹⁷

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

189. *Id.* at 202 (citing *United States v. Public Utilities Comm’n*, 345 U.S. 295, 315 (1953) (internal quotes omitted)).

190. *Id.* at 208.

191. *Id.* at 207 n.6.

192. *Id.*

193. *Id.*

194. *Id.* at 208 (citing *McDonald v. Sante Fe Trail Transp. Co.*, 427 U.S. 273 (1976)).

195. *Id.*

196. *McDonald*, 427 U.S. at 280.

197. *Weber*, 443 U.S. at 207.

VI. REAFFIRMING *WEBER*: *JOHNSON V. TRANSPORTATION AGENCY*

In *Johnson v. Transportation Agency*,¹⁹⁸ the Court again looked at the question of affirmative action first decided in *Weber*. If the Court had wanted to overrule its original decision, this would have been a good time to do it. Instead, the Court reinforced its finding in *Weber* and expanded it to include public sphere applications of workplace affirmative action. In this case, the affirmative action program was one promulgated by the Transportation Agency of Santa Clara County. Johnson, a white male, was passed over for road dispatcher in favor of a female applicant, Joyce. Both were qualified, Johnson receiving a score of 75 out of 80 on the relevant aptitude test (tied for second among seven applicants); Joyce was next, having scored a 73.¹⁹⁹

What is most interesting about the holding in *Johnson* is the Court's finding that once a majority plaintiff has established a prima facie case of discrimination under the *McDonnell Douglas* test, a valid affirmative action plan is an acceptable nondiscriminatory reason for the employment decision which shifts the burden back to the plaintiff.²⁰⁰ Once the defendant employer demonstrates its affirmative action plan, the burden is on the plaintiff to show that the program itself is invalid and is in reality only a pretext for a decision which has no valid nondiscriminatory justification.²⁰¹ That an affirmative action program is a valid nondiscriminatory business decision follows the Court's holding in *Weber*, where the Court found that "taking race into account was consistent with Title VII's objective of breaking down old patterns of racial segregation and hierarchy."²⁰²

Even more interesting was the Court's acceptance of Justice Blackmun's concurrence in *Weber*:

As Justice Blackmun's concurrence made clear, *Weber* held that

198. 480 U.S. 616 (1987).

199. *Id.* at 623-24.

200. *Id.* at 626 (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277-78 (1986)) ("We held that the ultimate burden remains with the employees to demonstrate the unconstitutionality of an affirmative-action program") (internal quotation marks omitted).

201. *Id.* According to the *Johnson* Court the *Weber* decision "was grounded in the recognition that voluntary employer action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace, and that Title VII should not be read to thwart such efforts." *Id.* at 630.

202. *Id.* at 628 (internal quotes and cites omitted).

an employer seeking to justify the adoption of a plan need not point to its own prior discriminatory practices, nor even to evidence of an “arguable violation” on its part. Rather, it need point only to a “conspicuous . . . imbalance in traditionally segregated job categories.”²⁰³

Under this reasoning, it isn’t necessary for an employer to demonstrate that the employer itself had ever discriminated in its employment practices, only that the job category itself has been “traditionally segregated.”²⁰⁴ In such circumstances, affirmative action designed to end that traditional segregation is acceptable under Title VII.

In his concurrence, Justice Stevens argued that the ruling of *McDonald*²⁰⁵ was no longer controlling: “Neither the ‘same standards’ language used in *McDonald*, nor the ‘color blind’ rhetoric used by the Senators and Congressmen who enacted the bill, is now controlling.”²⁰⁶ According to Stevens, at least, *McDonald* had been functionally overruled by *Weber* and *Johnson*.

Stevens also said that the decision in *Weber*, and now in *Johnson*, is drawn from “[t]he logic of antidiscrimination legislation [which] requires that judicial constructions of Title VII leave ‘breathing room’ for employer initiatives to benefit members of minority groups.”²⁰⁷ It is the logic of the statute—the very purpose of this remedial statute itself—which determines that voluntary affirmative action was permissible in some circumstances because a prohibition of every type of “affirmative action would bring about an end completely at variance with the purpose of the statute”²⁰⁸ This purpose, according to the Court in *Johnson*, was to “open employment opportunities for blacks in occupations that had been traditionally closed to them.”²⁰⁹ The Court has twice con-

203. *Id.* at 630 (emphasis added).

204. *Id.* See also *id.* at 652 (Stevens, J., concurring) (“While employers must have a firm basis for concluding that remedial action is necessary, neither *Wygant* nor *Weber* places a burden on employers to prove that they actually discriminated against women or minorities.”).

205. “We therefore hold today that Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they Negroes and Jackson white.” *McDonald v. Sante Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976).

206. *Johnson*, 480 U.S. at 644 (Stevens, J., concurring).

207. *Id.* at 645 (Stevens, J., concurring).

208. *United Steelworkers of America v. Weber*, 443 U.S. 193, 202 (1979) (quoting *United States v. Public Utilities Comm’n*, 345 U.S. 295, 315 (1953)) (internal quotes omitted).

209. *Johnson*, 480 U.S. at 648 (Stevens, J., concurring).

strued Title VII as permitting private affirmative action in the workplace so long as the employer can point to a “manifest . . . imbalance in traditionally segregated job categories.”²¹⁰ As long as the employer can make this showing, the Court will not interfere with the employer’s business decision because “Congress intended that traditional management prerogatives be left undisturbed to the greatest extent possible.”²¹¹

VII. THE CREATION OF REVERSE DISCRIMINATION UNDER
TITLE VII: *McDONALD V. SANTA FE TRAIL
TRANSPORTATION CO.*

In 1976, before they had considered *Weber* and *Johnson*, the Supreme Court saw its first ‘reverse discrimination’ case under Title VII. In *McDonald*, the Court gave short shrift to the legislative history of the statute, and simply stated that “the uncontradicted legislative history [shows] that Title VII was intended to cover white men and women and all Americans.”²¹² In *McDonald*, two white workers had been fired by their employer for stealing.²¹³ A third employee caught stealing, who was black, was not fired.²¹⁴ The two white workers brought suit, alleging discrimination in violation of Title VII.²¹⁵ The Court in *McDonald* said that Title VII’s “terms are not limited to discrimination against members of any particular race.”²¹⁶

However, while recognizing that “Title VII tolerates no racial discrimination, subtle or otherwise,”²¹⁷ the Court also differentiated between simple discrimination and affirmative action, and said that the decision in *McDonald* did not address “the permissibility of such a program, whether judicially required or otherwise prompted.”²¹⁸

Thus when the Supreme Court first held that Title VII protected all persons, it still recognized that there was a difference between hostile discrimination and the benign discrimination of affirmative action. In addition, Justice Marshall made his statement

210. *Id.* at 650 (Stevens, J., concurring) (quoting *Weber*, 443 U.S. at 197).

211. *Id.* at 645 (Stevens, J., concurring).

212. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976) (citation omitted).

213. *Id.* at 276.

214. *Id.*

215. *Id.* at 275.

216. *Id.* at 278-79.

217. *Id.* at 280 n.8 (emphasis omitted).

218. *Id.*

that the uncontradicted legislative history showed that whites and blacks were meant to be treated the same under the statute after only a cursory examination of that legislative history. In this case, the legislative history went uncontradicted. In *Weber* and *Johnson* that view of the legislative history was specifically contradicted. The result was, as Justice Stevens said, that "the same standards" language used in *McDonald* was no longer controlling.²¹⁹ Logically, this statement is necessarily true: if the Court could uphold affirmative action programs that promoted blacks and women over white men based on race and sex, then clearly white men, while protected by Title VII, could not possibly receive the protection of Title VII under the same standards as blacks or women.

McDonald also did not require that all plaintiffs receive the same prima facie test.²²⁰ In a footnote, Justice Marshall noted that the *McDonnell Douglas* test had required, as its first prong, that the plaintiff be a member of a racial minority group.²²¹ If this were true, then the plaintiffs in *McDonald* would have been unable to make out a case of discrimination. Marshall did not offer an alternative version of the *McDonnell Douglas* test for use in reverse discrimination cases. Instead he simply noted that plaintiff was not prevented from being able to make out a claim of discrimination cognizable under Title VII simply because the case did not fit into the rubric of *McDonnell Douglas*.²²² The *McDonnell Douglas* test was "set out only to demonstrate how the racial character of the discrimination could be established in the most common sort of case, and not as an indication of any substantive limitation of Title VII's prohibition of racial discrimination."²²³ Here Marshall suggests that the *McDonnell Douglas* test is not required for, or even appropriate in, all cases.

VIII. THE ARGUMENT AGAINST UNEQUAL PROTECTION: JUSTICE REHNQUIST'S DISSENT IN *WEBER*

The central argument against the idea that Title VII allows affirmative action was made by Justice Rehnquist in his dissent in *Weber*. To this day it is cited by those opposed to affirmative action as the definitive statement on the issue. In making his argument,

219. *Johnson v. Transp. Agency*, 480 U.S. 616, 644 (1987) (Stevens, J., concurring).

220. *McDonald*, 427 U.S. at 279 n.6.

221. *Id.* (citing *McDonnell Douglas Corp. v. Greene*, 411 U.S. 792, 802 (1973)).

222. *Id.*

223. *Id.*

Justice Rehnquist looked at a legislative history very different from that detailed in Part III of this Note.

In Part III A of his dissent, Justice Rehnquist reviewed the House debates to find that "the Court's interpretation of Title VII is totally refuted by the Act's legislative history."²²⁴ Viewing this statement in the context of the legislative history outlined above, this statement is arguably a complete misreading of the meaning of the Act's legislative history. Whatever else the legislative history may do, it does not refute the majority's holding in *Weber*. In finding that Title VII "does not condemn all private, voluntary, race-conscious affirmative action,"²²⁵ the majority relied on much of the legislative history cited in this Note. Justice Rehnquist is reading a different history than the majority.

Justice Rehnquist began his review by acknowledging that "employment discrimination against Negroes provided the primary impetus for passage of Title VII."²²⁶ In acknowledging the employment problem this way, however, he minimizes the repeated and lengthy discussions of the majority in Congress detailing the seriousness of this problem. He also fails to recognize that Title VII itself was part of a much larger civil rights bill designed to eliminate racial discrimination against blacks and other oppressed minorities.²²⁷ For instance, Title II of the bill was designed to require owners of public accommodations, like restaurants and hotels, to admit all persons regardless of race.²²⁸ To say that racial discrimination in public accommodations was the "impetus" behind that piece of the Act is to misstate the situation. Discrimination against blacks was not merely the "impetus" behind Title II, it was the very purpose of Title II; it was, in and of itself, the wrong requiring a remedy. If there had been no Jim Crow, no refusals to seat blacks

224. *United Steelworkers of America v. Weber*, 443 U.S. 193, 229 n.11 (1979) (Rehnquist, J., dissenting).

225. *Id.* at 208.

226. *Id.* at 229 (Rehnquist, J., dissenting).

227. 110 CONG. REC. H1600 (1964) (Comments of Rep. Minish: "The Title is designed to utilize to the fullest our potential work force This can be done by removing the hurdles that have too long been placed in the path of minority workers who seek to realize their rights . . .").

228. 110 CONG. REC. H1511 (1964). According to Rep. Madden:

This legislation gives the Attorney General and the aggrieved citizen authority to institute a civil action in Federal court against any person who denies an individual, because of race . . . access to public transportation, interstate travel, public eating houses, hotels, admission to places of exhibition and public entertainment, and other establishments supported by public taxation.

Id.

at lunch counters, no separate drinking fountains, there would never have been a need for Title II, and so Title II would never have existed. Just so with Title VII. Without discrimination against blacks, Title VII would never have been enacted because there would have been no wrong egregious enough to require Congressional remedy.

Justice Rehnquist also seems to misunderstand the evil of discrimination. As Justice Rehnquist would have it: "The evil inherent in discrimination against Negroes is that it is based on an immutable characteristic, utterly irrelevant to employment decisions."²²⁹ But discrimination is not inherently evil; discrimination as a concept is neutral. Discrimination is simply the separating of things, or people, into identifiable groups. Discrimination becomes evil when it is used to oppress a people. The discrimination that the majority in Congress was concerned with was the kind of discrimination outlined in Part IV above; discrimination as implemented in segregation was evil because it "denied the rights of first-class citizenship" to blacks and other minorities.²³⁰ As announced in the Declaration of Independence, government is instituted to protect these rights.²³¹ The evil of discrimination that the 1964 Civil Rights Act was designed to cure was the oppressive discrimination sanctioned, and often imposed by, the very government supposedly instituted to protect its citizens from oppressive discrimination.²³²

In his dissent, Justice Rehnquist complained that "discrimination" was not defined by the statute; however, everyone involved in passing the Act knew what the word discrimination meant. It meant hostile discrimination directed against blacks.²³³ It meant the kind of discrimination that refused to allow two-thirds of blacks to register to vote in Louisiana;²³⁴ that prevented 85% of potential black voters from registering in 250 counties in the United States;²³⁵ the kind of discrimination that relegated thousands of black students to substandard, segregated education; that did not allow children to play in parks and playgrounds because they were black (even when their parent's tax money was used to pay for those pub-

229. *Weber*, 443 U.S. at 230 n.10 (Rehnquist, J., dissenting).

230. 110 CONG. REC. H1600 (1964) (comments of Rep. Daniels).

231. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

232. Lovey, *supra* note 50, at 8.

233. 110 CONG. REC. H1600 (1964) (statement of Rep. Daniels: "Racial discrimination still persists throughout our land Twenty million Negroes are still denied the rights of first class citizenship.").

234. *Id.*

235. 110 CONG. REC. H1517 (1964) (comments of Rep. Cellar).

lic facilities);²³⁶ the kind of discrimination that forced an entire people to live with the “degradation, misery, and human indignities which attend second class citizenship”²³⁷ Discrimination, as a word, went undefined in the Act because a definition must have seemed, to those members of Congress, unnecessary and superfluous.

It is only by failing to understand Title VII within the context of the 1964 Civil Rights Act, by failing to see the larger historical and social context that led to the Act’s adoption in the first place, that Justice Rehnquist is able to declare that the holding in *Weber* “introduces into Title VII a tolerance for the very evil that the law was intended to eradicate”²³⁸

There are other problems with Justice Rehnquist’s analysis of the legislative history. As pointed out in Justice Blackmun’s concurrence, for example, most of the history Justice Rehnquist cites to support the idea that Title VII “forbids” affirmative action is actually only useful to demonstrate that Title VII does not “require” affirmative action.²³⁹ This is obviously a very important distinction—one that Justice Rehnquist ignores. This failure to recognize the subtlety of language crops up more than once in Justice Rehnquist’s exegesis. For example, he cites Republican supporters for the statement that what Title VII must do is remove “[a]ll vestiges of inequality based solely on race,”²⁴⁰ but he fails to note that this statement does not say that Title VII will remove all discrimination; it says it will remove *inequality*—a much larger conclusion, and one perfectly consonant with affirmative action and the holding of the majority.

This failure to read the subtleties of language is revealed again in Justice Rehnquist’s complaint that the majority has misread § 703(j)²⁴¹ of the statute.²⁴² The section plainly says that the Act is not to be “interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the

236. 110 CONG. REC. H1529 (1964) (statement of Rep. McCulloch).

237. 110 CONG. REC. H1627 (1964) (statement of Rep. Halpern). Such “degradations,” according to Congressman Halpern, included: “squalid housing conditions; second-rate educational opportunities; employment at the lowest rung of the economic ladder.” *Id.*

238. *United Steelworkers of America v. Weber*, 443 U.S. 193, 254-55 (1979) (Rehnquist, J., dissenting).

239. *Id.* at 215 (Blackmun, J., concurring) (emphasis added).

240. *Id.* at 232 n.12 (Rehnquist, J., dissenting).

241. 42 U.S.C. § 2000e-2(j).

242. *Weber*, 443 U.S. at 227 (Rehnquist, J., dissenting).

race . . . of such individual or group.”²⁴³ The most that Justice Rehnquist can muster against the obvious reading that the statute clearly does *not* prohibit preferential treatment, it simply does not *require* it, is to say that this reading is “outlandish” when read in conjunction with §§ 703 (a) & (d),²⁴⁴ and that it contradicts the legislative history of the Act,²⁴⁵ which, as has already been shown, is simply not the case.

An aspect of Justice Rehnquist’s dissent which must be answered is the assertion that the language of the statute simply “prohibits a covered employer from considering race when making an employment decision,”²⁴⁶ and thus contradicts the majority’s holding. A reading of the statute’s plain language, according to Justice Rehnquist, precludes the possibility of affirmative action. In §703(a),²⁴⁷ the statute clearly says that it is unlawful to “discriminate against any individual . . . because of such individual’s race.”²⁴⁸ It is, under current law, impossible to argue that choosing to hire a black candidate over a white candidate in order to integrate a traditionally segregated job category does not entail discriminating “against” the white person because of his race but instead entails discriminating in favor of the black person because of his. This is a classic representation of disparate treatment—where persons otherwise roughly equivalent are treated differently solely because of race.²⁴⁹ In other words, the white person is not being passed over because he is white—he is being passed over because the other candidate is black. As the law stands today, this situation is no different than the more traditional and more troubling case where a black person is not hired because he is black.

One answer to Justice Rehnquist’s reading of the statute, that the express language of Title VII “prohibits a covered employer from considering race when making an employment decision,” is to say that the statute does not say that. Had Congress wanted to “prohibit[] a covered employer from considering race when making an employment decision”²⁵⁰ it certainly could have said so in the simple and express terms Justice Rehnquist uses. That it did not

243. 42 U.S.C. § 2000-2(j). *See also Weber*, 443 U.S. at 227 n.8 (Rehnquist, J., dissenting).

244. 42 U.S.C. §§ 2000e-2(a) & (d).

245. *Weber*, 443 U.S. at 227-29 (Rehnquist, J., dissenting).

246. *Id.* at 220 (Rehnquist, J., dissenting).

247. 42 U.S.C. § 2000e-2(a).

248. *Id.*; *Weber*, 443 U.S. at 227 n.7 (Rehnquist, J., dissenting).

249. *See, e.g., McGuinness v. Lincoln Hall*, 263 F.3d 49, 54-55 (2d Cir. 2001).

250. *Weber*, 443 U.S. at 220 (Rehnquist, J., dissenting).

say what Justice Rehnquist wanted it to say means that the statute does not necessarily mean what Justice Rehnquist wanted it to mean.²⁵¹

Still, this cannot be a complete answer to Justice Rehnquist's charge. The best way to understand the argument against Justice Rehnquist's reading of the statute is to see Justice Rehnquist's version of the statute in action. And to do that we have to return to where we began, to Wayne Tappe and his Title VII suit against Alliance Capital Management.

If one accepts the reasoning in *Tappe II*, what becomes the identifying characteristic for protection under Title VII is not Tappe's status, but the status of his fellow co-workers. That *they* belong to protected classes makes *his* firing suspect. However, this is only the case because of the way the court has read the first prong of the test to mean that *everyone* is a member of a protected class because equal protection requires it. Therefore, the first three prongs of the test are essentially eliminated as a matter of law. Any time a person is fired he has suffered an adverse employment action. Further, because he was presumably qualified for the job in the first place (since he must have been hired in order to be available for firing), then the fourth prong would be proved simply by the fact of his being fired. Even the *Tappe II* court refuses to go this far, so it adds two further points: 1) Tappe was the most productive member of his group, and 2) an inference can be made that Alliance was afraid that if it had fired another member of the group it would have faced a Title VII suit.²⁵²

There are a number of troubling aspects with the *Tappe II* court's conclusions—conclusions which seem to follow implicitly from Justice Rehnquist's reading of Title VII. One problem with the test as transformed by the court is that it fails to satisfy the essential function of the test itself, which is to "raise[] an inference of discrimination because [of employment actions that], if otherwise unexplained, are *more likely than not* based on consideration of impermissible factors," (i.e., race, sex, religion or national origin).²⁵³

251. See, e.g., *id.* at 253-54 (Rehnquist, J., dissenting) ("Our task in this case, like any other case involving the construction of a statute, is to give effect to the intent of Congress. To divine that intent, we traditionally look first to the words of the statute . . .").

252. *Tappe v. Alliance Capital Mgmt. L.P.*, 198 F. Supp. 2d 368, 376 (S.D.N.Y. 2001).

253. *Tappe v. Alliance Capital Mgmt. L.P.*, 177 F. Supp. 2d 176, 184 (S.D.N.Y. 2001) (citing *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981)).

Unless one believes, as Part IV of this Note shows is not true, that discrimination and the effects of discrimination are things of the past, then the version of the *McDonnell Douglas* test created by the *Tappe II* court simply fails to eliminate other reasonable hypotheses for Tappe's termination. Perhaps Tappe was paid more than the other managers, and thus firing him made sense financially for his employer. Perhaps Tappe's "profile" didn't fit with the business model going forward because his style, his experience, his qualifications, did not fit in with that plan. Perhaps Tappe was simply the least personable of the group and was fired for that reason. There are a number of possibilities which might explain why Wayne Tappe was let go. Of course, when a black employee is fired it is possible that one or more of these non-discriminatory reasons played a part. However, this awareness only serves to highlight a fundamental difference between Tappe and a similarly-situated, black employee. While non-discriminatory possibilities exist for both terminations, *Tappe is not part of a class against whom such justifications have historically been used to conceal invidious discrimination.* The *McDonnell Douglas* test operates to shift the benefit of the doubt (or the burden of proof).²⁵⁴ In the case of the black employee, it makes sense to require the employer to justify his decision when there is the possibility of racist discrimination. In the case of a white male like Tappe, it makes no sense at all to require the employer to explain his decision as based upon non-prohibited criteria. Instead, the history of the statute and the purpose behind the *McDonnell Douglas* test both suggest that because racism is such an unlikely cause of his firing, the burden should be on Tappe to prove that he was in fact fired because of invidious discrimination.

Another problem with the holding in *Tappe II*, and with Justice Rehnquist's reading of Title VII, is that it is no longer sufficient for the black applicant or employee to be qualified for the job that he or she has been hired for. The *Tappe II* reading would prevent employers from hiring or promoting members of minority groups unless the employer can show that the prospective or current employee is at least as qualified, if not more qualified, than a white counterpart. After all, the *Tappe II* court reasoned that employers who use permissible criteria in making employment decisions generally do not fire their most productive workers.²⁵⁵ As workplaces become more diverse, whenever *any* worker is fired perhaps he will

254. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973).

255. *See Tappe II.*, 198 F. Supp. at 376.

have a claim under Title VII. All he need show is that someone of a different race did not perform as well,²⁵⁶ this despite the fact that “there is rarely a single, best qualified person for a job.”²⁵⁷ Employers who attempt to bring diversity into the workplace will be subject to lawsuits under the very statute designed to bring diversity into the workplace.²⁵⁸ The very idea that a member of a minority group might attempt to use Title VII to vindicate his rights creates a cause of action under Title VII for white employees. Title VII, an anti-discrimination statute, may thus become a statute used to harass employers and constrict their legitimate business decisions.

Here, the central problem of the *Tappe II* decision and Justice Rehnquist’s reading of Title VII is revealed. Imagine that a black lawyer in 1965 is hired into a formerly segregated law firm in the South. Let’s assume that he is qualified for the position, but only minimally, because, of course, he’s had few opportunities to practice his profession. Now imagine a white lawyer who also applied for the position and didn’t receive it, even though he is in many ways more qualified because he has more experience than the black lawyer who was hired. According to *Tappe II*, and according to Justice Rehnquist’s reading of Title VII, the white applicant would have a prima facie case under Title VII because “employers motivated by profit or other legitimate reasons do not” fail to hire the “best qualified” applicant.²⁵⁹ Now imagine the white lawyer is hired, and the black lawyer is not. The black lawyer would not be able to make out a prima facie case because, after all, the white applicant was best qualified under the only allowable criteria. Employers, under these circumstances, would be foolish to hire anyone but the most qualified for any job, because to do otherwise would subject them to liability. This reading of Title VII surely undermines the purposes of the statute since it would simply freeze the employment situation of 1965 just as it was. This cannot logically be what Congress intended, and when the legislative history is examined, there is no doubt that this *is not* what Congress intended. Justice Rehnquist’s reading of Title VII, that Congress wanted to “prohibit[] a covered employer from considering race when mak-

256. See, e.g., *Collins v. Sch. Dist.*, 727 F.Supp. 1318 (1990).

257. *Johnson v. Transp. Agency*, 480 U.S. 616, 641 n.17 (1987) (internal quotation marks omitted).

258. *But see id.* at 645 (Stevens, J., concurring) (“The logic of antidiscrimination legislation requires that judicial constructions of Title VII leave ‘breathing room’ for employer initiatives to benefit members of minority groups.”).

259. *Tappe II*, 198 F. Supp. 2d at 376.

ing an employment decision,"²⁶⁰ is simply nonsensical.

IX. UNEQUAL PROTECTION: HONORING THE PURPOSE OF TITLE VII

The problem then is that the *Tappe II* court's interpretation of the *McDonnell Douglas* test precludes any consideration of race or other protected classification from being used to make a legitimate business decision, however banal or benign that consideration may be. The use of the *McDonnell Douglas* test in this way makes private diversity efforts illegal *per se*. Voluntary, informal efforts by an employer to diversify a traditionally segregated workplace—a workplace like the upper echelons of a financial services company, or the partnership of a major law firm—would too often be illegal under Title VII.

As this Note has endeavored to show, this is not what Title VII was supposed to do: in *Johnson*, a concurring Justice Stevens opined that "Congress [in enacting Title VII] intended that traditional management prerogatives be left undisturbed to the greatest extent possible."²⁶¹ In addition, Congress had made clear that one of the purposes of Title VII was to encourage private voluntary efforts to improve the racial situation in the United States.²⁶² The *McDonnell Douglas* test was not designed as a method for investigating the legitimate private employment choices of businesses.²⁶³

At least one United States Court of Appeals has explicitly held that the *McDonnell Douglas* formulation was simply not created to protect whites at all.²⁶⁴ "Racial discrimination against whites is forbidden, it is true, but no presumption of discrimination can be based on the mere fact that a white is passed over in favor of a black."²⁶⁵ Why not? If Title VII is intended to protect both whites and blacks equally, then why shouldn't whites be able to make out a presumption of discrimination through the *McDonnell Douglas* prima facie test under the same standards as a member of a protected class?

The answer, as revealed in the legislative history detailed above, and the socio-historical context which led to the enactment

260. See *United Steelworkers of America v. Weber*, 443 U.S. 193, 220 (1979) (Rehnquist, J., dissenting).

261. *Johnson*, 480 U.S. at 645 (Stevens, J., concurring).

262. H.R. REP. NO. 88-914, at 2393 (1964).

263. See *Weber*, 443 U.S. at 207.

264. *Ustrak v. Fairman*, 781 F.2d 573, 577 (7th Cir. 1986).

265. *Id.*

of the 1964 Civil Rights Act, is that Title VII was never intended to protect white males at all. After *McDonald*, *Johnson* and *Weber*, there is a strong argument to be made that while Title VII protects all persons from invidious employment discrimination, it does not and should not protect all persons equally.²⁶⁶ And while the ostensibly neutral language of the statute protects white males, it cannot be suggested, in light of the historical context in which Title VII was passed, and as elucidated by its legislative history, that Title VII, or any section of the 1964 Civil Rights Act, was implemented to protect anyone other than racial minorities, particularly African Americans.²⁶⁷

As Justice Stevens wrote in his *Johnson* concurrence, “neither the ‘same standards’ language used in *McDonald*, nor the ‘color blind’ rhetoric used by the Senators and Congressmen who enacted the bill, is now controlling.”²⁶⁸ The Court has recognized, at least in part, that under Title VII not all forms of racial discrimination are the same. Affirmative action plans, the Court has said, must be legal in order to further the fundamental purpose of Title VII. In addition, the Court has stated several times that because Title VII was passed pursuant to the Commerce Clause and not the Fifth or Fourteenth Amendment there is no equal protection requirement inherent in the law.²⁶⁹ The court in *Tappe II* implicitly ignored this finding, just as it ignored *Weber* and *Johnson*, by requiring that all plaintiffs have their cases viewed under the same standard. By doing so, the *Tappe II* court imported an equal protection standard into Title VII that the Supreme Court had explicitly said was not there. This part of the *Tappe II* decision appears to be unprecedented. There appears to be no case in which a federal court has applied strict scrutiny to a court-made presumption, and then found that the presumption, created by the court, must be applied equally or the underlying statute will be unconstitutional.

Strict scrutiny, it should be remembered, was initially suggested by the Court to protect the interests of “discrete and insular

266. *See id.*

267. *Johnson v. Transp. Agency*, 480 U.S. 616, 646 (Stevens, J., concurring) (“[T]he statute does not absolutely prohibit preferential hiring in favor of minorities; it was merely intended to protect historically disadvantaged groups against discrimination . . .”).

268. *Id.* at 644 (Stevens, J., concurring).

269. *Id.* at 628 n.6 (“Title VII . . . was enacted pursuant to the commerce power to regulate purely private decisionmaking and was not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments.”) (quoting *United Steelworkers of America v. Weber*, 443 U.S. 193, 206 n.6 (1979)).

minorities.”²⁷⁰ In early strict scrutiny cases, the Court was concerned with such things as “legal restrictions which curtail the civil rights of a single racial group.”²⁷¹ Prior to 1989, the Supreme Court had recognized that racially benign government actions were different than those which harmed or isolated specific minority groups: “Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice”²⁷²

But that recognition changed with *Richmond v. J.A. Croson*,²⁷³ when the Court for the first time applied strict scrutiny to a government sponsored affirmative action program. As Justice Marshall, the author of *McDonald*, said in his *Croson* dissent: “A profound difference separates governmental actions that themselves are racist, and governmental actions that seek to remedy the effects of prior racism”²⁷⁴ Justice Marshall went on to point out that the only possible justification for the sudden change was the apparent belief on the part of the majority that “racial discrimination [was] largely a phenomenon of the past”²⁷⁵ Justice Marshall was justified in his belief that America was nowhere near “eradicating racial discrimination or its vestiges.”²⁷⁶

Strict scrutiny is applied to governmental actions only. Because it cannot be used to investigate private employment, there was no basis for the *Tappe II* court to use strict scrutiny to investigate the private program at issue. The *Tappe II* court’s duty was to interpret the law that Congress had passed, using the standards enunciated by the Supreme Court in *McDonald* and *Weber* and other Title VII cases. There is no indication from any of these cases that courts must examine every Title VII claimant under precisely the same standards. In fact, the Court has noted on numerous occasions that the *McDonnell Douglas* test is not a rigid formula to be applied the same way to every case—rather it is a flexible test designed to root out discriminatory actions that, on their face, may appear unrelated to race.²⁷⁷

There have been other attempts to get around the *McDonnell*

270. *United States v. Carolene Products*, 304 U.S. 144, 153 n.4 (1938).

271. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

272. *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 325 (1978) (Brennan, J., concurring).

273. 488 U.S. 469 (1989).

274. *Id.* at 551-52 (Marshall, J., dissenting).

275. *Id.* at 552 (Marshall, J., dissenting).

276. *Id.* (Marshall, J., dissenting).

277. *See, e.g., Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978).

Douglas problem. One solution was formulated in *Parker v. The Baltimore & Ohio Railroad Co.*²⁷⁸ Karl Parker, an employee of the B & O Railroad, had for several years tried unsuccessfully to get a promotion from conductor to fireman. He charged "essentially that affirmative action constituted unlawful reverse discrimination."²⁷⁹ In response, B & O Railroad acknowledged it had "engaged in affirmative action . . . [in order] to overcome the underutilization of minorities and women in various jobs" during part of the time Parker alleged he had suffered an adverse employment decision.²⁸⁰ Therefore, the Court was confronted with a direct challenge to an "employer's efforts to improve the record of [its] hiring practices"²⁸¹ by a white employee who felt his rights under Title VII had been violated. The Court, however, found the facts as presented insufficient to determine whether B & O Railroad's plan was valid under the *Weber* criteria.²⁸²

At least one of the adverse employment decisions Parker claimed to have suffered came after B & O's affirmative action plan had expired.²⁸³ For this part of the complaint, the court looked to see whether Parker had, or could establish, a prima facie case under *McDonnell Douglas*.²⁸⁴ In addressing the *McDonnell Douglas* test, the court pointed out that the test was simply a "procedural embodiment of the recognition that our nation has not yet freed itself from the legacy of hostile discrimination."²⁸⁵ The court then discussed how the *McDonnell Douglas* test must be adjusted to reflect various circumstances brought by plaintiffs.²⁸⁶

In order to account for the different circumstances of different plaintiffs, the court enunciated what has come to be called "the background circumstances test." The background circumstances test is a modification of the first prong of *McDonnell Douglas*

278. 652 F.2d 1012 (D.C. Cir. 1981).

279. *Id.* at 1013.

280. *Id.* at 1015.

281. *Id.* at 1013.

282. *Id.* at 1016.

283. *Id.*

284. *Id.* at 1016-17 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).

285. *Id.* at 1017. It is interesting to note the use of the term "hostile" to clarify the word discrimination. It seems that the *Parker* court recognized that there are different kinds of discrimination, and that different kinds of discrimination need to be treated differently by the law.

286. *Id.* (citing *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981)). In *Bundy*, the court changed the fourth element of the *McDonnell Douglas* test to reflect the particular employment decision of the case. *Bundy*, 641 F.2d at 951.

which, in its original incarnation, required the plaintiff to be a racial minority.²⁸⁷ Obviously the first prong as enunciated could not apply to a white plaintiff, and, as the court says, “it defies common sense to suggest that the promotion of a black employee justifies an inference of prejudice against white co-workers in our present society.”²⁸⁸ So the court found that for a majority plaintiff to establish the first prong of *McDonnell Douglas* in order to allow a “fact finder to infer discriminatory motive” the white plaintiff must show “intentionally disparate treatment when background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority.”²⁸⁹

The solution in *Parker* has much to recommend it. The background circumstances test avoids the problem, exemplified by *Tappe II*, of courts inserting themselves too far into private employer’s employment decisions. Instead of requiring that the employer hire the “best” employee, based on some strict, objective model, the court in *Parker* keeps the burden of establishing a prima facie case back where it belongs, on the employee, by requiring the plaintiff to demonstrate the likelihood of intentional discrimination on the part of the employer. Given the lack of significant anti-white discrimination in the workforce, the *Parker* test offers one rational solution to the *McDonald/Weber* problem.

The *Parker* test, however, is itself unsatisfactory in a number of ways. For one, it still takes charges of racist employment discrimination against whites too seriously. It is the rare discrimination case brought under Title VII where the plaintiff is a white man alleging that he suffered an adverse employment decision because he was white and his employer held a racial animus against white people.²⁹⁰ In these instances, the *Parker* test may be appropriate. However, the great majority of reverse discrimination cases argue that the white employee was fired because the *other employees*

287. *Parker*, 652 F.2d at 1017 (see *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973)).

288. *Id.*

289. See *id.* at 1017 n.9 (“We do not equate lawful affirmative action with discrimination against the majority, nor do we suggest that [such a] program would . . . constitute suspicious circumstances sufficient to justify an inference of discriminatory intent under *McDonnell Douglas*.”).

290. See, e.g., *Waterhouse v. District of Columbia*, 298 F.3d 989 (D.C. Cir. 2002); *Ramsey v. Henderson*, 286 F.3d 264 (5th Cir. 2002); *Ditzel v. Univ. of Med. and Dentistry of New Jersey*, 962 F. Supp. 595 (D.N.J. 1997); *DeCapua v. Bell-Atlantic*, New Jersey, 313 N.J.Super. 110 (1998).

were persons of a protected class.²⁹¹ In these cases, the plaintiff is using Title VII as a sword to attack the very diversity Title VII was designed to encourage. Courts should simply refuse to recognize such claims as allowing for recovery, and instead should look at such situations as examples of Title VII working as it was designed. Courts should return to the clear and unmistakable wording of the first prong of the *McDonnell Douglas* test; if the plaintiff is not a member of a protected class, i.e., a racial minority or a woman, then the *McDonnell Douglas* test is an inappropriate method of establishing a prima facie case of employment discrimination, and the plaintiff should not be allowed to avail himself of it. If he wants to prove racial discrimination he will have to overcome the strong presumption the facts of our society rationally suggest—that racism against whites is a non-issue.

CONCLUSION

In a sense, Title VII creates a floor below which the employer may not go. It does not prevent him from hiring and firing who he wishes. Rather it imposes on him a certain burden to justify an adverse employment decision in the case of a minority precisely because the possibility of the decision being based on a racist or other discriminatory reason is, based on our nation's history, such a viable and unacceptable possibility. When he makes an employment decision that works against a white person, this suspicion does not exist, and the necessity of the *McDonnell Douglas* prima facie test is obviated. In this way, Title VII can be thought of as a mild form of government sponsored affirmative action.

Formal affirmative action plans have been one way that businesses have worked to diversify their workplaces.²⁹² At the same time, private, informal efforts at diversity are recognized by many business leaders as essential to keeping their businesses viable into the 21st century.²⁹³ Diversity efforts, whether formal or informal, are both forward looking and progressive. In part they are retrospective efforts to remedy the prior wrong of segregation—to use an analogy from tort law, affirmative action may be necessary until

291. A Westlaw search—"reverse discrimination" & "hostile work environment" & "white male" & "Title VII"—reveals forty-seven cases in the database. A similar search excluding the "hostile work environment" phrase increases the number to 472.

292. Eskridge, *supra* note 176, at 1494.

293. See Brief of Amicus Curiae 65 Leading Businesses in Support of Respondents, at 1, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-516) (arguing that a diverse workforce is "important to amici's continued success in the global marketplace").

black Americans, and other traditionally and currently oppressed minorities, are made whole: that is, put in the position they would have been in had they come to America as equal partners with whites.²⁹⁴ At the same time, diversity itself is necessary to a healthy workplace in our increasingly diverse society.²⁹⁵ A business with an all white face is less likely to draw customers from a rainbow of potential consumers.

When the day comes when all traces of past discrimination are gone, any act of discrimination against any person based on race will be execrable, and should be subject to society's condemnation. When that day comes, Title VII should be read as equally protecting all persons from invidious discrimination. But that day is not yet here, and until it is, justice requires, and the law should allow, employers to make value judgments between types of discrimination to favor of those who traditionally have been discriminated against, even when that favoritism may thwart the interests of those who have traditionally enjoyed the fruits of discrimination. One way to achieve this goal is to recognize that some forms of racial discrimination are different than others and ought to be treated as such. To deny this fact, to pretend that all forms of discrimination are the same, only slows the arrival of the day when racial discrimination finally vanishes from the American landscape.

A reading of Title VII which does not allow this to happen—in other words, the *Tappe II* court's reading—will simply ensure that the ultimate statutory purpose of the 1964 Civil Rights Act, the partial remediation of 350 years of overt, government sanctioned racism, will never come about. This, as the *Weber* Court said, would be ironic indeed.²⁹⁶ More, it would be another missed opportunity for the nation to live up to the ideals of our founding: to give all persons an equal stake in American life and American liberty, to give every American a fair shot not only at pursuing happiness, but of attaining it.²⁹⁷

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294. Part of this argument, of course, might mean that other minorities also should not benefit equally from the protections of Title VII. Asian Americans, for example, have a higher per capita income than do white Americans. On the other hand, a strong argument can be made that American Indians have suffered just as much, if not more from hostile discrimination at the hands of white America, and so would also be entitled to full Title VII protections.

295. See *supra* note 293.

296. *United Steel Workers of America v. Weber*, 443 U.S. 193, 208 (1979).

297. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).