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Title VII of the Civil Rights Act of 1964 - Educational and Testing Requirements Invalid Unless Job-Related

Fred W. Veil

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Recent Decisions

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964—EDUCATIONAL AND TESTING REQUIREMENTS INVALID UNLESS JOB-RELATED—The United States Supreme Court has held that an employer's use of educational and testing requirements for screening job applicants violates Title VII of the Civil Rights Act of 1964 when the effect is to disqualify a disproportionate number of Negroes, and where there is no showing that either standard is significantly related to job performance.

Griggs v. Duke Power Company, 401 U.S. 424 (1971).

Prior to the effective date of Title VII of the Civil Rights Act of 1964,[1] a North Carolina employer openly discriminated on the basis of race in the hiring and transferring of his employees. Negroes were restricted to the lowest paying jobs in the labor department, while whites were permitted to be hired or transferred into the operating departments where the pay was substantially higher. After the Act became effective, the employer abandoned his policy of restricting Negroes to the labor department. This policy was replaced by the requirement that an employee must either have a high school education or attain a satisfactory score on a standardized general intelligence test, as a condition of employment in—or transfer to—jobs in the operating departments from which Negroes had formerly been excluded. Although the educational and testing requirements were administered in a non-discriminatory manner, the new standards disqualified a disproportionate number of Negroes as compared with their white contemporaries. An action was brought under Title VII by a group of Negro employees who were hired after the educational and testing requirements were established by the employer, but who failed to meet either standard for promotion into the operating departments of the plant.[2]

The Act makes it an unlawful employment practice for an employer to discriminate against an employee because of his "race, color, religion, sex, or national origin" by classifying him in a way which would deprive him of "employment opportunities or otherwise adversely affect his status as an employee."[3] An employer who requires fixed educational

1. §§ 701-16, 42 U.S.C. §§ 2000e-15 (1964) [hereinafter cited as Title VII].
2. Griggs v. Duke Power Co., 401 U.S. 424 (1971).
3. Title VII, § 703(a), 42 U.S.C. § 2000e-2(a) (1964).

and testing standards as conditions of employment and promotion "classifies" his employees within the meaning of Title VII. Since Negroes as a class suffer from inherently inferior social and cultural backgrounds,[4] such employment requirements, although administered fairly, may operate to disqualify a disproportionate number of their race from equal employment opportunities.[5] Title VII expressly prohibits an employer from acting upon the results of tests that are *intended* to discriminate against any individual protected by the Act;[6] therefore, in *Griggs*, the district court was confronted with whether a "professionally developed" employment test that operates with discriminatory effect was *intended* to be an *unlawful classification* of employees.[7] Concluding that the employer had adopted his testing requirements in good faith, and without a racial purpose,[8] the court dismissed the complaint of the Negro employees. The Fourth Circuit Court of Appeals,[9] affirming the decision, also adopted a subjective test[10] to determine discriminatory intent. Finding no evidence that the employer's purpose for adopting the testing requirements was to discriminate against Negroes, the court held that the employer's reliance on the results of professionally developed tests was not violative of the Act.[11]

Reversing the court of appeals, the United States Supreme Court[12] adopted the Equal Employment Opportunity Commission's objective interpretation[13] of the Act, and concluded that the statutory standard of intent is determined from the effect of the employment practice, and

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4. 401 U.S. at 430, *citing* Gaston County, North Carolina v. United States, 395 U.S. 285 (1969).

5. *See* Cooper and Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1640-41 (1969).

6. § 703(h) 42 U.S.C. § 2000e-2(h) (1964) provides:

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

7. Griggs v. Duke Power Co., 292 F. Supp. 243 (M.D. N.C. 1968).

8. *Id.* at 250-51.

9. Griggs v. Duke Power Co., 420 F.2d 1225 (4th Cir. 1970).

10. *Id.* at 1232.

11. *Id.* at 1235.

12. 401 U.S. at 433-34.

13. *Id.* at 433. Equal Employment Opportunity Commission [hereinafter referred to as EEOC] Guidelines on Employment Testing Procedures, issued August 24, 1966, provide:

> The Commission accordingly interprets "professionally developed ability test" to mean a test which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs. The fact that a test was prepared by an individual or organization claiming exper-

not from a subjective analysis of the employer's motives.[14] Balancing the respective interests of the employer and the employees affected by the testing requirements, the Court found that the tests were not job-related, and concluded that the employer did not have a valid business need for the adoption of these requirements as a condition of employment.[15] In short, the Court held that notwithstanding an employer's lack of discriminatory intent, where the effect of an employment practice is to exclude a disproportionate number of a group protected by the Act from equal employment opportunities, such a practice is unlawful unless the employer can establish a bona fide business justification outweighing the discriminatory effects of the practice. Applying this principle to educational and testing requirements, the Court decided that such criteria must bear a demonstrable relationship to the successful performance of the jobs for which they are used in order to be valid under the Act. In other words, the test "must measure the person for the job and not the person in the abstract."[16]

Griggs resolves the apparent conflict in the lower court decisions as to the intent requirements of the Act.[17] Since the enactment of Title VII the courts have been split as to whether an objective standard[18] or a subjective standard[19] should apply in determining whether an employer has the statutory requisite of discriminatory intent. The objective standard adopted by the *Griggs* Court is consistent with the majority viewpoint.[20]

The *Griggs* holding is compatible with the Act's objective to elim-

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tise in test preparation does not, without more, justify its use within the meaning of Title VII. Reprinted in BNA FAIR EMP. PRAC. 401:1501 (1966).

The EEOC position has been codified in the new Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1971).

14. 401 U.S. at 432.
15. *Id.* at 431-32.
16. *Id.* at 436.
17. See note 6, *supra*.
18. Local 189, United Papermakers and Paperworkers, AFL-CIO, CLC v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); Quarles v. Phillip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968). In *Local 189*, the court objectively interpreted the term "intent" as found in § 703(h) of the Act stating that: "[T]he statute, read literally requires only that the defendant meant to do what he did, that is, his employment practice was not accidental." 416 F.2d at 996.
19. Parham v. Southwestern Bell Telephone Co., 2 FEP Cases 40 (E.D. Ark. 1969). In *Parham* an employer refused to hire an unwed mother. The court adopted a subjective standard of intent and explained: "If [an employer] adopts his criteria in good faith and for what reasonably appears to him to be valid reasons, and if the criteria are not themselves based on race, the court does not think they are prohibited by the Act merely because many Negroes on account of cultural and economic deprivations may not be able to meet them." *Id.* at 49.
20. Note, *Arrest Records and Employment Discrimination: Gregory v. Litton Industries, Inc.*, 32 U. PITT. L. REV. 254, 256 (1971).

inate racial discrimination in employment,[21] and is not repugnant to the interpretation given the Act by the majority of courts and legal writers who have considered it in light of its legislative history and social objectives.[22] It is also analogous in principle to the "Voting Rights Cases"[23] decided by the United States Supreme Court in the 1960's. In *Gaston County, North Carolina v. United States,*[24] the Court interpreted the Voting Rights Act of 1965[25] as prohibiting a county government from using a literacy test to determine voter eligibility because the test had the effect of denying a disproportionate number of Negroes the right to vote. In *Gaston County,* as in *Griggs,* the Court rejected the contention that a test, fairly administered and adopted without racial intent, would satisfy the requirements of the appropriate statute.[26] *Griggs,* therefore, represents a logical extension of the developing civil rights law into the private employment sector.

The principles established in *Griggs* will be expanded to other criteria that employers use to screen applicants for hire and employees for promotion.[27] *Griggs* invalidates *any employment standard* that cannot be shown to be job related, and which disqualifies a disproportionate number of Negroes and others protected by the Act regardless of whether the practice is fair on its face and is administered in a nondiscriminatory manner. Since most employers use some sort of screening device for both employment and promotion, the Court's broad decision will have a significant impact on employment practices.[28]

The prospective application of *Griggs* is obvious, and employers should have no difficulty in evaluating their screening and selection techniques.[29] The more difficult question raised by the *Griggs* decision

21. Title VII, § 703(a), 42 U.S.C. § 2000e-2(a) (1964). *See* Comment, *Employment Testing under Title VII of the Civil Rights Act of 1964,* 12 B.C. IND. & COM. L. REV. 268, 274 (1971).

22. *See* Hicks v. Crown Zellerbach Corp., 319 F. Supp. 314 (E.D. La. 1970); Kovarsky, *Testing and the Civil Rights Act,* 15 HOW. L. J. 227 (1969); Cooper and Sobol, *supra* note 5.

23. Gaston County, North Carolina v. United States, 395 U.S. 285 (1969); Louisiana v. United States, 380 U.S. 145 (1965).

24. 395 U.S. 285 (1969).

25. §§ 2-19, 42 U.S.C. §§ 1973-1973p (Supp. V, 1969).

26. 395 U.S. at 296-97.

27. *See* Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1971). In particular see EEOC definition of "test," *Id.* § 1607.2, and material relevant to other selection techniques, *Id.* § 1607.13.

28. *See* Phillips v. Martin Marietta Co., 400 U.S. 542 (1971) (employer policy against hiring women with pre-school age children); Gregory C. Litton Systems, Inc., 316 F. Supp. 401 (C.D. Cal. 1970) (employer policy against hiring applicants with arrest records); EEOC Decision No. 71-1418, 3 FEP Cases 580 (March 17, 1971) (employer policy of rigid adherence to height requirements); EEOC Decision No. 71-322, 2 FEP Cases 1016 (September 29, 1970) (employer policy against hiring unwed mothers).

29. *Griggs* may create serious problems, however, for employers who rely on tests and

is whether it has opened the door to a retroactive application of Title VII.

Much of the Title VII litigation has been concerned with interpretation of the seniority and test clauses of section 703(h) of the Act.[30] In *Quarles v. Phillip Morris, Incorporated*,[31] a district court found that prior to 1965, an employer openly discriminated in the hiring and placement of Negro employees so that after 1965, although the employer had ceased its discriminatory practices, these Negroes were "locked into" the lowest paying jobs by virtue of the employer's seniority system.[32] There the court held that the seniority clause of section 703(h) of the Act did not prohibit the court from modifying an existing seniority system not in itself violative of the Act, but found to be discriminatory because it perpetuated the effect of an employer's prior overt acts.[33] Although expressly denying that its decision involved a retroactive application of the Act, the district court corrected discriminatory conditions that existed prior to the passage of the Act, and reasoned that its remedial measures only affected the present consequences of these conditions and were, therefore, not retroactive.[34]

More recent Title VII litigation[35] has been concerned with the test clause of section 703(h) and, like *Quarles*, has involved employment practices neutral on their face but discriminatory in effect. In these cases the principle now approved by the *Griggs* decision was first established; that is, when an employment practice, because of social and cultural conditions existing in society has the effect of discriminating against a group protected by the Act, it is invalid regardless of an employer's lack of discriminatory intent. Whereas the cases of the first type *(Quarles)* involved litigants who were subject to prior acts of discrimination, the cases of the latter type *(Griggs)* involve a class of plaintiffs not subject to pre-Act discrimination, but who are presently discriminated against because of the effects of an apparently neutral employment practice. To further distinguish between the two types of

other objective criteria for selecting qualified persons for both hire and promotion. For a thorough discussion of some of these problems see Cooper and Sobol, *supra* note 5, at 1676-79.

30. Title VII, 42 U.S.C. § 2000e-2(h) (1964). Employment practices based on a "bona fide seniority system" or a "professionally developed ability test" are the two major exceptions to the broad prohibitions of § 703(a)(2).

31. 279 F. Supp. 505 (E.D. Va. 1968).

32. *Id.* at 513-14.

33. *Id.* at 520-21.

34. *Id.* at 518-19.

35. Hicks v. Crown Zellerbach Corp., 319 F. Supp. 314 (E.D. La. 1970); Broussard v. Schlumberger Well Services, 315 F. Supp. 506 (S.D. Tex. 1970).

cases, in *Griggs*, the Court held that the Act was directed at the consequences of all employment practices regardless of intent and not simply those practices, as in *Quarles*, which perpetuate the effects of an employer's prior acts based on discriminatory motives.

Griggs, dealing only with the discriminating effect of present employment practices, would not appear to create any problem of retroactivity. When *Griggs* however, is considered in light of *Quarles*, an interesting question of retroactivity is raised, that is, whether an employer who had administered employment tests[36] prior to the effective date of Title VII, which were not then but are now illegal under the Act, can be required to modify a presently neutral seniority system on the basis that it perpetuates the effects of past discrimination.

An affirmative answer to that question would require an extension of the *Quarles* principle to a situation where the pre-Act discrimination was not the result of an intent to discriminate. If *Griggs* is interpreted so that the objective standard of intent is applied to pre-Act as well as present conduct then there would appear to be no reason why *Quarles* should not be extended to include those situations. Such an interpretation would, of course, subject the Act to a charge of retroactivity. If, on the other hand, the *Griggs* standard is interpreted to apply only to present conduct, then the *Quarles* principle would not be so extended and no problem of retroactivity would be raised. To place the problem in its proper perspective, consider the example of a class of Negroes[37] who were refused jobs or promotions prior to 1964 because of their failure to pass an aptitude test which was not job-related. If the *Griggs* standard were extended by *Quarles* to include pre-Act conduct, it would appear that those Negroes who were in the job market and were not hired, as well as those who had jobs and were not promoted, would have a cause of action for an advanced position on a seniority list.[38] Negroes in this class would find support in *Quarles* that the failure to grant them an advanced position would result in the perpetuation of the effects of the employer's previously discriminatory

36. Employment tests are used here only for explanatory purposes. The same rationale would apply to any employment practice now invalidated by *Griggs*. See notes 27 and 28 *supra*, and textual material related thereto.

37. Negro is used here for explanatory purposes only. The same rationale would apply to any person or groups of persons protected by the Act.

38. A new employee put on the bottom of a seniority list would suffer from the same infirmities that resulted in the modification of the seniority system in *Quarles*. Had the discriminatory test not been used the employee would have been hired or promoted earlier, and would hold a position on the seniority list commensurate with the earlier date.

testing practice.[39] Although there has been no litigation on this precise issue the rationale of a recent EEOC decision indicates that the Commission would favor this position.[40]

The argument for an advanced position on a seniority list as a remedy for past discrimination might well be advanced in one of several ways. Relying on *Quarles*, Negroes could argue that the requested remedy was not retroactive in that the object of the remedy is to eliminate the present consequences of the discrimination and not the discrimination itself.[41] Alternatively, even if the remedy was construed as a retroactive application of the Act, the argument could be made that the remedy is a valid exercise of government power to further the designs of the Act to eliminate racial discrimination in employment;[42] and further, that the remedy—even though retroactive—does not impair the vested seniority rights of incumbent white employees, since promotions based on seniority are a mere expectation and not a vested right.[43] Since statutes that impair vested rights are subject to a constitutional challenge,[44] a successful argument for the latter position may be necessary to save this retroactive application of the Act from being declared unconstitutional.

There are persuasive arguments against the granting of an advanced seniority position to an employee who, on the basis of the *Griggs* standard, was the subject of pre-Act discrimination. First, a construction of Title VII which would permit the modification of a seniority system to the extent required here would subject it to a charge of retroactivity.

39. 279 F. Supp. at 520-21.

40. EEOC Decision No. 71-1447, 3 FEP Cases 391 (March 18, 1971). The EEOC found that an employer's seniority system discriminated against employees hired after 1964, but whose employment was postponed due to the employer's prior discriminatory practices. In other words, the EEOC found that if an employer had not discriminated prior to 1964, certain Negroes who were in the job market at the time would have been hired sooner and would have thus earned greater seniority rights than what they presently possessed. Although this case only involved those Negroes who were hired after the employer eliminated his discriminatory hiring practices, the same rationale could be applied to those Negroes who were not subsequently hired but who were in the job market at the time the employer was discriminating. For a thorough discussion on the practical problems of identifying persons who would be included in a group of the latter type, *see* Cooper and Sobol, *supra* note 5, at 1632-36.

41. 279 F. Supp. at 520-21.

42. Lynch v. United States, 292 U.S. 571 (1934); Speert v. Morgenthau, 116 F.2d 301, 305 (D.C. Cir. 1940).

43. Gould, *Employment Security, Seniority and Race: The Role of Title VII of the Civil Rights Act of 1964*, 13 How. L.J. 1, 5-7 (1967); Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532, 1540-42, 1553 (1962).

44. Lundquist v. Coddington Bros., Inc., 202 F. Supp. 19, 21 (W.D. Wis. 1962); Stancil v. United States, 200 F. Supp. 36 (E.D. Va. 1961); Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 692-97 (1960).

Statutes are presumed to apply prospectively[45] unless there is an express provision for retroactivity in the statute itself, or an otherwise clear expression of legislative intent[46] to the contrary. Legislative intent may be inferred from the legislative history of the statute.[47] There is nothing in Title VII itself to suggest that it was intended to be retroactively applied, and its legislative history clearly expresses the intent of Congress that existing seniority systems would not be affected by its enactment.[48] The *Quarles* Court reasoned that its remedy modifying an existing seniority system was not contrary to the legislative history of the Act since the history dealt only with employment seniority and not job seniority.[49] The difference between the remedy ordered by *Quarles*, and that which is required to improve the relative seniority positions of employees who were not hired or promoted as a result of past unintended but discriminatory employment practices, is fairly obvious. In the first instance a simple modification of a seniority system so that all future promotions would be based on employment seniority rather than job seniority is all that is required.[50] In the second, a fictional credit[51]

45. Hassett v. Welch, 303 U.S. 303, 314 (1938); Shwab v. Doyle, 258 U.S. 592 (1922).

46. Sovereign Camp, W.O.W. v. Casados, 305 U.S. 558 (1938) *aff'g* 21 F. Supp. 989, 1000 (D.C. N.M. 1938); United States v. St. Louis, San Fran. & Tex. Ry., 270 U.S. 1, 3 (1925); Silurian Oil Co. v. Essley, 54 F.2d 43, 47 (10th Cir. 1931).

47. Sovereign Camp, W.O.W. v. Casados, 305 U.S. 558 (1938) *aff'g* 21 F. Supp. 989, 1000 (D.C. N.M. 1938); DuLaney, Insurance Comm'r. v. Continental Life Ins. Co., 47 S.W.2d 1082, 1083 (Ark. 1932); Gallegos v. Atchison, T. & S. F. Ry., 214 P. 579, 582 (N.M. 1923).

48. During the Congressional debates Senator Clark presented an interpretive memorandum from the Department of Justice which explains:

> First it has been asserted that Title VII would undermine vested rights of seniority. This is not correct. Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by Title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. Title VII is directed at discrimination based on race, color, religion, sex, or national origin. It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is "low man on the totem pole," he is not being discriminated against because of his race. Of course, if the seniority rule itself is discriminatory, it would be unlawful under Title VII. If a rule were to state that all Negroes must be laid off before any white man, such a rule could not serve as the basis for a discharge subsequent to the effective date of the title . . . . But, in the ordinary case, assuming that seniority rights were built up over a period of time during which Negroes were not hired, these rights would not be set aside by the taking effect of Title VII. Employers and labor organizations would simply be under a duty not to discriminate against Negroes because of their race. Any differences in treatment based on established seniority rights would not be forbidden by the title.

Department of Justice Interpretive Memorandum on H.R. 7152, 110 CONG. REC. 6986 (daily ed. April 8, 1964). *See* Note, *Title VII, Seniority Discrimination and the Incumbent Negro*, 80 HARV. L. REV. 1260, 1266 (1967); note 52, *infra*.

49. 279 F. Supp. at 516.

50. *Id.* This is the remedy imposed by the *Quarles* Court.

51. This is a modification of the "Freedom Now" and "Rightful Place" theories discussed in Note, *supra* note 48, at 1268-75, and expressly rejected in *Local 189*, United Paper-

must be granted to an employee to represent those seniority credits he would have earned had his employment not been postponed due to the employer's discriminatory practices. In the former, the court is utilizing a right already possessed by the employee (employment seniority) and in the latter, in order to remedy the imbalance, the court must grant the employee a benefit he has not earned (fictional seniority). Not only is a remedial measure based on fictional seniority clearly contrary to the legislative history of the Act,[52] but it is doubtful that the court could apply the rationale of the first situation to that of the second and still logically conclude that its application was not retroactive. Consequently, in order to apply *Griggs* and *Quarles* as has been suggested here, the court must be willing to ignore the legislative history of the Act and assume that Title VII can be retroactively applied.

Perhaps the strongest argument against the retroactive application of Title VII is found in section 703(j)[53] of the Act which specifically bars reverse discrimination. It would appear that this section would prohibit the granting of fictional seniority credits to correct imbalances that existed prior to the Act. It has been argued, however, that the legislative history of this section deals only with a prohibition against the *replacement* of senior white workers by junior Negro incumbents, and that a system of *redistribution* of jobs based on fictional seniority would

makers and Paperworkers, AFL-CIO, CLC v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). The EEOC denied that its position in Decision No. 71-1447 (see note 40, *supra*) would lead to fictional seniority but failed to suggest an alternative remedy. 3 FEP Cases at 394, n.11.

52. *Interpretive Memorandum of H.R. 7152 submitted jointly by Senator Joseph S. Clark and Senator Clifford P. Case, Floor Managers*, 110 CONG. RECORD 6991, 6992 (daily ed. April 8, 1964):

> Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier. (However, where waiting lists for employment or training are, prior to the effective date of the title, maintained on a discriminatory basis, the use of such lists after the title takes effect may be held an unlawful subterfuge to accomplish discrimination).

See note 48, *supra*.

53. 42 U.S.C. § 2000e-2(j) (1964) provides:

> Nothing contained in this title shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex or national origin employed by any employer . . . in comparison with the total number or percentage of persons of such race, color, religion, sex or national origin in any community, State, section, or other area.

See Note, *Civil Rights—Racially Discriminatory Employment Practices Under Title VII*, 46 N.C.L. REV. 891, 895 (1968).

not violate the intent of the Act.[54] A court dedicated to eliminating the social injustices that Title VII was designed to correct could easily adopt this construction of the Act.

Finally, both *Griggs* and *Quarles* were decided on their own facts, and there is nothing in either decision to suggest that the present consequences of unintentional pre-Act conduct would come within the purview of the Act. *Griggs* does not stand for the proposition that an objective standard of intent should be applied to a period of time during which the statute was not in effect. If the Court had intended that this standard was to be retroactive it would have made express provision for that circumstance in its opinion.

The Court's adoption of an objective standard of intent in *Griggs* would appear to be a valid measure for meaningfully enforcing the designs of the Act to eliminate discrimination in employment. To extend the objective standard to pre-Act conduct, however, would undoubtedly be a retroactive application of the Act which, if not expressly prohibited by the Act itself, certainly raises a question as to the constitutionality of such a judicial construction. It would appear that the fourteenth amendment would prohibit the granting of preferential treatment by means of fictional seniority to any person or group of persons so as to divest incumbent workers of their reasonable expectancies for promotion and advancement.[55] The effect of such preferential treatment would be the application of a statutory standard of intent to a period of time not intended to be covered by the Act, and to create undue hardships on those employers whose discriminatory employment practices were not foreseeable nor racially motivated. The complex matter of rectifying past social injustices is not a function of the judiciary. If the *Griggs* standard is to be retroactively applied to remedy conditions which existed prior to the passage of the Act, that task is more appropriately left to the legislature.

Fred W. Veil

54. Cooper and Sobol, *supra* note 5, at 1635; Note, *Title VII, Seniority Discrimination and the Incumbent Negro*, 80 HARV. L. REV. 1260, 1271 (1967).
55. Carter v. Gallagher, No. 71-1181 (8th Cir., Sept. 9, 1971).