A Liability Loophole for the Undeserving?
Timeliness in Title VII Challenges After
United Air Lines, Inc. v. Evans

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In United Air Lines, Inc. v. Evans, the Supreme Court rejected plaintiff's argument that an employer's neutral seniority system perpetuated the effects of a prior discriminatory discharge in violation of Title VII of the Civil Rights Act of 1964 where the discriminatory policy had long ceased. Some courts have interpreted the decision as imposing severe limits on both continuing violation suits and class action suits under Title VII which challenge current discriminatory policies. After an examination of judicial precedent and statutory construction of Title VII, the author presents arguments against the creation of these limits on challenges to current discriminatory policies, and advances strategies by which the perpetuation of the effects of past discrimination can be challenged in spite of Evans.

I
INTRODUCTION

Title VII of the Civil Rights Act of 19641 provides for the enforcement of its employment discrimination prohibitions through the timely filing of charges by aggrieved individuals with the administrative agency, the Equal Employment Opportunity Commission.2 Charges of discrimination based on race, color, religion, sex, or national origin must be filed with the EEOC within 180 days of the alleged unlawful employment practice.3 Thereupon, the Commission, after attempting

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2. Hereinafter referred to as the EEOC or the Commission.
3. § 706(e), 42 U.S.C. § 2000e-5(e) (1976), which allows 300 days for EEOC filing if proceedings have been initiated with an appropriate state or local agency, provides in pertinent part: A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . except that in a case of an un-
voluntary settlement or dismissing the charge, will notify the individual of his or her right to bring a civil suit.\(^4\) The Act's time limitation on filing a charge with the EEOC generally has been treated by the courts as a jurisdictional prerequisite to a Title VII suit.\(^5\) Once a charge based on a discriminatory act, practice, or policy within the 180-day time period has been filed, thus invoking their jurisdiction, the courts have remedied the injuries caused by such discrimination without regard to the 180-day period.\(^6\)

This jurisdictional treatment of Title VII's timely filing requirement is illustrated by two types of Title VII suits: the continuing violation suit and the class action suit. In the continuing violation suit, the courts have found jurisdiction where the employer's discriminatory acts against the plaintiff did not occur within 180 days of the charge, but the discriminatory policy or practice accounting for them was in effect within that time period.\(^7\) The plaintiff's challenge to the current discriminatory policy or practice is treated as timely and entitles him or her to relief for the injuries personally suffered outside the 180-day period.\(^8\) In the class action suit, jurisdiction has been found where the representative plaintiffs have filed timely charges with the EEOC alleging discrimination against them within the 180-day period. Members of the class who have also been injured by the defendant's discriminatory policy or practice are then given the benefit of the timely filing and entitled to relief without regard to the 180-day limit.\(^9\)

In the recent Supreme Court case of *United Air Lines, Inc. v. Evans*,\(^10\) the plaintiff attempted to invoke the Court's jurisdiction by

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5. 415 U.S. at 47; McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973). See also Macklin v. Spector Freight Systems, Inc., 478 F.2d 979, 986 (D.C. Cir. 1973), which indicates that even if the EEOC has found the charge timely, most courts prefer to make their own decisions *de novo* as to whether jurisdiction exists.
charging that her employer's seniority system perpetuated the effects of an earlier discriminatory discharge. Despite the seniority system's equal treatment of males and females, Evans argued that such perpetuation was a continuing violation, thereby making her filing with the EEOC timely. The disparate treatment usually challenged in a continuing violation suit had ended years before, when the employer abandoned the discriminatory policy which caused Evans' termination. Although Evans did not file any charges at the time of the discharge, she alleged that she continued to suffer the effects of that previous discriminatory act by application of the employer's neutral seniority system. The true theoretical basis of Evans' Title VII claim was perpetuation theory, a formulation propounded by the Supreme Court in Griggs v. Duke Power Co. Failing to squarely meet such an argument, Justice Stevens, speaking for the majority, rejected Evans' claim of a "continuing" violation and indicated that the employer "was entitled to treat that past act [of unlawful termination] as lawful after respondent failed to file a [timely] charge of discrimination."

This article will explore the reception of Evans in the lower courts and will evaluate the possibility of challenging the perpetuation of the effects of past discrimination not timely charged in light of Evans. Evans has, however, also had an impact on challenges against current discriminatory practices which is potentially devastating for continuing...
violation and class action suits. Focusing on Justice Stevens’ language, one court has held “that acts not made the basis of timely charges cannot be the basis of any liability . . . .” 17 While such an approach has as yet received limited acceptance, it has resulted in the limitation of class action relief to only those class members with claims within the 180-day period preceding filing 18 and in the restriction of statistical data used to prove a prima facie case of classwide discrimination to only incidents occurring within the 180-day period. 19 Title VII’s requirement of a timely-filed charge with the EEOC has not been treated merely as a means of invoking the courts’ jurisdiction but as a statute of limitations, protecting the employer from liability for acts outside its limits though it discriminates until the present.

This article’s thesis is that the Supreme Court in Evans was concerned with the fairness of holding an employer liable for failure to remedy the effects of past discrimination where a prior discriminatory practice had been abandoned and the effects of that practice were being perpetuated by a neutral seniority system. The language of Evans is capable of being extended to protect from timely challenge as a current violation all neutral systems or rules, not just seniority ones, which perpetuate the effects of an abandoned discriminatory practice; some courts have taken this approach. 20 However, any inequity in holding an employer liable for “stale” claims vanishes when it is a current discriminator. This article will argue first that where the employer has instituted or maintained the facially neutral rule with an intent to lock in the effects of its past discrimination ostensibly abandoned, the employer’s attempt to circumvent the mandate of Title VII deserves no protection from timely challenge. Second, where the employer has a current discriminatory policy or practice, involving either differential treatment or impact (from other than unintentional perpetuation of the effects of once-actionable discrimination), the employer should not be protected from liability for injuries inflicted outside its limits; that is, Evans should not be interpreted as creating a Title VII statute of limitations. To limit relief once a timely charge of discrimination has been filed to injuries which themselves occurred within the 180-day period is contrary to the Act’s only remedial limit, two years on back pay. 21 Furthermore, an employer found to be currently discriminating should be charged with compensating his victims not only for their own sake but

18. Id.
as a deterrent against future discrimination. Finally, this article concludes that interpreting *Evans* as creating a 180-day statute of limitations in addition to the jurisdictional requirement would cripple: 1) continuing violation challenges, by severely limiting the number of employees willing to challenge their employer's discriminatory practice or policy, and 2) class action suits, by restricting class numerosity and thus the financial practicability of bringing suit.

II

THE *EVANS* CASE

A. Perpetuation Theory Background

The Supreme Court's seminal case on present perpetuation of the effects of past discrimination as a violation of Title VII is *Griggs v. Duke Power Co.* The employer/defendant in *Griggs* had, prior to the Act, discriminated against blacks by restricting them to jobs in the least desirable department. After the passage of Title VII, the employer instituted the requirement of a high school diploma or passage of generalized intelligence tests for both new employment and as a condition of transfer between departments. The Court, in holding the employer liable for violation of Title VII regardless of his intent, stated: "Under the Act, practices, procedures or tests, neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." The holding of *Griggs* evidences at least a partial concern with circumventions of Title VII, because blacks, in the Court’s words, “have long received inferior education in segregated schools” and have thus fared worse than whites in diploma or testing requirements. Those black employees discriminatorily assigned to jobs prior to the Act would have difficulty transferring to more desirable departments, despite the removal of the past transfer prohibitions. However, the disparate impact of the diploma and testing requirements similarly affected new black employees. Thus, the Court’s language has been interpreted as indicating a broader Title VII prohibition against practices which unjustifiably lock in the effects of general, societal discrimination.

What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications. . . . [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to mea-

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23. *Id.* at 430 (emphasis added).
24. *Id.*
suring job capability.\textsuperscript{25}

The perpetuation of past discrimination by a present facially neutral practice, such as testing, employment procedure or seniority rules, can thus refer to the freezing in of the effects of either the employer's prior discriminatory practices or of general, societal discrimination. Both references focus on the perpetuation of past discrimination as the basis for finding a current Title VII violation.

Perpetuation of both employer-specific and general-societal past discrimination are Title VII violations of a type the Supreme Court has recently recognized as disparate impact violations. More specifically, the violations involve the disparate impact of a practice or policy on a protected group rather than any explicit discriminatory treatment on the basis of some impermissible classification.\textsuperscript{26} It should be further noted that there are not only two types of perpetuation theory violations but also two distinct yet often confused types of disparate impact violations: those which result from past discrimination and those which do not. For example, the \textit{Griggs} case has been cited by the Supreme Court in recent sex discrimination cases as supporting the finding of disparate impact violations of Title VII;\textsuperscript{27} however, the disparate impact in at least some of those cases was not the result of any past discrimination against women, either employer-specific or general-societal, but stemmed from different group physical characteristics.\textsuperscript{28}

In order to understand the scope of the Supreme Court's rejection of the plaintiff's argument of a current "continuing violation" in \textit{Evans}, it is helpful to keep in mind the types of discrimination capable of being perpetuated by neutral systems, namely, employer-specific and general-societal, as well as the larger category of disparate impact violations into which they fit.

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\item \textsuperscript{25} \textit{Id.} at 431-32.
\item International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-336 n.15 (1977): "Disparate treatment"... is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment... Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VI...

Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive, we have held, is not required under a disparate impact theory.
\item \textit{Id.}
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B. The Supreme Court's Rejection of Evans' "Continuing Violation" Argument

Evans was forced to resign in 1968 as a result of United Air Lines' discriminatory rule that stewardesses could not marry; she did not at that time file a charge with the EEOC. United subsequently abandoned its no-marriage rule and rehired Evans, but due to a seniority system rule which was applied to all employees and which required continuous employment for credit, United failed to credit her with past service. In 1973, five years after her original discharge, four years after United had dropped its no-marriage rule, and one year after rehire, Evans filed a charge with the EEOC. Seeking to recover seniority and backpay lost as a result of her involuntary resignation, Evans alleged a continuing violation on the basis of the perpetuation of the effects of her discriminatory discharge by application of United's facially neutral seniority system.

The district court, finding that there was no continuing violation, granted United's motion to dismiss for lack of a timely filing with the EEOC, a jurisdictional prerequisite to a Title VII civil suit. The court of appeals reversed, noting that several courts had previously held "that a facially neutral seniority policy may be in violation of Title VII if its effect is to perpetuate the disadvantages accruing from prior discrimination" and that where a challenged practice is current and con-

29. See note 12 supra.
31. 534 F.2d at 1248. While Evans' original complaint requested as relief seniority and backpay lost as a result of United's discriminatory termination, Evans on appeal to the Supreme Court restricted the backpay relief sought to the amount lost since rehiring attributable to her lower seniority. Evans, in requesting "but-for" seniority, was asking to be credited not only with seniority actually earned but that which she would have earned if not forced to resign. This situation involves a cross between departmental seniority cases, where the plaintiff requests the ability to transfer between departments and be credited in the department system with company time actually served, and company-wide seniority system challenges, which involve the requested relief of constructive seniority. Circuit courts prior to Evans and International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977), seemed more likely to find a Title VII violation on the basis of perpetuation theory in the departmental seniority cases, awarding the respective relief, than in the company-wide ones. For a discussion of the background to Evans written prior to the Supreme Court decision see generally Lynk, Present Perpetuation of Past Discrimination: Employment Seniority Systems as a Continuing Violation under Title VII—Effect on its Statute of Limitations, 53 Chi-Kent L. Rev. 520 (1976).
32. 534 F.2d at 1248.
continuing the 180-day filing requirement is inapplicable. However, in accepting Evans' claim of a "continuing violation" the court of appeals was extending the continuing violation concept beyond its usual application to discriminatory treatment. Evans was challenging no current disparate treatment of women versus men but was instead challenging the perpetuation of the effects of past sex discrimination. That the court of appeals recognized that it was dealing with a perpetuation theory problem is evident from its citation to *Griggs*. The discrimination perpetuated in *Evans*, however, was that of the employer, not the societal discrimination alluded to in *Griggs*, and, unlike *Griggs*, was post-Act and thus actionable at the time of its occurrence.

The Supreme Court rejected Evans' claim of a current, continuing violation sufficient to make her filing timely on two different grounds, one common law, the other statutory. The common law ground, potentially the more far reaching of the two, is an extension of the continuing violation concept, a judicially-created means of challenging current disparate treatment. The Court, Justice Stevens writing, rejected any claim of a continuing violation because the challenged seniority system was neutral, that is, it did not treat females differently from males.

Respondent emphasizes the fact that she has alleged a continuing violation. United's seniority system does indeed have a continuing impact on her pay and fringe benefits. But the emphasis should not be placed on mere continuity; the critical question is whether any present violation exists. She has not alleged that the system discriminates against former female employees or that it treats former employees who were discharged for a discriminatory reason any differently than former employees who resigned or were discharged for a nondiscriminatory reason. In short, the system is neutral in its operation.

The Court went on to accept that the present seniority system gives effect to a past act of discrimination. However, in broad language

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34. 534 F.2d at 1248.
36. Theoretically, an overlap exists between perpetuation and continuing violation theory as noted in 91 Harv. L. Rev. 250, 263 n.66:

The perpetuation and continuing violation theories are distinct in that the former defines when an otherwise neutral practice is illegal under Title VII, while the latter determines whether a given violation persists to the present. The theories overlap in that an initial practice, such as a discriminatory transfer rule, which is currently continuing, may be illegal precisely because it perpetuates a prior discriminatory practice, such as a racial hiring policy.

However, in practice, current disparate treatment, not merely perpetuation of past discriminatory effects, appears at issue in continuing violation challenges. See the cases cited at note 35 supra.
37. 534 F.2d at 1250 n.15.
38. 431 U.S. at 558 (emphasis in original).
which may prove to have grave implications for Title VII challenges to even current discriminatory practices, Justice Stevens stated:

United was entitled to treat that past act as lawful after respondent failed to file a charge of discrimination within the 90 days then allowed by § 706(d). A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences. 39

On statutory grounds, the Court pointed to section 703(h) of the Act to hold that a “bona fide” seniority system was expressly protected from challenge for perpetuating the effects of prior, post-Act discrimination. 40 The Court elaborated on the definition of a bona fide seniority system in an opinion decided on the same day as Evans, International Brotherhood of Teamsters v. United States, 41 and there cited as significant the absence of an intent to discriminate in the adoption or maintenance of the system. 42 The Evans Court concluded:

Since respondent does not attack the bona fides of United’s seniority system, and since she makes no charge that the system is intentionally designed to discriminate because of race, color, religion, sex, or national origin, § 703(h) provides an additional ground for rejecting her

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39. Id.
Section 703(h), 42 U.S. § 2000e-2(h) (1976) provides:
Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority system...system...provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin....
42. Teamsters was a suit by the government involving an alleged pattern and practice of employment discrimination against Blacks and Spanish-surnamed Americans. The legality of the departmental seniority system was at issue in light of an attempt to hold the negotiating union liable for violating Title VII and to enjoin it from such future violations. 431 U.S. at 349 n.30.

The Supreme Court found the seniority system bona fide, and thus protected under § 703(h), citing lack of discriminatory intent and several other facts:

The seniority system in this litigation is entirely bona fide. It applies equally to all races and ethnic groups. To the extent that it “locks” employees into nonline-driver jobs, it does so for all...The placing of line drivers in a separate bargaining unit from other employees is rational in accord with the industry practice, and consistent with National Labor Relations Board precedents....It is conceded that the seniority system did not have its genesis in racial discrimination, and that it was negotiated and has been maintained free from any illegal purpose. In these circumstances, the single fact that the system extends no retroactive seniority to pre-Act discriminatees does not make it unlawful.

Id. at 355. The weight to be given these various factors, including intent, in determining bona fides is unclear. “The Court did not establish whether the illegal purpose must be predominant or merely one factor among others in order to vitiate section 703(h) immunity.” 91 HARV. L. REV. 250, 258 (1977).
claim.\textsuperscript{43}

In rejecting Evans' claim of a current violation, the Court drew on an important distinction between "a remedy issue and a violation issue" as regards the awarding of retroactive seniority.\textsuperscript{44} The Court distinguished Evans from the case of Franks v. Bowman Transportation Co.,\textsuperscript{45} which held retroactive seniority an appropriate remedy to be awarded once a timely charge had been filed and an illegal discriminatory act or practice proven:

In contrast, in the case now before us we do not reach any remedy issue because respondent did not file a timely charge based on her 1968 separation and she has not alleged facts establishing a violation since she was rehired in 1972.\textsuperscript{46}

The Court's apparently favorable mention of the Franks case, holding retroactive seniority a proper classwide remedy for post-Act discrimination, has significance in light of post-Evans attempts to curtail the employer's liability for acts outside the 180-day period preceding a timely charge.\textsuperscript{47} Neither Franks nor Evans indicates any such limitation on the post-Act relief granted once a timely charge against a current discriminatory practice has been filed.\textsuperscript{48}

However, Justice Stevens' majority opinion in Evans failed to directly confront the plaintiff's perpetuation theory argument based on the Griggs case.\textsuperscript{49} In Teamsters, where a neutral seniority system was challenged for perpetuating the effects of both pre- and post-Act discrimination, the Supreme Court indicated that, as regards the perpetuation of pre-Act discrimination, "[w]here it not for \textsection 703(h), the seniority system in this case would seem to fall under the Griggs rationale."\textsuperscript{50} As to perpetuation of the effects of the employer's post-Act discrimination, the Teamsters Court again held the neutral seniority system immune from challenge as a violation of the Act, basing its decision on the Evans case decided the same day.\textsuperscript{51} Besides citing Evans, the Court in Teamsters noted that, "Section 703(h) on its face immunizes all bona fide seniority systems, and does not distinguish between the perpetuation of pre- and post-Act discrimination."\textsuperscript{52} However, the Court in Evans indicated that the statutory ground of section 703(h) was only an
additional basis for holding a neutral seniority system not a violation of the Act.\textsuperscript{53} Therefore, the \textit{Evans} Court would appear to be rejecting without argument a \textit{Griggs}-type challenge to a neutral seniority system, and possibly other neutral systems, for perpetuating the effects of post-Act discrimination.

In his opinion Justice Stevens expressed a concern typically associated with true statutes of limitations, namely, the unfairness of holding a now-reformed employer liable for claims which have long gone stale.\textsuperscript{54} The concern of the \textit{Evans} Court with the employer's indefinite liability for now-abandoned discriminatory practices is indicated in its statement that a challenge to a neutral seniority system may not be predicated on the mere fact that a past event which has no present legal significance has affected the calculation of seniority credit, even if the past event might at one time have justified a valid claim against the employer. A contrary view would substitute a claim for seniority credit for almost every claim which is barred by limitations.\textsuperscript{55}

However, the 180-day period for the filing of suits with the EEOC generally has not been invoked as a true statute of limitations in Title VII suits, barring liability for acts outside its limits, at least where the attack is upon a current discriminatory practice.\textsuperscript{56} The extent to which courts since \textit{Evans} have been similarly concerned with fairness to the employer will be examined below, first where the challenge is to the perpetuation of past discrimination and then to cases involving challenge of current discriminatory practices.

\section*{III}
\textbf{CHALLENGING THE PERPETUATION OF PAST DISCRIMINATION AFTER \textit{EVANS}}

\subsection*{A. Breadth of the \textit{EVANS} Protection}

As noted above, the decision in \textit{Evans} rested only in part on the explicit section 703(h) protection for bona fide seniority systems. This partial reliance has facilitated both narrow and broad readings of \textit{Evans}. The narrowest reading is suggested in \textit{Cates v. Trans World Air-}

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\item\textsuperscript{53} 431 U.S. at 560.
\item\textsuperscript{54} “Statutes of limitations are primarily designed to assure fairness to defendants. Such statutes promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded. . . .” Burnett v. New York Central R.R. Co., 380 U.S. 424, 428 (1965).
\item\textsuperscript{55} 431 U.S. at 560.
\item\textsuperscript{56} See text accompanying notes 137 to 142 infra.
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where the plaintiff challenged a neutral seniority system for allegedly perpetuating the employer's past racially discriminatory hiring practices. The Second Circuit, relying on *Evans*, held that the seniority system challenge was precluded by section 703(h). The court ruled that layoffs based on low seniority, where that seniority was the result of previous discriminatory refusals to hire, did not trigger a new period within which timely Title VII charges could be filed. However, the court in a footnote stated:

We have no occasion in this case to decide whether the period within which charges must be filed under § 706(e) on a refusal to hire claim runs from the date employment was unlawfully refused or from the later date of assignment of a lesser level of seniority attributable to a prior discriminatory refusal of employment. Judged by either standard, appellants' filings were untimely.

Similarly, the plaintiff in *Evans* did not file a charge within the then statutory period of 90 days of rehire and assignment of lesser seniority. This issue was addressed by the *Evans* Court in two footnotes, the first of which would seem to lend support to the possibility of a timely challenge to the assignment of seniority:

Respondent cannot rely for jurisdiction on the single act of failing to assign her seniority credit for her prior service at the time she was rehired, for she filed her discrimination charge with the Equal Employment Opportunity Commission . . . more than one year after she was rehired . . .

However, the *Evans* Court apparently forecloses this possibility when, elaborating on Evans' failure to allege facts establishing a violation since her rehire, it states in a later footnote:

At the time she was rehired in 1972, respondent had no greater right to a job than any other applicant for employment with United. Since she was in fact treated like any other applicant when she was rehired, the employer did not violate Title VII in 1972. And if the employer did not violate Title VII in 1972 by refusing to credit respondent with back seniority, its continued adherence to that policy cannot be illegal.

Even if the door to a challenge of assignment of lesser seniority remains open for 180 days (the current statutory period for filing), such a narrow reading of the *Evans* case may prove difficult to maintain if the Court's concern with protecting the now-reformed discriminator from

57. 561 F.2d 1064 (2d Cir. 1977).
58. Id. at 1072.
59. Id. at 1072 n.10 (emphasis added).
60. 431 U.S. at 557 n.9.
61. 431 U.S. at 559 n.13 (emphasis added).
stale claims is to be consistently followed.⁶²

If the scope of Evans is limited to statutory immunity for neutral seniority systems, other neutral systems which perpetuate the effects of past discrimination should remain vulnerable to challenge as Title VII violations. The District of Columbia Circuit Court reached just such a result in United States v. Trucking Employers, Inc.,⁶³ where the court reviewed a consent decree against a trucking company accused of discriminatory hire and transfer policies. The decree required lump-sum payments in return for a waiver of the right to sue by individual discriminatees. The question presented by the decree was whether the signing of such a waiver released the employer from claims arising from the perpetuation of future effects of past discrimination. The court indicated that, after Evans and Teamsters, a bona fide seniority system was protected by section 703(h) from future challenge for perpetuating the effects of either pre- or post-Act discrimination. However, the court emphasized that:

[T]he waiver would not preclude a suit arising from the post decree operation of any neutral practice other than the seniority system that perpetuated the effects of the prior act of neutral discrimination. An employer cannot purchase a license to avoid its duty to eliminate practices which perpetuate prior discriminatory acts any more than circumvent its responsibility for future acts of purposeful discrimination.⁶⁵

The court ended by affirming the continued vitality of the Griggs perpetuation theory, pointing out in a footnote that Teamsters "proceeded on the assumption that absent § 703(h), a seniority system which perpetuated the effects of prior acts of discrimination would fall under the rationale of Griggs."⁶⁶ However, even if the Evans case is read narrowly to protect on statutory grounds only neutral seniority systems, the question of when a neutral rule or policy is part of a protected

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⁶² One court has recognized a possible difficulty with giving a rehired discriminatee the right to sue for retroactive seniority for even 180 days:

This Court is somewhat troubled by the fact that Collins [v. United Air Lines, 514 F.2d 594 (9th Cir. 1975)] and Evans [334 F.2d 1247 (7th Cir. 1976)], when taken together, hold that an employee aggrieved under Title VII has allowed the "statute of limitations" to commence and pass, his employer need not rehire him at all, yet that employee must be awarded full retroactive seniority if his employer does rehire him. In other words, it might seem that the decision here encourages employers in such a situation not to hire at all, lest they be "punished" (by being required to add back seniority to their benevolence) for doing so.

However, that opinion went on to conclude: "However, if such a risk is built into the Evans-Collins result, and even if such a risk is more real than hypothetical, the Court concludes that such a risk is worth the legal result." Kennan v. Pan American World Airways, Inc., 424 F. Supp. 721, at 728 (N.D. Cal. 1976).

⁶³ 561 F.2d 313 (D.C. Cir. 1977).

⁶⁴ Id at 319 n.23.

⁶⁵ Id at 319 (footnote omitted).

⁶⁶ Id at 319 n.24.
seniority system may remain open to dispute. A broader interpretation of Evans' protection as extending to all neutral systems perpetuating the effects of prior discrimination is exemplified by three cases decided in the eastern district of Pennsylvania. In Dickerson v. United States Steel Corp., Judge Newcomer was faced with a challenge to transfer policies for perpetuating the effects of the employer's alleged discriminatory job assignment. In response to plaintiffs' argument that Evans and Teamsters together protected seniority systems only from perpetuation theory attack, Judge Newcomer stated:

This Court cannot agree, for these opinions say more than that. Evans is based on two separate grounds. First, the Court holds that a prior discriminatory act cannot be a basis of liability if the individual failed to file a charge under § 706(d) [since amended to 706(e)] . . . even if its effects are continuing. This opinion clearly holds that the statute of limitations is an absolute bar and that it cannot be circumvented by "lock-in." A second and independent holding said that such a past event may not serve as a basis for a present challenge to a neutral seniority system which is immunized by § 703(h) . . .

However, Judge Newcomer retreated somewhat, noting on the facts of the Dickerson case that "even if . . . the Supreme Court intended to keep this 'lock-in' theory available for practices other than those attached to a seniority system," the main transfer policy attacked as discriminatory by the plaintiffs was the seniority system, which resulted in loss of departmental seniority upon transfer.

The two other cases in the eastern district of Pennsylvania explicitly found that Evans protected neutral rules or systems other than seniority systems from perpetuation theory challenge. In Myles v. Schlesinger, Judge Lord cited Evans in holding that a plaintiff, failing to timely file a claim of racial discrimination in attempted transfer to a GS-8 level government job, could not file anew upon being declared

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67. Compare Dickerson v. United States Steel Corp., 439 F. Supp. 55, 70 (E.D. Pa. 1977) (neutral rule providing for loss of seniority upon transfer between departments protected under § 703(h)) and United Air Lines, Inv. v. Evans, 431 U.S. 553, 560 (1977) (neutral rule providing for loss of seniority if service not continuous protected under § 703(h)) with Nashville Gas Co. v. Satty, 434 U.S. 136, 140-42 (1977) (neutral rule providing for loss of seniority upon leave of absence for other than disease or disability including pregnancy held in violation of Title VII without mention of § 703(h)'s protection for bona fide seniority systems).

In Satty, despite characterization of the rule as neutral, the Court may have believed the rule was intended to discriminate and thus was not bona fide. Alternatively, since the Court found the rule to be a disparate impact violation which was not based on the perpetuation of past discrimination, that may have rendered § 703(h) inapplicable; however, the wording of § 703(h) has no such qualification.

69. Id. at 70.
70. Id.
ineligible for a GS-9 position. "In Myles' case, lack of job experience as a GS-8 is a racially neutral qualification. Plaintiff waived her right to object to the discrimination which kept her from obtaining the GS-8 experience. There is current impact, but not present violation." Finally, Judge Becker in *Freude v. Bell Telephone Co.* applied the Evans principle to a facially neutral pension plan system, holding the system protected from challenge where the pensions were based on an allegedly sex-discriminatory salary, the receipt of which had ceased more than 180 days before the charge was filed. As to plaintiff's attempt to distinguish this as a pension rather than a seniority system case, Judge Becker stated that in *Evans*,

[the Court's discussion of § 703(h) of Title VII . . . is discrete and independent . . . . In view of Justice Stevens overriding language, it is plain that the basic holding of Evans is that a current nondiscriminatory policy will not revive a time-barred act of discrimination even though such policy has a continuing impact and gives present effect to a past act of discrimination.]

The breadth of protection afforded by *Evans* must also be examined where the discrimination allegedly being perpetuated is pre-Act discrimination, rather than the post-Act discrimination at issue in *Evans*. The court in *Teamsters* indicated that, absent the protection of section 703(h), the seniority system could be challenged under the reasoning of *Griggs* for perpetuating the effects of the employer's pre-Act

72. *Id.* at 15.

The discrimination which kept plaintiff from obtaining GS-8 level experience was allegedly discriminatory evaluations written by superiors. The court indicated in a footnote that:

We would distinguish the case where a plaintiff charges that s/he was denied a promotion because an old discriminatory evaluation was used in the current employment decision. The new direct use of the evaluation gives it fresh significance and should be treated as a new and independent act of discrimination. . . . [A] new use of an old biased evaluation would not be racially neutral. The evaluation would not be an objective, nondiscriminatory criterion as would be length of service or lack of job experience.

436 F. Supp. at 15 n.7. However, if the evaluations were themselves facially neutral, query whether even their use anew per standard procedure would not be protected by *Evans*.


74. *Id.* at 1061.

If sex-discriminatory salaries were still being paid at the time of plaintiff's filing with the EEOC, under continuing violation theory plaintiff could timely challenge that salary practice despite her injury outside the 180-day period; the only problem, in some courts, might be her standing to challenge an employment practice as a past employee. See text accompanying notes 107 to 110 infra.

75. *Id.* An example of a case in another circuit reading *Evans* broader than just seniority systems is *Smith v. American President Lines*, 571 F.2d 102 (2d Cir. 1978). The plaintiff, a black seaman, claimed employer's filing of charges with the Coast Guard alleging incompetence were discriminatorily motivated, and that during period of administrative delay of Coast Guard in dismissing such charges, he suffered the effects of such filing as a continuing violation. The court cited *Evans* in dismissing the charges, but query whether perpetuation by employer was even present.
discrimination. Teamsters, when combined with a broad reading of Evans, would seem to allow recovery for the effects of pre-Act discrimination where such discrimination has been perpetuated by a neutral system other than seniority. The Dickerson court may have been referring to this possibility in its statement, “Plaintiffs look to Griggs v. Duke Power Co. . . . to keep their ‘lock-in’ theory viable . . . . [However,] the ‘prior’ practices in the Griggs case occurred prior to Title VII. It appears that Evans puts a limiting gloss on the word ‘prior.’”77 Such a result may consistently follow from the Evans Court’s concern with balancing the equities between an employee who was at one time capable of suing to redress post-Act discrimination but did not and an employer who has long abandoned his discriminatory treatment of employees. The employee who has his pre-Act discrimination perpetuated by other than a seniority system has never been able to recover directly for the original discrimination. Whether a court would follow this extension remains to be seen if and when such a claim is brought to suit. However, as to the perpetuation of post-Act discrimination by a neutral system, seniority or otherwise, a brief survey of the possible challenges left after Evans follows.

B. A Sketch of Tactics

The Evans Court, in finding no current violation of Title VII, discussed at great length the functioning of the employer’s seniority system, concluding it was “neutral in its operation.”79 The Court defined “neutral” to mean a lack of different treatment of male and female employees or of their past service on the basis of sex.80 Plainly then, the lack of facial neutrality of a seniority system or some other system would leave the practice subject to Title VII challenge after Evans. One district court has so distinguished Evans in dealing with an employer who discontinued his more overt discriminatory practices but maintained seniority lists for each department on a sex-segregated basis.81

Even if the seniority or other system is facially neutral, the Supreme Court has indicated in both Teamsters and Evans the possi-
bility of a Title VII challenge based on the employer's intent to discriminate. In Evans, the Court noted the plaintiff's failure to allege that the system was intentionally designed to discriminate or to attack its bona fide nature. Bona fide nature was elaborated in reference to the Teamsters seniority system as one which, among other things, "did not have it genesis in racial discrimination, and . . . was negotiated and has been maintained free from any illegal purpose." The lower courts have recognized this exception in the context of challenging seniority systems which were allegedly adopted or maintained with a discriminatory purpose. In Evans, the employer's intent is discussed only in relation to the statutory grounds of the decision, which is limited to seniority systems. Thus Evans does not provide a clear statement that intent to discriminate—that is, intent to perpetuate the effects of past discrimination—would subject a neutral system other than seniority to challenge as a current violation. Nonetheless it seems doubtful that where discriminatory intent is clear, the neutral rule would be protected from challenge. Current intent to perpetuate the effects of past discrimination is designed to avoid Title VII's proscriptions and is therefore undeserving of any equitable protection from stale claims.

The question of how long a challenge to a neutral system adopted or maintained with discriminatory intent remains timely may differ depending upon whether or not a seniority system is involved. The language of the Teamsters opinion implies that the bona fides of a seniority system may be destroyed by proof of intent to discriminate either in its adoption or in its maintenance. However, Evans might be read as extending protection to all neutral systems initiated with discriminatory intent and not timely challenged, provided that such discriminatory intent did not also enter into the maintenance of the system. Given a reading of Evans in which challenges to the perpetuation of the effects of post-Act discrimination are predicated upon proof of intent to discriminate, it would follow that once such intent clearly stops, the timeliness of the charge may stop also.

82. 431 U.S. at 560.
83. 431 U.S. at 356.
85. The Supreme Court noted that the Teamsters seniority system "did not have its genesis in racial discrimination, and that it was negotiated and has been maintained free from any illegal purpose." 431 U.S. at 356 (emphasis added).
86. For example, if a new employer utilized his predecessor's system which had its genesis in discrimination but operated neutrally on its face he would be perpetuating the effects of past discrimination without any intent or purpose to do so.
If a requirement of intent is thus introduced, a major problem in sustaining challenges under perpetuation theory will be the difficulty of proving an employer's intent to discriminate. On the question of discriminatory intent in cases involving the departmental or unit seniority system at issue in Teamsters, an EEOC interpretative memorandum states: "Where unions or units were previously segregated, discriminatory intent in the institution of a unit seniority system will be inferred." Thus, the circumstances surrounding the imposition of a neutral seniority or other system may prove crucial in inferring the employer's discriminatory intent. The EEOC memorandum goes on to state: "When a unit seniority system is in effect and the employer or union is made aware that it is locking in minorities or females, discriminatory intent will be inferred if the system is maintained or renegotiated when an alternative system is available." This approach of equating knowledge of perpetuation of the effects of past discrimination with an intent to perpetuate those effects might facilitate challenges to a neutral system which perpetuates the effects of post-Act discrimination.

Running counter to this possibility is the holding of several courts since Evans that the employer is under no duty to take affirmative action to remedy the effects of his past discrimination. In EEOC v. Delta Air Lines, Inc., Delta rehired stewardesses forced to resign because of its since abandoned no-marriage rule; the rehired employees were credited with time served, but as in Evans, demanded seniority for time they would have served but for their discriminatory forced resignation. Since the former discriminatees had failed to file timely charges upon resignation, the Court found Evans controlling and dismissed for lack of jurisdiction. As to the further claim that the employer violated the Act by refusing to eliminate the effects of past discrimination, the Court responded:

Inasmuch as plaintiff has stated that Delta's rehiring system is neutral on its face, no cause of action constituting a continuing violation of Title VII has been alleged. The Court has been directed to no decision imposing on an employer a duty to implement an affirmative action program or other corrective measures absent a court finding of a Title

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87. 91 Harv. L. Rev. at 258-59.
89. Id.
90. See 91 Harv. L. Rev. at 259-60.
92. Id. at 5632.
VII violation. 93
While proving intent to discriminate may be difficult, it appears to be the major route open in Title VII challenges to neutral systems, seniority or otherwise, which perpetuate the effects of an employer's now-abandoned discrimination.

A suit brought under section 1981 of the Civil Rights Act of 1866 94 may avoid both the statutory and the judicially-created restrictions of Title VII. 95 An action directly against the past discriminatory practice may be possible, depending upon the applicable statute of limitations, usually longer than 180 days. 96 However, claims of sex discrimination are not challengeable in a section 1981 suit. 97 Furthermore, some courts have required in a section 1981 action proof of the employer's discriminatory purpose or intent. 98 If section 1981 were used to challenge a neutral or other system for perpetuating the effects of past discrimination, a requirement of proving discriminatory intent would eliminate any advantage over a suit based on Title VII.

93.  Id. at 5633. McMonigle v. Delta Air Lines, Inc., 556 F.2d 1261, 1263 (5th Cir. 1977), also relied on Evans in determining an employer had no obligation to reinstate with full seniority a former discriminatee who had not timely filed. However, on its facts, the case involved no perpetuation by the employer as the employee had not been rehired. See the pre-Evans case of Collins v. United Air Lines, Inc., 514 F.2d 594 (9th Cir. 1975) (continuing nonemployment is not itself a continuing violation of the Act) and notes 13 and 62 supra.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.


95. But see Chance v. Board of Examiners, 534 F.2d 993, 998 (2d Cir. 1976), cert. denied 431 U.S. 965 (1977), concluding that an employer's bona fide seniority system was protected under § 703(h) of Title VII. The court stated: "That plaintiffs herein are proceeding under 42 U.S.C. §§ 1981, 1983 does not render defendant's seniority system any more susceptible to attack." The court would appear to be reading § 703(b)'s protection into a section 1981 suit.

96. The Supreme Court has indicated that the statute of limitations in section 1981 suits is ordinarily governed by applicable state law. 421 U.S. at 462.


Contra, Davis v. County of Los Angeles, 566 F.2d 1334, 1338-41 (9th Cir. 1977), cert. granted 98 S. Ct. 3087 (1978). The Ninth Circuit upheld a finding of discrimination under both Title VII and section 1981 without proof of discriminatory purpose. Noting that the courts have consistently applied Title VII principles, which include disparate impact concepts, as a benchmark in employment discrimination cases, the Ninth Circuit stated, "In the absence of any express pronouncement from the Supreme Court—a pronouncement not delivered in Washington—we are unwilling to deviate from this established practice."  Id. at 1340.
A non-statutory basis for challenging the perpetuation of the effects of past discrimination may possibly prove productive. Executive Order 11246\(^99\) requires all government contracts to contain a non-discrimination clause and an agreement that the contractor undertake affirmative action to insure achievement of equal opportunity—an agreement that might require an employer to eliminate perpetuation of the effects of past discrimination.\(^\text{100}\) The Director of the Office of Federal Contract Compliance administers the Order using as the primary enforcement weapons both cancellation of the employer's present contract and blacklisting the employer from future government contracts.\(^\text{101}\) However, these sanctions are not to be imposed unless the Director first attempts to secure compliance through conciliation and persuasion.\(^\text{102}\)

Besides potential administrative delay in enforcement and the Order's limited applicability to federal contractors, the other major disadvantage of relying on Executive Order 11246 for relief has been the courts reluctance to imply a private right of action for individuals challenging noncompliance.\(^\text{103}\) Individual employees may file complaints against their employer but have no control over the direction of any enforcement proceedings.\(^\text{104}\) Thus, any remedy for perpetuation of past discrimination appears to be left to the government's enforcement.

As this discussion has indicated, the language of the Evans decision has the potential to be read broadly to protect all neutral rules or systems perpetuating the effects of post-Act discrimination since abandoned. Some courts have done so, and it is hard to deny a logical consistency with the Evans "repose" concerns. However, where the plaintiff challenges intentional perpetuation, courts have found the statutory bona fides of seniority systems destroyed and the Title VII claims timely. Similarly, proof of intent to discriminate seems the most promising tactic for timely challenge to other neutral systems or rules.


A contractor is required to make a good faith effort to eliminate underutilization of minorities and women, underutilization usually defined in reference to the local labor force. 41 C.F.R. § 60-2.11 (1977).

\(^100\) For a holding that § 703(h)'s protection of bona fide seniority systems does not limit affirmative action under Exec. Order No. 11246 see Contractors Ass'n v. Secretary of Lab., 442 F.2d 159, 172 (1971), cert. denied, 404 U.S. 854 (1971).

\(^101\) § 209(a)(5) and (6), 30 Fed. Reg. 12316 (1965).


\(^104\) The regulations provide a time limitation on the filing of complaints: "Complaints shall be filed within 180 days of the alleged violation unless the time for filing is extended by the agency or the Director for good cause shown." 41 C.F.R. § 60-1.21 (1977). However, failure to eliminate the effects of past discrimination pursuant to an affirmative action program may be a current, continuing violation.
Perpetuation theory violations, found on the basis of effect regardless of employer intent, may still be actionable if they involved the lock-in of general, societal discrimination. If the discrimination has never before been actionable, the apparent concerns of the Evans Court are not relevant. Moreover, if the plaintiff's claim is of disparate impact based on other than perpetuation theory, Evans should not apply; the challenge is to a current violation and, like challenges to disparate treatment, timely. The lower courts' reaffirmation of the continuing violation theory after Evans indicates the proper confinement of that case to situations where the employer has abandoned his discriminatory practice at the time of charge. However, some courts have interpreted Evans as limiting not only challenges to perpetuation of past discrimination but to current discrimination as well. Both approaches to Evans and the danger that the latter poses to proving and remedying current violations are explored hereafter.

IV
Remedying Existing Discrimination after Evans

A. Continuing Violation Theory Reaffirmed

The development of continuing violation theory in Title VII suits illustrates the courts' division of the violation and remedy phases of such suits. The courts have accepted this theory in two slightly different situations, both of which evidence the dichotomy. First, where an employer has committed specific discriminatory acts against a plaintiff, some within the 180-day period and others not, the courts have found jurisdiction citing those acts within the 180-day period. Relief is then given for injuries suffered from the "continuing" violation even if they occurred outside the 180-day period. Second, where the employer's discriminatory acts against the plaintiff did not occur within 180 days of the charge but the discriminatory policy or practice accounting for them was in effect within that time period, the courts have found jurisdiction based on the timely-charged policy. Relief is then awarded to the individual even though his injury occurred outside the 180 days. This second type of continuing violation suit, challenging an em-

105. See text accompanying notes 24 through 28 supra.
106. Id.
107. See, e.g., Pacific Maritime Ass'n v. Quinn, 491 F.2d 1294, 1297 (9th Cir. 1974); Cox v. United States Gypsum Co., 409 F.2d 289, 290-91 (7th Cir. 1969).
108. The courts have reasoned first that the existence of a discriminatory policy equals a discriminatory act under Title VII. See, e.g., Belt v. Johnson Motor Lines, Inc., 458 F.2d 443, 445 (5th Cir. 1972):
We cannot agree with the district court that a discriminatory labor practice may not be a continuing act. To so hold on the facts of this case would permit discriminatory acts to go unrebuked, a construction far too restrictive and alien to the liberal construction we have previously given the Civil Rights Act of 1964.
ployer's current policy or practice, may involve the courts in additional
determinations of the individual's standing to bring suit. To file a
charge under the statute, one must be aggrieved; but to recover
under continuing violation theory, the court additionally may require
the plaintiff to be presently employed, or at least laid off rather than
fired, in order to allege a continuing violation against his employer.

Both of these types of continuing violation suits have been reaf-
firmed since Evans, which, while alleging a continuing violation, did
not involve challenging an employer's current discriminatory treat-
ment. The first type of continuing violation, involving acts both
within and outside the 180 days, was at issue in Clark v. Olinkraft,
Inc. Plaintiff claimed an agreement between her employer and
union did not sufficiently remedy the effects of past sex discrimination
against her and additionally alleged fresh acts of discrimination within
the 180-day period before filing. In overturning the lower court's
granting of a motion to dismiss, arguably a summary judgment, the
Fifth Circuit Court of Appeals observed:

We need not reach the question presented in Evans, however, since
even if the trial court order is viewed as a summary judgment, there
exists a critical disputed factual question concerning the active discrim-
inination that continued beyond the effective date of the agreement.

Therefore, the challenge to the continuing violation is timely. See, e.g., Egelston v. State U. C.,
535 F.2d 752, 755 (2nd Cir. 1976), where the court noted:

[Plaintiff] alleges that the discrimination against her was not an isolated act, but rather
constituted a part of the college's continuing policy to deny women access to its upper
echelons. ... A principal purpose of a statute of limitations is to bar stale complaints;
yet, according to [plaintiff's] complaint, the discriminatory policy here was still fresh.
These allegations of continuing discrimination are sufficient to constitute a timely filing
with the agency.

The EEOC is in accord. "A Charging Party may attack a current employment policy, in addition
to past application of that policy; and, since a policy is by nature continuing, a "policy" charge is
timely filed." EEOC COMPLIANCE MANUAL (CCH), Continuing Violation, ¶ 4101 (1976).

Charging Party must evidence sufficient specific acts (hiring acts, promotion acts,
etc.) from which an underlying policy (discriminatory hiring policy, promotion policy,
etc.) reasonably may be inferred. Those specific acts need not have occurred during the
180 or 300-day period. ... The Commission and the courts will infer, absent other
facts, that the thus inferred policy carried over into, and in fact existed during, the 180 or
300-day period.

See note 36 and the cases cited at note 35 supra.

But see, Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 247 (3rd Cir.), cert. denied, 421
U.S. 1011 (1975) (holding that a former employee not entitled to reinstatement may still be an
adequate representative of a class of past and present employees); Olsen v. Rembrandt Printing
Co., 511 F.2d 1228, 1234 (8th Cir. 1975):

While the continuing discrimination theory may be available to present employees even
though on layoff, we do not think this theory has validity when asserted by a former
employee. For such a former employee the date of discharge or resignation is the con-
trolling date under the statute, and a charge of employment discrimination must be
timely filed in relation to that date.
[Plaintiff] repeatedly stated that even after the effective date of the agreement, men with less seniority than her seniority were promoted ahead of her. . . . The allegations of the complaint and testimony in the deposition show that continuing discrimination is under attack. The appellant's action therefore is not time-barred.113

In the second type of continuing violation suit, where specific acts against the plaintiff occurred outside the 180-day period but a current policy or practice is charged, Evans has been cited by defendant employers as barring liability for acts not within 180 days of the charge. Two districts courts have specifically rejected this argument in the context of continuing violation suits.114 Both have stressed the difference between the violation phase of Title VII suits, to which a violation within the 180-day period is a jurisdictional prerequisite, and the remedial phase, to which the 180-day period is inapplicable. Both concluded that plaintiffs can recover for acts occurring outside the 180-day period.115 Furthermore, in one of those cases, Grano v. Department of Development,116 the court reaffirmed that the violation phase's jurisdictional prerequisite of a timely-charge violation can be met by the existence within the 180-day period of a discriminatory policy, without mention of specific acts within that period.

The defendants contend that the requirement that a charge be filed within 180 days of the unlawful employment practice acts as a statute of limitations on all actions occurring outside that period. I cannot agree. . . . This requirement does not limit as to time the Court's examination of unlawful employment practices once the Court's jurisdiction is properly invoked. . . . The Court also finds that the evidence [of promotion and demotion practices] tends to show a continuing practice of sex-based discrimination in the defendants' promotion policy. . . . As the Supreme Court noted in United Air Lines, Inc. v. Evans, . . . "the critical question is whether any present violation exists" at the time the EEOC charge is filed. The plaintiff in the present case alleged a present violation of a continuing nature and not a past violation as in Evans.117

In class action suits, the courts typically have limited the applica-

113. Id. at 1223 (footnotes omitted).
117. Id. at 443. Also note the EEOC's narrow and somewhat simplistic interpretation of Evans so as to preserve the continuing violation theory.

The Commission interprets United Airlines v. Evans to hold only that discharges are not continuing violations. If a claim for unlawful discharge is not filed within 180 days of termination, the charge is not timely.

The Commission does not consider that the case affects the continuing violation principle with respect to other employment practices. In particular, any allegation of
tion of the 180-day period to the violation or jurisdictional phase of a Title VII suit. Usually the representative plaintiff files a charge based on acts against him or her occurring within the 180-day period, and the class receives the benefit of the satisfaction of the jurisdictional prerequisite; relief is then provided to the class without reference to the 180-day period.118 In some class action suits, continuing violation theory may be combined to enable the representative plaintiff to file a timely charge against the employer's policy without reference to an injury within the 180-day period.119 In one such class action suit, *Caldwell v. Seaboard Coastline Railroad*120 the district court distinguished *Evans* from another case,121 noting:

Before *Guy* and *Evans*, the lower federal courts had regularly held that where the unlawful practices a plaintiff complained of extended beyond the critical dates for filing EEOC charges . . . and where plaintiff challenged that continuous discrimination rather than any one discriminatory act, plaintiff's suit was properly brought even though plaintiff has been the victim of one or more discriminatory acts occurring before the critical dates . . . . Neither plaintiff in the *Evans* or *Guy* cases appeared to have alleged a pattern or practice of racial discrimination in employment. Neither plaintiff alleged that any discriminatory practices continued after the discharge. Neither case was a class action.

Plaintiff in this case has alleged a pattern or practice of racial discrimination that continues against him and a class of black employees and applicants . . . .122

In contrast to the limited application of *Evans* evidenced in *Caldwell*, some courts have extended the holding of *Evans* to the remedial as well as to the jurisdictional phase of class suits challenging a current employment policy. Three cases which have so extended *Evans* are discussed below. The judicial and statutory authorities against the creation of a strict 180-day limitation on class relief in Title VII suits are also considered.

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119. See, e.g., 508 F.2d at 247; *Rich v. Martin Marietta Corp.*, 522 F.2d 333, 348 (10th Cir. 1975).


122. 435 F. Supp. at 311-12 (emphasis in first paragraph added).
B. The Statute of Limitations Threat

In two post-Evans cases decided in the Eastern District of Pennsylvania a month apart by Judge Newcomer, the representative plaintiffs in class action suits filed timely charges with the EEOC. Judge Newcomer recognized that the class was entitled to benefit from plaintiffs' satisfaction of the jurisdictional requirements but in both cases limited class relief to those members whose injury occurred within 180 days of the charge. In effect, he used the 180-day limitation period as a true statute of limitations.

In *Croker v. Boeing Co.*, the issue was class size in a suit against racially discriminatory employment practices. While citing *Evans* elsewhere in his opinion, Judge Newcomer relied on a Third Circuit case, *Wetzel v. Liberty Mutual Insurance Co.*, to hold:

[T]he filing of an EEOC charge tolls the statute of limitations for both the person who has filed the charge, and any class of persons he purports to represent. On the other hand, a plaintiff's filing with the EEOC does not revive stale claims for which the 90 day time period has already expired at the time the plaintiff filed his charges. In this action, the named plaintiffs can represent all persons who could have filed charges with the EEOC on June 19, 1968, the date plaintiff Croker filed her charge. . . . All Title VII claims that did not accrue after March 23, 1968 (90 days prior to June 19, 1968) are barred by the statute of limitations.

Judge Newcomer's reliance on the *Wetzel* case was only partially accurate. While the Third Circuit, dealing with class certification in a sex discrimination suit, did indicate that representative plaintiffs could only represent those class members who could themselves challenge the discriminatory policy, that same court went on to reject, on the basis of continuing violation theory, any inflexible statute of limitations.

This conclusion does not mean, however, . . . that the numerosity requirement of 23(a)(1) has not been met. Wetzel's and Ross' charges alleged the maintenance of discriminatory hiring and promotion policies up to the time of the filing of their complaint. Such policies are continuing violations of Title VII and would allow a filing of a charge at any time by a present employee. . . . The only employees barred from the class are those who left the employ of the Company more than 210 days before the filing of the charges with the EEOC by Wetzel and Ross.

124. 508 F.2d 239 (3rd Cir. 1975).
125. 437 F. Supp. at 1178 (citations omitted).
126. 508 F.2d at 246 (emphasis added, citations omitted). 210 days was the pre-1972 amendment time period for filing if filed initially with a state or local agency.

The *Wetzel* case was concerned with the standing problem in continuing violations suits. See text accompanying notes 107 and 108.
In *Dickerson v. United States Steel Corp.*, Judge Newcomer clearly rested his statute of limitations restriction for class relief on the *Evans* case.

The opinion in United Air Lines v. Evans... holds that acts not made the basis of timely charges cannot be the basis of any liability.... Therefore, it is clear to this Court that any action, not within the statute of limitations period established for the class, cannot serve as a basis of liability, whether it be pre-Act or post-Act.

After allowing the class to benefit from plaintiffs' satisfaction of the jurisdictional requirement and further ruling that a prima facie case of a pattern of racial discrimination in initial job assignment had been presented, the court made good on its assurance not to find "either defendant liable for any incident occurring outside the statute of limitations period." All individual claims of the named class members which did not occur within the stated "statute of limitations" were dismissed.

The *Croker/Kickerson* interpretation of *Evans* as creating a 180-day statute of limitations on class relief has been adopted by another district court in another circuit. In *Neloms v. Southwestern Electric Power Co.*, involving a class action suit against a broad pattern of racial discrimination in employment, the district court echoed:

In *Evans* the Court stated that any remedy must be based upon an act of discrimination that is still actionable. In the class action context, the only actionable claims would be those that occurred within 180 days of the filing of the earliest charge of discrimination with the EEOC by a named plaintiff.

However, the *Neloms* court extended this reasoning one step further, stating:

The rationale behind *Teamsters* and *Evans* impels the conclusion that statistics are relevant evidence, but that any statistical disparity to support a prima facie case must be shown during time periods relevant to the law suit. Hiring decisions under scrutiny in the action must be actionable decisions. Thus, the Court, in examining statistical evidence, must judge the hiring and promotion statistics, as well as others, from a point in time 180 days prior to... the day on which Charles Neloms

128. *Id.* at 69-70.
129. *Id.* at 70.
130. *Id.* at 83-93.
132. *Id.* at 1369.
filed his charge . . . .

Judge Newcomer had applied the same approach to the statistical data in Croker\textsuperscript{134} and Dickerson\textsuperscript{135} but did not explicitly cite Evans in support. Not surprisingly, the Neloms opinion includes various cites to the Croker\textsuperscript{136} case.

The creation of a 180-day statute of limitations in class action suits runs afoul of lower court decisions after Evans reaffirming the validity of the continuing violation theory as a basis for finding Title VII violation.\textsuperscript{137} Moreover, a true statute of limitations barring class membership and relief would run counter to the violation/remedy dichotomy developed by the courts and noted by the Supreme Court in Evans. Justice Stevens, in distinguishing Franks v. Bowman Transportation Co.\textsuperscript{138} from Evans, specifically pointed to "[t]he difference between a remedy issue and a violation issue."\textsuperscript{139} The Franks case was a class action suit in which the Court decided the appropriateness of retroactive seniority relief to a class of applicants discriminatorily refused hire. In applying the timely filing requirement, the Court indicated that the unnamed class members were not to be denied relief because they had not filed administrative charges.\textsuperscript{140} Furthermore, on the issue of class membership and relief, the Court held appropriate the relief afforded to the class certified by the district court. That class, defined as all black applicants prior to January 1, 1972,\textsuperscript{141} had no 180-day limit on membership or relief, and the Supreme Court did not mention one. The only concern expressed by Justice Brennan in writing for the Court was that the class was "not qualified by a limitation that the discriminatory refusal to hire must have taken place after the effective date of the Act."\textsuperscript{142} However, Justice Brennan appeared satisfied that, on the facts, relief was sought only for post-Act discriminatees.

The statutory language of Title VII, which was designed to effectuate "make-whole" remedies in suits against current discriminatory

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{133} Id.
\item \textsuperscript{134} 437 F. Supp. at 1183, 1185.
\item \textsuperscript{135} 439 F. Supp. at 76-80.
\item \textsuperscript{136} 440 F. Supp. at 1369.
\item \textsuperscript{137} See text accompanying notes 113 to 117 supra.
\item \textsuperscript{138} 424 U.S. 747 (1976).
\item \textsuperscript{139} 431 U.S. at 559.
\item \textsuperscript{140} 424 U.S. at 771.
\item \textsuperscript{141} Id. at 751.
\item \textsuperscript{142} Id. at 758 n.10.
\end{itemize}
\end{footnotesize}
practices, further supports the violation/remedy distinction. Section 706(g) empowers the courts, upon determination of an unlawful employment practice, to order such "equitable relief as the court deems appropriate." Only backpay relief has any time limit imposed and even that limit runs counter to a 180-day statute of limitations. One district court has noted, post-Evans, that "construction of the 180-day requirement as a limitation on defendant's liability is inconsistent with the authorization to award back pay for a period up to two years prior to the filing of the EEOC charge." Thus, statutory language, as well as judicial authority developed in continuing violation and class action suits challenging current discriminatory practices, stands squarely in the path of the creation of a Title VII statute of limitations. The problem in the Evans case was to find a current violation in order for the Court to have jurisdiction. With the failure of that attempt, the remedy issue was never reached. The Court's silence on that issue should not now be taken to overturn the weight of past authority.

V

CONCLUSION

The Supreme Court in United Air Lines, Inc. v. Evans rejected plaintiff's attempt to file a timely charge with the EEOC against a neutral seniority system for perpetuating the effects of her past, post-Act discriminatory discharge. As a result, plaintiff failed to meet the jurisdictional prerequisite to a Title VII suit. The case clearly restricts the scope of acceptable perpetuation theory violations implicit in the Supreme Court's earlier Griggs v. Duke Power Co. decision. The perpetuation of the effects of an employer's since-abandoned, post-Act discrimination by a neutral seniority system is not a current violation of Title VII. The Court in so deciding weighed the equities in the em-

143. 424 U.S. at 763.
145. Id.
146. 16 Fair Empl. Prac. Cas. at 443.
147. A case where the class action implications of Evans are currently being tested is Inda v. United Air Lines, 405 F. Supp. 426 (N.D. Cal.), rev'd & remanded, 565 F.2d 554 (9th Cir. 1977), now remanded and pending in the northern district of California. On facts roughly similar to Evans involving United's same no-marriage policy, two former stewardesses have established a timely filing and the employer's liability. On appeal to the Ninth Circuit, the lower court's determination of jurisdiction was affirmed. However, the circuit court vacated and remanded for specific findings regarding the lower court's denial of class action status. Plaintiffsoriginally had filed "on behalf of themselves and all other women who because of the no marriage rule, had either been denied initial employment as stewardesses or had been forced to resign such positions." Id. at 556. All indications are that the Evans' interpretations discussed will figure prominently in the determination of the class entitled to relief.
148. See text accompanying notes 22 to 25 supra.
ployer's favor, resting on the judicial concern with "stale" claims.\textsuperscript{149} This concern with stale claims appears relevant as well to the perpetuation of the effects of past discrimination by an employer's neutral rules outside the seniority area. However, the Court's equitable considerations break down when the employer's neutral rule is actually a subterfuge intended to lock in or to continue past discrimination. Proving discriminatory intent, however difficult, remains the major route left for eliminating the perpetuation of past discrimination after \textit{Evans}.\textsuperscript{150}

The truly disturbing implications of \textit{Evans} come from the unwarranted extension of that case by a few courts to challenges against an employer's current discriminatory practices.\textsuperscript{151} Attempts to rely on \textit{Evans} to bar employer liability for acts outside the 180-day period replace a jurisdictional prerequisite with a true Title VII statute of limitations. Such an interpretation overturns court-developed continuing violation theory, which recognizes a sharp distinction between the jurisdictional and the remedial phase of Title VII suits and which treats the 180-day period as inapplicable to the latter.\textsuperscript{152} This dichotomy also has been recognized in Title VII class action suits.\textsuperscript{153} The Supreme Court in its treatment of such suits, including \textit{Franks v. Bowman Transportation Co.}, has never incorporated a 180-day limit on relief. Instead, the Court has repeatedly stressed the make-whole policy of Congress in enacting Title VII and its grant of remedial powers to effectuate the Act.\textsuperscript{154} Congress' make-whole policy was circumscribed by the Court as a result of its concern in \textit{Evans} with the reformed discriminator. However, where the employer maintains a discriminatory practice which is timely charged, he should be liable for the full injury inflicted in order to further "the dual purposes of Title VII": make-whole relief and deterence.\textsuperscript{155} In rejecting any general bar to the awarding of retroactive seniority in \textit{Franks}, the Supreme Court noted that such a bar "reduces the restitution required of an employer at such time as he is called upon to account for his discriminatory actions perpetrated in violation of the law."\textsuperscript{156}

The creation of a true Title VII statute of limitations would severely cripple continuing violation and class action suits, which should be encouraged because they are aimed at the current discriminator. If individuals are barred from recovery for injuries outside the 180-day

\begin{itemize}
\item \textsuperscript{149} See notes 54, 55 and accompanying text supra.
\item \textsuperscript{150} See text accompanying notes 82 to 93 supra.
\item \textsuperscript{151} See text accompanying notes 123 to 136 supra.
\item \textsuperscript{152} See text accompanying notes 107 to 117 supra.
\item \textsuperscript{153} See text accompanying notes 118 to 122 supra.
\item \textsuperscript{154} 424 U.S. at 763; Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975).
\item \textsuperscript{155} 424 U.S. at 767 n.27.
\item \textsuperscript{156} \textit{Id}.
\end{itemize}
period, continuing-violation suit plaintiffs have no gain in challenging current practices. In class action suits, even if individual representative plaintiffs can timely file their own injuries, the financial demands of bringing suit may prove too onerous. If class membership and relief are severely restricted, financial feasibility may be also.

Furthermore, the extension of the statute of limitations reasoning to bar from proof of a prima facie classwide case any statistical data outside the 180-day period imposes a tremendous burden on the plaintiff. The employer's discriminatory policy may not be apparent within the 180-day period despite its existence, owing, for example, to a lack of available employment positions within that period. Such a liability restriction also can be manipulated by the canny employer anticipating a Title VII charge. The courts must be aware of the full implication of interpreting Evans beyond its narrow claim of the perpetuation of past discrimination if the courts wish to avoid creating a liability loophole for the undeserving employer currently violating Title VII.

157. See text accompanying notes 133 to 138 supra.