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The Law Transmission System and the Southern Jurisprudence of Employment Discrimination

Alfred W. Blumrosen†

During the past seven years, the Supreme Court has restricted the expansive reading given Title VII by the southern courts of appeal. Examining the social and legal context of this change, the author argues that the values underlying Title VII have been widely transmitted to employers and unions because of aggressive enforcement. The author traces this value transmission process from Congress through administrative agencies and the courts to the "voluntary acceptance" of nondiscrimination and affirmative action programs by major employers, and he analyzes substantial changes in the racial composition of the American work force. The apparent institutionalization of Title VII values suggests that some aspects of the southern jurisprudence, having successfully overcome the most entrenched forms of discrimination, may safely be modified without harm to the underlying goals of Title VII.

INTRODUCTION

Substantial and significant improvement in minority employment has taken place since 1965. This improvement has resulted from broad interpretations of Title VII of the Civil Rights Act of 1964 which were developed in important part by the southern courts of appeals. Through the operation of the "law transmission system" many employers accepted these interpretations, changing their practices to include minorities in occupations from which they had been excluded. In the 1980s, the Supreme Court narrowed some of these interpretations of the southern courts, relying on the very improvement which the broader interpretations had helped to produce.

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The purpose of this paper is threefold: to describe the law transmission system, the process by which the Civil Rights Act was realized in the workplace, to demonstrate that this process was responsible for an improvement in minority employment opportunities, and to evaluate the Supreme Court decisions which relied on this improvement in narrowing the interpretations of Title VII of the southern courts of appeals.

The law transmission system is that set of legislative, administrative, and judicial actions which interact with regulated institutions, beneficiary organizations and individuals to achieve a real world response to a legislated standard. The law transmission system has not been extensively studied or documented, but it is presupposed whenever a regulatory statute is enacted. The hope is that regulated institutions will somehow build statutory requirements into their ongoing activities. The concept of a law transmission system focuses upon the process by which this is accomplished.

Regulated institutions seek to minimize the intrusive effect of new statutes to avoid massive changes in their operations. At some point, industry may decide that the operational and economic costs of "massive resistance" to bureaucratic or judicial supervision is too great. Industry leaders then opt for "voluntary compliance" with the new standard. To the extent that industry complies, the policies of the legislature are transformed into real world results with a minimum of formal governmental supervision. This voluntary compliance was the process favored by both Title VII of the Civil Rights Act of 1964 and executive orders regulating the employment practices of government contractors.


One important goal of regulatory policy is that a resolution of one regulatory problem will become a model for resolution of others. This goal is frequently unattained; the steel industry consent decree discussed extensively in this paper did, however, become such a model. See Moore, Steel Industry Consent Decrees-A Model for the Future, 3 EMPLOYEE REL. L.J. 214 (1977).

2. When the nature of the required response is finally established, industry frequently acts "voluntarily," demonstrating its social responsibility. Industry representatives frequently understate the coercive power of the law so as to discourage those who would expand regulation. Symbolically, those who desire new regulation generally overestimate the power of the law in order to rally political support. When legislative reform is adopted, the administrators, and to a lesser extent, the courts, inherit both misrepresentations. See infra text accompanying note 6.


By the mid-1970s much of industry had taken affirmative action to increase minority and female participation. The action taken was at least partly in response to the set of policies promulgated and enforced under Title VII and the Executive Order program. The Supreme Court, in *United Steelworkers v. Weber*, upheld the legality of such race and sex specific programs to improve opportunities for minorities and women. Kaiser Aluminum and the Steelworkers had established a skilled training program which reserved fifty percent of the seats for minorities. The Supreme Court upheld the race-specific feature of the program both because it was consistent with the purpose of Title VII and because it was a result of voluntary action.

The history behind the *Weber* decision illuminates the operation of the law transmission system. The training program in *Weber* was modeled after a massive settlement of discrimination claims in the steel industry. That settlement in turn was a product of a well-developed body of discrimination law which the courts and administrative agencies formed under Title VII. *Weber* protects those who take affirmative
action from claims of reverse discrimination, thus facilitating voluntary compliance with the regulatory standards set by Congress and the President.

The courts of appeals having jurisdiction over the southern states heavily influenced the development of the body of law that prompted the movement toward self-regulation. In the southern states, overt racial segregation in all areas of life had been the rule before the Civil Rights Act of 1964. The southern courts of appeals approached the problems of employment discrimination with the benefit of hard experience in addressing discrimination in public education, and they used some techniques which had been developed in that area.8

In one important development, these courts, followed by other federal courts, held that seniority systems and other practices which perpetuated earlier discrimination against minorities were illegal regardless of the intent of union or employer, and were not protected by the bona fide seniority system provisions in Title VII. Another key development, which occurred in the Fifth Circuit, was the evolution of a presumption that blacks who were denied employment opportunities had been discriminated against and were appropriate class representatives of all black employees and applicants. Title VII could be enforced in across-the-board class actions which reached many employment practices, and afforded relief to victims of discrimination who had not filed individual claims.

These Fifth Circuit interpretations were “transmitted” to employers and unions in the early 1970s. The results were striking. Many major companies changed hiring and promotion practices. Some signed agreements or consent decrees with the EEOC and established affirmative action programs in response to Executive Order (EO) 11,246. The impact on the workplace of this policy transmission is evidenced by the fact that nearly twenty-five percent of the minority labor force in 1980 were in substantially higher level occupations than they would have been under the restrictive patterns of 1965.9 The improvement in the southeastern states was proportional to the minority labor force located in those states.

Toward the end of the 1970s, the Supreme Court began to reject much of the body of law which had contributed to industry’s compliance with Title VII, and had thereby produced these dramatic changes in the occupational status of minorities. This rejection of the “southern jurisprudence” occurred only after long-standing, systematic discrimi-

8. See generally J. Bass, UNLIKELY HEROES (1981), for a vivid description of the experiences of the judges of the Fifth Circuit in school desegregation cases.

9. See infra notes 61-69 and accompanying text.
natory practices had been substantially altered, and blacks had moved in substantial numbers into jobs previously filled only by whites.

This paper first examines, as a case study in the operation of the law transmission system, the process by which the race-specific program upheld in *Weber* was developed. It then discusses the extent to which antidiscrimination policies have been transmitted and incorporated into industrial relations systems. Finally, the paper assesses the Supreme Court's repudiation of some of the positions which the southern courts of appeals had adopted in interpreting Title VII. The social response to the prohibition on sex discrimination in employment is different from that of race discrimination, and will not be discussed here in detail.

I
THE LAW TRANSMISSION SYSTEM AND TITLE VII

A. Formulating Title VII Policies: The Steel Industry and EEOC

Title VII did not take effect until one year after its passage. This "grace period" was designed to allow compliance with the law's requirements. The statute established a five-member Equal Employment Opportunity Commission (EEOC or "Commission") to investigate and conciliate complaints and it provided for civil actions where conciliation failed.

Because the Commissioners were not appointed until May, 1965, the Commission could not, prior to Title VII's effective date, advise the regulated community of its views of the law by guideline or regulation. As a result, employers took little action during that year.

The potential beneficiaries of the new law took the first steps in the operation of the law transmission system. One such group of beneficiaries were black steelworkers in Birmingham, Alabama, who gathered in the dental office of Dr. John Nixon, the Alabama Chapter president of the National Association for the Advancement of Colored People (NAACP). Until the previous year, the NAACP had been an illegal organization in Alabama. Tensions were still high over efforts to improve conditions for blacks. These workers faced the risk of violence which ran deep in the history of race and labor relations in the south. Stories of company machine guns at the plant gates to block unionism in the 1930s and recent racist bombings and murders were part of the atmosphere in Birmingham. Nevertheless, these workers were determined to invoke the Civil Rights Act.

11. *See supra* note 5.
These black workers signed complaints of employment discrimination against virtually all of the major employers in the Birmingham area, including U.S. Steel and other firms in heavy industry. The complaints were compiled and organized by the NAACP office in New York. In the late summer of 1965, Herbert Hill, Labor Director of the NAACP, delivered a suitcase filled with hundreds of complaints, many from the black workers in Birmingham, to the EEOC offices in Washington. These complaints, filed by brave men, triggered the law transmission system.

In the fall of 1965 the EEOC began what proved to be nearly ten years of negotiation between the federal government and the steel industry concerning discriminatory seniority practices. At one early meeting, the Steelworkers' initial response to Title VII became apparent. One union attorney declared that *Whitfield v. United Steelworkers of America, Local No. 2708* was controlling. Whitfield had held that a

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13. In 1965, the Commission organized itself by creating an office of compliance in which were located three units: advice and analysis, investigation, and conciliation. The author of this article became Chief of Conciliations in the fall of 1965, directing and participating in conciliation activities until the spring of 1967. The first year's work at the Commission is described in A. Blumrosen, *Black Employment and the Law* 51-101 (1971).


Prior to 1956, the Armco Steel Company and the Steelworkers Union had maintained strict job segregation by race at the plant in Houston, Texas. Jobs were organized in lines of progression, or job ladders. "Black" jobs and black lines of progression were openly acknowledged. Blacks could not obtain any white jobs.

In 1956, the company and the union decided to end their rigid job segregation. Black employees were allowed to enter the previously white line of progression at the bottom, as if they were new employees. They were not given seniority credit for their prior service in "black" jobs. They contended that this new opportunity did not satisfy the union's "duty of fair representation." (In 1944, the Supreme Court had held that unions had a duty to bargain fairly and without racial discrimination on behalf of employees whom they represented. The Court invalidated a "quota" which would have eliminated blacks from desirable jobs. *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944). The "duty of fair representation" was sparingly enforced in the next twenty years. See Herring, "Fair Representation" Doctrine: An Effective Weapon Against Union Discrimination?, 24 MD. L. REV. 113 (1964); Rosen, Law and Racial Discrimination in Employment, 53 CALIF. L. REV. 729 (1965).

The *Armco* case came before the Fifth Circuit as *Whitfield v. Steelworkers*, 263 F.2d 546 (5th Cir. 1959). In an opinion by Judge Wisdom, the court upheld the Armco agreement, stating:

The problem before us is not unique. It is bound to come up every time a large company substitutes a program of equal job opportunity for previous discriminatory practices. In such case it is impossible to place Negro incumbents holding certain jobs, especially unskilled jobs, on an absolutely equal footing with white incumbents in skilled jobs. In this situation, time and tolerance, patience and forebearance, compromise and accommodation are needed in solving a problem rooted deeply in custom.

We attach particular importance to the good faith of the parties in working toward a fair solution. It seems to us that the Union and the Company, with candor and honesty, acknowledged that in the past Negroes were treated unfairly in not having an opportunity to qualify for skilled jobs. They balanced the interests of Negroes starting Line 1 [white] jobs against the interests of employees who have worked previously in Line 1 jobs, in the light of fairness and efficient operation. After many months of negotiations, and having in mind their duty to all the employees and the need for proper management.
discriminatory seniority system was cured if senior black employees were allowed to enter previously "white" jobs as new employees, even though they received no credit for their prior service in "black" jobs. If *Whitfield* applied under Title VII, the outlook for major improvement in black employment opportunities was bleak. Under *Whitfield*, the most senior black employee would be permanently locked in behind the most recently hired white worker.

The steel companies and unions repeatedly urged the EEOC and staff to apply the *Whitfield* doctrine. They urged the Commission to independently interpret Title VII on this issue, disregarding the views of the complainants who had rejected offers of settlements along *Whitfield* lines. The staff presented options to the Commission. They came up with... an honest attempt to solve a difficult problem... The Union and the Company made a fresh start for the future. We might not agree with every provision but they have a contract that from now on is free from any discrimination based on race. Angels could do no more. 263 F.2d at 551 (emphasis in original).

This opinion limited the legal force of the duty of fair representation in seniority discrimination cases. The maximum relief available to black employees was the opportunity to take a less secure, lower paying job at the bottom of the "white" line. Thus the game was rarely worth the candle. The *Whitfield* doctrine was criticized at the time for sapping the duty of fair representation of much of its vitality. See, e.g., Blumrosen, *Union-Management Agreements which Harm Others*, 10 J. Pub. L. 345, 360-62 (1961).

15. *Whitfield v. United Steelworkers of America*, Local No. 2708, 263 F.2d at 550-51. Recognizing the import of *Whitfield*, EEOC Chief of Conciliation Alfred Blumrosen prepared a memorandum to EEOC Executive Director N. Thompson Powers after the meeting:

If *Whitfield* is the law under Title VII, the Commission will be unable to substantially improve the seniority position of Negroes who had been discriminated against in the past.

I recommend a concerted Commission program to secure a ruling under Title VII which is more favorable to complainants than *Whitfield*...

Title VII complainants in the steel industry, represented largely by the NAACP Legal Defense and Educational Fund, Inc., were offered settlements which included *Whitfield* type relief: the opportunity to enter "white" lines, as junior employees. They generally rejected these settlement offers. See generally A. Blumrosen, *Black Employment and the Law* 159-217 (1971).

16. These were:

1. Merge the two lines in the literal sense, and allow all employees to carry their seniority from the segregated lines into the merged lines...

2. Allow the black employees, on the basis of their seniority, to fill vacancies which develop anywhere in the white line, not only at the bottom, and to utilize their full seniority in the event of a layoff...

3. Allow senior black employees to enter the white line at the bottom, for promotion purposes but use their plant age in the event of a layoff...

4. Allow senior black employees to fill vacancies anywhere in the line of promotion, but, in the event of layoff, to be returned to their seniority position in the previously all-black line (Leap in—leap out).

5. All senior black employees to bid into the bottom of the previously all-white line, and, in the event of a layoff, treat them as the most junior employees in the white line, allowing them to exercise their full seniority for layoff purposes only with respect to the previously all-black jobs.


In one early episode under Title VII, the Papermakers Union and Crown Zellerbach had persuaded EEOC Chairman Franklin D. Roosevelt, Jr., and Executive Director Herman Edlesberg to approve a merger of seniority lines based on wage rates. Because black workers were all paid less...
The EEOC finally decided to seek remedies for discriminatory seniority systems beyond that provided for in *Whitfield*. The Commission articulated its policy in its response to the union-industry arguments concerning a steel facility in Birmingham. EEOC Executive Director Herman Edelsberg authored the Commission's response:

The Commission's deliberations identified two broad areas where it believes that the revision is not adequate to the requirements of the statute. First, it does not give adequate weight to seniority in permitting Negro employees to move up in the previously all white lines of progression. Second, it fails to allow Negro employees who have moved up in the line of progression to utilize their seniority in cases of further promotion or in cases of reduction in force. Edelsberg's letter insisted that the steel industry both afford black workers "the opportunity to fill vacancies anywhere in the line on the basis of their company seniority," and agree that "company seniority would govern their status in the line for layoff purposes." The EEOC, the toothless tiger of equal employment opportunity law, in a classic low-visibility administrative decision, thus rejected the effort to engraft the *Whitfield* doctrine into Title VII and insisted on greater relief for the senior black employees, including the establishment of training programs.

B. Implementation of Title VII Policies: Training Programs

The need for training programs to enable black workers to take advantage of newly opened opportunities was recognized in the early days of Title VII. A 1966 conciliation agreement, for example, provided for a Labor Department grant to assist in training programs for blacks who could then use their plant seniority to bid on previously white jobs. One hundred twenty of the more than 300 blacks took ad-
vantage of the training. 19

The major success story of 1966, however, was the Newport News Agreement. This agreement was the first detailed plant-wide revision of industrial relations systems under Title VII and the executive order program. Akin to a collective bargaining agreement in breadth and depth, it specifically provided for enhanced black participation in apprenticeship programs:

As the Company's last report to the Government (Form 40) showed that only 6 of the 506 apprentices enrolled in the apprenticeship program were Negroes, the Company agrees that, to provide affirmatively for equal employment opportunity, apprenticeship classes shall henceforth be filled as follows:

d. In filling vacancies in the apprenticeship classes, the Company agrees to exercise its utmost efforts to see that substantial numbers of Negroes are included in such classes. To this end the Company agrees, (1) to include in its recruitment efforts the predominantly Negro schools in the labor market areas; and (2) to notify civil rights organizations in said area of this Agreement and to solicit such organizations to send qualified applicants for such programs. . . . 20

The Newport News agreement had been negotiated during the suspension of government contracts with the shipyard. The various federal agencies involved cooperated with each other in the negotiations. After the agreement, however, the agencies disagreed on the question of credit for the agreement. As a result, the Department of Labor, the Department of Justice, and the EEOC independently developed policies concerning remedies for seniority discrimination. The courts finally resolved the ensuing confusion. 21 Despite this bureaucratic bickering, the EEOC, the Department of Labor, and the Department of Justice, by the close of 1966, had laid the foundation for those principles which would prove important as the courts began to interpret Title VII. These principles were:

(1) A "fresh start for the future," the Whitfield solution, was not a sufficient remedy for seniority discrimination. Senior blacks could not be treated as junior employees in white jobs. Further relief for senior black workers confined to low-paying jobs because of their race was necessary;

(2) Training programs to equip minorities to handle the jobs


20. Conciliation Agreement Between EEOC and Newport News Shipbuilding & Dry Dock Co. (March 30, 1966) (Case No. 5-7-235, 5-7-237, 5-7-520, 5-7-521) (quoted in A. BLUMROSEN, BLACK EMPLOYMENT AND THE LAW 372 (1971)). For an analysis of the agreement, see id. at 328-66.

21. See supra note 16.
from which they had been traditionally excluded were an essential part of a major settlement package correcting the historic exclusion of minorities and;

(3) The training opportunities should be allocated by reference to the proportion of blacks and whites in the labor market.

The EEOC pressed these positions in the limited forms which were open to it, including conciliation proposals, publication of sanitized reasonable cause decisions, amicus briefs and guidelines, and speeches by Commissioners and staff. Some employers did not accept the EEOC’s broad interpretations of Title VII. Thus, in the late 1960s, the issues moved to the courts.

C. Reinforcing Title VII Policies in the Courts

The principles which the EEOC formulated were asserted in many Title VII class actions brought primarily by private plaintiffs, often supported by the NAACP Legal Defense and Educational Fund, Inc.22 In defending against these Title VII suits, the steel industry and unions pressed the Whitfield argument with some initial success.23 The Northern District Court of Alabama in United States v. H.K. Porter24 gave hope to the steel industry and unions by adopting a narrow interpretation of the statutory obligations. These hopes were soon dashed, however, as courts began to take positions which were incompatible with Whitfield. In one particularly influential decision, Judge Butzner, in the Eastern District of Virginia, concluded that “Congress did not intend to freeze a generation of Negro employees into discriminatory patterns that existed before the Act.”25 The Fifth Circuit adopted the view that senior black employees were entitled to advance to their “rightful place” measured by overall length of service; these employees should not remain behind junior white workers, as they would be compelled to do under the Whitfield rule.26 The court later squarely held the Whitfield doctrine inapplicable to Title VII in a case arising from the same facility which had been involved in the Whitfield case.27

27. Taylor v. Armco Steel Corp., 429 F.2d 498 (5th Cir. 1970). The case dealt with the same plant and the same contractual provision which had been upheld in Whitfield. Judge Wisdom, the author of the Whitfield decision, wrote the opinion. In contrast to his conclusion in Whitfield that “[a]ngels could do no more,” he wrote:
In *United States v. Bethlehem Steel Corp.*, the Second Circuit went further, sweeping away not only the *Whitfield* defense, but also many other legal objections that the steel industry employers and unions had raised to a revision of the seniority system. *Bethlehem Steel* involved a fact pattern of “classic job discrimination in the north.” One issue was whether black employees who transferred into white lines of progression could carry their plant seniority with them for bidding purposes. The court answered the question in the affirmative thus joining the Fifth Circuit in rejecting the *Whitfield* doctrine.

The union argued that some of the blacks who had been assigned to the black departments or lines of progression would have been so assigned even absent racial discrimination, and that therefore those workers should not be given transfer rights. The court stated:

> [I]t is true that some of the black employees might have been assigned there even under the best of systems. But there is no apparent way of knowing that, or determining now who they would be. 

The discrimination found illegal here was to a group; group remedy is therefore appropriate.

In 1973, two more blows were dealt the steel industry’s seniority systems. First, the Secretary of Labor found the system at Bethlehem eleven years ago this Court gave its blessing to the revision of. . . . a system . . . that improved the lot of many black employees but still fell short of cleansing progression lines of past racial discrimination . . . . Within the context of the NLRA and [*Steele v. Louisville & N.R.R., 323 U.S. 192 (1944)*], *Whitfield* is defensible. Today, however, the court must reverse and remand this case . . . for proceedings consistent with *Title VII* . . . .

Seven years later, Judge Wisdom was to apply his understanding of *Title VII* in a powerful dissent to the Fifth Circuit’s decision in *Weber*. That dissent influenced the Supreme Court’s ultimate disposition of the case.

28. 446 F.2d 652 (2d Cir. 1971), later cited with apparent approval by the Supreme Court in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 805 n.19 (1973). The opinion in *Bethlehem Steel* relied on the Fifth Circuit discussion in *Papermakers*.


30. Because of the job assignment discrimination against blacks, the Court held that the seniority system was not protected by the “bona fide seniority system” proviso of *Title VII*, § 703(h).

The defense of a “bona fide seniority system” is analytically distinct from the *Whitfield* analysis. The *Whitfield* argument was that as long as the seniority system provided the “fresh start for the future,” there was no violation of *Title VII* even though the system perpetuated pre-Act discrimination. The “bona fide seniority system” defense § 703(h) constitutes a justification for what would otherwise be a violation of the statute. See Jones, *Title VII, Seniority and the Supreme Court: Clarification or Retreat*, 26 KAN. L. REV. 1 (1977) for a detailed description of the evolution of the law concerning seniority discrimination. After the Fifth and Second Circuit decisions discussed above, and until *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977), the courts adopted an analysis of the type presented in Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598 (1969). See also W. GOULD, *Black Workers in White Unions* (1977) and A. BLUMROSEN, *Black Employment and the Law* (1971) for discussions of the pre-*Teamsters* law. The post-*Teamsters* law is discussed infra notes 61-69 and accompanying text.

31. 446 F.2d at 660.
Steel's Sparrows Point plant in violation of the executive order proscribing discrimination by government contractors. 32 Second, the district court in Birmingham in United States v. United States Steel Corp., 33 rejecting both the Whitfield analysis and the "bona fide seniority" defense, found discriminatory the seniority systems of the nine plants of U.S. Steel's Fairfield Works. Judge Pointer's order required revisions in the seniority systems and associated promotional opportunities for all employees. The Second Circuit and the Secretary of Labor had required that blacks be allowed to use plant-wide seniority in competing with whites. But the seniority rights of whites vis-à-vis each other were left on a departmental basis. The results were dual-seniority systems, which created considerable tensions. The union cited these tensions in its argument for evenhanded plant-wide seniority for all workers, black and white. Judge Pointer agreed, ordering a complete change in the seniority system. His decision was the final event leading to the industry-wide settlement. 34

D. The Steel Industry Response

After Judge Pointer's decision, steel industry employers and the United Steelworkers sought to settle the seniority discrimination issues being raised throughout the industry. They decided to alter the departmental seniority system and give decisive weight to plant seniority. The modifications would provide long term black employees with seniority credit for time spent in black jobs. Plant seniority would be applied to blacks and whites alike, thus avoiding the dual-seniority systems which had emerged under some early court orders. The decision to change the nature of the seniority systems was based on the case law, which included many decisions invalidating "small unit" seniority. 35 This law, uniform throughout the circuits, suggested that the employers and the union would lose many of the discrimination cases which had been filed against them. 36

35. This account draws heavily on two papers delivered at the Rutgers University Equal Employment Opportunity Symposium, November 28-29, 1975: Fischer, Evaluating the Consent Decree, and Moore, Steel Industry Consent Decrees—A Model for the Future? The Moore paper was revised and published as Moore, Steel Industry Consent Decree—A Model for the Future, 3 EMPLOYEE REL. L.J. 214 (1977). The EEOC financially supported the symposium, but did not contribute to the publication of the proceedings.
36. The cases, many of which relied upon the Fifth Circuit decision in Papermakers and Judge Butzner's decision in Quarles, are cited in Justice Marshall's dissent in International Bhd. of Teamsters v. United States, 431 U.S. at 379, 380 (Marshall, J., dissenting).
After the union and the employers reached this agreement, they sought to negotiate governmental approval. In intricate and exhausting negotiations, the government demanded back pay and increased minority participation in the trade and craft jobs in exchange for its approval. The companies earmarked some thirty million dollars for settlement payments to nearly 50,000 black workers. The union and the employers also agreed to create specific promotional opportunities for minority workers into trade or craft jobs on a 50-50 basis, despite their preference for a color-blind program. The inclusion of craft jobs gave additional opportunities to black employees beyond those provided by the change in the seniority systems while addressing the claim of discrimination in assignment to those jobs. The agreement provided:

10. AFFIRMATIVE ACTION FOR TRADE AND CRAFT OCCUPATIONS . . . the Implementation Committee [shall] . . . establish goals and timetables for qualified minority representation . . . in Trade and Craft jobs wherever there is underutilization of minorities . . . . Such goals shall be established in accordance with 41 C.F.R. § 60-2.11 and 60-2.12 of Revised Order No. 4 issued by the Department of Labor, Office of Federal Contract Compliance, as made more specific by the following:

(d) IMPLEMENTING RATIO: An implementing ratio of 50% (except as the Audit and Review Committee determines that unusual circumstances compel a different ratio) shall be applied in the aggregate for all groups for whom timetables are established, for each Trade and Craft grouping at each plant, to the extent that qualified applicants from such groups are available within the plant, until the goals therefor have been achieved.

(e) SENIORITY FACTORS: . . . all permanent vacancies in apprenticeships and in entry level jobs in lines of promotion containing occupations which in fact lead to craft jobs, shall be filled on a plantwide basis from among qualified bidding employees . . . .

37. The agreement appears in 8 LAB. REL. REP. (BNA) 431:125-52 (1974). The agreement was later challenged by the NAACP and the National Organization for Women (NOW) as inadequate to protect the minority and female workers. NOW objected to paragraph 10 on the grounds that, since there were so few women in production and maintenance jobs, the proportionate goals for women in the trade and craft jobs would be so low as to "make a mockery" of the obligation to include more women in trade and craft jobs. The court pointed out that the overall goal of 20% females hired in production and maintenance, along with the 50% implementing ratio of section 10(d) would cure the condition. Id. The agreement was upheld in United States v. Allegheny Ludlum Steel Corp., 517 F.2d 826, 880 (5th Cir. 1975).

The complainants also challenged the government's failure to involve interested private parties and their counsel in predecree negotiations. Id. at 825. They alleged that the consent decree constituted an abuse of administrative and prosecutorial discretion in that the relief granted was too limited and the impact on private Title VII rights was too great. The court held that it was within the discretion of the government to agree to a massive settlement in lieu of multiple litigation, and that the terms of the settlement were within the zone of reasonableness which is the
Paragraph 10(d), which establishes the "implementing ratio," is the precise precursor of the Kaiser Plan approved by the Supreme Court in *Weber*. The specificity of language in the steel industry settlement was the result of programs under EO 11,246 requiring government contractors to establish "goals and timetables" to correct underutilization of minorities and women.

A comparison of the 1966 Newport News agreement with the Kaiser-Steelworkers agreement of 1974 involved in *Weber* reflects important developments in the intervening years under EO 11,246 in the Labor Department. The Newport News agreement concerning apprentices contained only a general provision:

[A]s a natural result of this recruitment effort . . . the ratio of Negro to white apprentices in any given year should approach the ratio of Negro to white employees and the ratio of Negro to whites in the labor market area but this provision shall not be construed to require or permit the rejection of any qualified applicant on the basis of his race or color.38

The Kaiser-Steelworkers agreement was far more specific, requiring fifty percent minority placements in craft training programs until the minorities reached their work-force proportion.39

**E. Other Sources of Anti-Discrimination Values: The Executive Order Program and “Plans for Progress”**

This increased specificity resulted from efforts of the Labor Department to find a formula to increase minority hiring under EO 11,246.40 In the 1960s, the Labor Department attempted to address the

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39. The agreement provided for the establishment of goals for minority participation in each category of craft jobs. The goals were to be met as follows:
   As apprentice and craft jobs are to be filled, the contractual selection criteria shall be applied in reaching such goals; at a minimum, not less than one minority employee will enter for every non-minority employee entering until the goal is reached unless at a particular time there are insufficient available qualified candidates.
   A memorandum executed by a joint company and union committee implemented this agreement:
   As on the job training and/or apprentice programs are established, each training class entering will be filled on a 50-50 basis. Employees in each training class shall be selected on the basis of the existing practice in each plant; however, 50% of the training class will be composed of only minority and/or female employees, including, if necessary, off the street hires.

virtual exclusion of minorities from some building construction unions. After a series of experiments, the Department established the "Cleveland Plan," which required contractors to agree to meet unspecified minority hiring goals as a condition of obtaining government contracts. After the Comptroller General held this obligation too vague to be enforceable, the Department of Labor decided to adopt more specific standards. It developed a plan for Philadelphia which set specific goals and timetables in those skilled trades where minorities were underrepresented. Once again, contractors appealed to the Comptroller General, this time claiming that the specificity which his earlier decision required had produced preferential treatment for minorities, in violation of the Constitution, EO 11,246, and Title VII.

The Comptroller General ruled that the specific goals and timetables were unconstitutional. Both the Department of Labor and the Justice Department viewed this ruling as a usurpation of authority. The Justice Department, supported by the Labor Department, issued an Attorney General's opinion upholding the constitutionality of the "Philadelphia Plan," after which the contractors and unions in Philadelphia sought to enjoin the program. In Contractors Association v. Secretary of Labor, a 1971 case, the Third Circuit upheld the goals and timetables aspect of the "Philadelphia Plan."

In 1970, Senator Fannin proposed a rider to an appropriations bill which would have abolished such goals and timetables. The Nixon Administration, prompted by Secretary of Labor Shultz and Assistant Secretary Fletcher, opposed the rider. The rider was defeated. Thus in the crucible of the construction industry and its history of exclusion of minorities from skilled crafts was born the goals and timetables approach which the Department of Labor, under Order No. 4, expanded to all government contractors in 1970.43


41. 442 F.2d 159 (3d Cir. 1971). The construction industry was a major target of civil rights interest through so many years, proceedings, and programs that former Secretary of Labor John Dunlop, perhaps the person who understood it best, had called it a "dismal swamp" for those who would reform its employment practices. Construction work is performed "in public" and some construction work appeared not to require significant skills. In the pre-Civil War South, slaves performed much construction work. They were frozen out of much of that work after the Civil War. These reasons were contributing factors to the focus on the construction industry. Another factor was the energy of the former labor director of the NAACP, Herbert Hill. See H. Hill, BLACK LABOR AND THE AMERICAN LEGAL SYSTEM (1977). The Supreme Court's willingness in Weber to take judicial notice of the pattern of discrimination in that industry flows in important measure from the zeal and perseverance of the NAACP, and the Legal Defense and Educational Fund, Inc.


The Department of Labor's specific goals and timetables approach was a reaction to an experiment in voluntarism without enforcement. In 1961, EO 10,925, which prohibited discrimination by government contractors, was given teeth. Administrators were authorized to conduct hearings leading to cancellation of government contracts and debarment from future contracts. While the government deliberated whether to take a tough or soft approach to the enforcement of EO 10,925, industry established “Plans for Progress” (PFP); a group of large employers voluntarily dedicated themselves to improving the employment position of minorities. The government provided funding for PFP staff. Perhaps some improvement in minority opportunities did result from the policy changes which the PFP employers announced. One of the advantages of being a PFP member, however, was relief from even the minimal risk of sanctions under EO 10,925 and, later, EO 11,246.

In early cases under Title VII, some employers argued that “good faith” constituted a defense under Title VII and asserted their PFP membership and activities as evidence of good faith efforts to assist minorities. The EEOC took the position that Title VII was concerned with the results of employment practices, rather than with the state of mind of the employer. Because the results which PFP members achieved appeared unimpressive, the EEOC did battle with PFP on the field of statistics.

The statistics which the EEOC used showed that in 1966, five years after the founding of PFP, 25 of the first 100 PFP firms, and 72 of the first 340 PFP firms, had less than 3% black employees.

In 1968, the EEOC held hearings on white collar employment in New York City. The research report compared the performance of forty-six PFP companies with that of fifty-four nonmembers:

By almost any measure, we find that those who should be the leaders in this crucial area of local and national concern are, in fact, the laggards. All 100 companies have comparatively large resources which make it possible to recruit with ingenuity on a broad scale; to search with diligence among their existing work forces for the Negro, Puerto Rican, or

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44. P. NORGREN & S. HILL, TOWARD FAIR EMPLOYMENT (1964); M. SOVERN, supra note 4, 61-102; U.S. COMMISSION ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT 52 (1973); R. NATHAN, JOBS AND CIVIL RIGHTS 102-03 (1969). Management and labor often adjust to legal developments such as the anti-discrimination laws by seeking informal programs which will leave them with as much flexibility as possible. The response of the steel industry to the passage of Title VII illustrated this process. The industry first attempted to minimize the significance of the statute by engrafting the Whitfield principle onto Title VII. When this failed, they adopted the principle of plant seniority, rather than face legal challenges against each facility.

45. See, e.g., Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972).

46. The “good faith” defense was held inapplicable under Title VII in Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

woman who is employed at a level beneath his or her skills and potentiality; to invest in the company or community-wide training programs necessary to make equal job opportunity meaningful. . . . Such measures as these are known as "affirmative action"—a term which appears in the non-discrimination clause of every Federal government contract and in many of the "Plans for Progress" documents . . . .

Among the 100 employers themselves, those who have not participated in the Plans for Progress organization have a record of higher minority utilization, in almost every occupational category, than those who have made these pledges. 48

According to the report, the PFP firms employed 2.3% blacks in white collar jobs to the nonmember firms' 2.9%, and only 1.8% Puerto Ricans compared to the nonmembers' 2.4%. After these revelations, PFP was quietly interred, in favor of a new organization called the National Alliance of Businessmen. Before disappearing, however, PFP published, jointly with the National Association of Manufacturers (NAM), recommendations for affirmative action. 49 Included was an outline of a process of self-evaluation, and the establishment of goals and objectives to solve problems which had been identified. The outline stated: "Goals should be specific both for planned results and timetables." 50

When the Comptroller General's decision concerning the "Cleveland Plan" pressured the Department of Labor to establish specific standards for employers, the PFP-NAM publication literally became the basis of the program, except that compliance with the program was required of, rather than merely recommended to, government contractors. 51 Revised Order No. 4, now in effect, which demands "underutilization analysis" to identify "deficiencies," and the setting of "goals and timetables" to correct them, is a lineal descendant of this last, and perhaps best, PFP service performed in the cause of equal employment opportunity. By adopting the business-endorsed plan, the Department defused the political pressure which might otherwise have been mounted against this extensive regulation of the industrial relations system. 52

48. EEOC, HEARINGS ON DISCRIMINATION IN WHITE COLLAR EMPLOYMENT (1968).
50. Id. at 119. The following illustrates the extent of the expected specificity: "New York office plans to hire 20 sales representatives by June 1, 1969. Ten of the twenty will be minorities. Six of the ten will be Negro." Id.
51. In response to Congressional criticism, "shall" was changed to "should" in revised Order 4. See U.S. CIVIL RIGHTS COMMISSION 1971 REPORT 60 n.275. The "should" or "shall" controversy lingered into 1978.
52. Nathan Glazer, whose AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY (1975) was a major intellectual attack on affirmative action, wrote a new introduction to a paperback edition published in 1978, in which he noted, with some surprise, "[E]ight years of
Thus, by the end of 1971, the Labor Department’s program to require specific performance of the affirmative action obligation was in place, and had been upheld by the Third Circuit in the “Philadelphia Plan” case. Major efforts made during the 1972 Congressional review of Title VII to knock out the “Philadelphia Plan” concept of goals and timetables failed. By the time that the steel industry and the steelworkers sat down to negotiate their settlement of seniority discrimination issues, the use of specific goals and timetables had been upheld in the courts, and had survived the rigors of Congressional review.

The steel industry settlement was the product of three strands of enforcement activity under the equal employment opportunity laws and orders. The seniority discrimination cases created the pressure for settlement between the union and the companies; the government’s challenge to discrimination in the construction trades produced the focus on skilled jobs; and the evolution of the goals and timetables under EO 11,246 provided the formula which was incorporated into the agreement. Through this gradual institutionalization, the concept of specificity in hiring goals became a viable option for the steel industry in 1974, in contrast to 1966, when the Newport News agreement relied on general statements of objectives.

F. An Increase in Voluntary Compliance

The industrial relations specialists in the aluminum industry were aware of the negotiations in the steel industry. After observing the agonies which the steel industry had endured for nearly a decade, the aluminum industry and the steelworkers decided to improve minority employment opportunities without waiting for the plethora of suits and administrative proceedings which had preoccupied the steel industry. The aluminum industry’s agreement with the steelworkers, which was involved in Weber, tracked several aspects of the steel settlement, including its 50-50 training program. The Supreme Court in Weber upheld this imitative approach, even though the circumstances at the

Republican administration saw these [affirmative action] policies more decisively and effectively imposed on the country than anyone dreamed possible in 1968.” Id. at xiv. On the problems of effectuating the equal opportunity obligation in both Republican and Democratic administrations. see A. FLETCHER, SILENT SELLOUT (1974).


54. The district court, in United States v. U.S. Steel Corp., 371 F. Supp. 1045 (N.D. Ala. 1973), rev’d in part, 520 F.2d 1043 (5th Cir. 1975), incorporated some of the Department of Labor’s affirmative action requirements in the injunction remedying discrimination at U.S. Steel’s Fairfield Works. Some of these standards were incorporated into the consent decree. See supra text accompanying note 35.

55. For a description of the first four years activity under this decree, see Ichniowski, Have Angels Done More? The Steel Industry Consent Decree, 36 INDUS. & LAB. REL. REV. 182 (1983).
Kaiser plant in Weber differed from the circumstances in the steel industry which gave rise to the 50-50 training program.

In the steel industry large numbers of black workers had not been promoted into skilled positions. The 50-50 training program allowed senior black employees to enter skilled jobs, thus addressing problems of discrimination in promotions. Kaiser, on the other hand, had employed few blacks as unskilled workers and virtually none as skilled workers. Because there were few senior blacks, the 50-50 program became a method by which junior blacks (some themselves the beneficiaries of affirmative action in hiring) could advance to skilled jobs.

The inclusion of junior blacks in the program precipitated the litigation in Weber; senior white employees claimed "reverse discrimination." The Supreme Court, in an opinion authored by Justice Brennan, held that the social purpose which the training program served, which mirrored the purpose of Title VII, justified the program.

Justice Brennan's opinion took judicial notice of the traditional exclusion of blacks from craft unions and concluded that the employers' preference for previously trained craftsmen severely limited the number of blacks in those positions because of the history of discrimination in craft unionism. This situation, the court held, warranted an agreement between the union and employer to create a program to provide skills training for blacks. The court noted with approval that the program was not limited to blacks in concluding that it did not "unnecessarily trammel" the interests of white employees, that its duration was limited to "correcting racial imbalance," and that it could not be continued to "maintain a racial balance" once the imbalance had been corrected. Justice Rehnquist's dissent argued that the legislative history of Title VII required a color-blind interpretation of the statute.

The operation of the law transmission system in the Weber case—the fact that the program in Weber had been hammered out in the crucible of the steel industry settlement, and was based on a decade of developments among employers, unions, courts, and agencies—gave

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56. 443 U.S. at 198, n.1.

57. The history of the program involved soundly distinguished Weber from the decision of the Court in Regents of the University of California v. Bakke, 438 U.S. 265 (1978). In Bakke, the Court had invalidated, under the fourteenth amendment, a program which set aside for minorities a specific number of seats in a medical school class. On the facts concerning a "set aside" on specific racial grounds, Weber and Bakke are identical. The major factual difference in the cases is that the program in Weber was the product of years of intensive development under the strictest scrutiny by various groups interested in the matter, while the program in Bakke apparently reflected the judgment only of the medical school faculty. The course of development and testing of the plan in Weber provided not only assurance that it had met the test of acceptability among touch-minded institutions, but also that it was likely to be limited to situations where that test had been met.
the program a stamp of legitimacy. The consent decrees, conciliation agreements, and affirmative action programs, which many other companies in a wide variety of fields had adopted, attest to the degree to which Title VII values had become embedded in American industry. The American Telephone and Telegraph (AT&T) consent decree, for instance, incorporated goals and timetables, training programs, and a "seniority override."59

Although one could argue that any action taken in anticipation of possible adverse legal consequences is not "voluntary," such an argument disregards the key role of the law transmission system in modern regulation. Voluntarism in modern regulation does not mean "done of charitable motives from the goodness of the heart." Rather, it means choosing from among options available after considering institutional and legal pressures. Voluntary collective bargaining, for example, means bargaining within the framework of legal and economic pressures which the parties can impose on each other. The concept of voluntarism is best understood as allowing the regulated institutions to exercise options and choices within the framework of law, not as justifying a disregard for legal norms.60

58. At trial, Thomas Bowdle, Kaiser's Director of Equal Employment Opportunity, discussed the relationship of Kaiser's program to the steel industry settlement. Trial Transcript, pp. 97, 131. In the court of appeals, Judge Wisdom noted the relationship in his dissent. 553 F.2d 216, 229. The relationship was discussed in briefs filed in the Supreme Court by the company (Brief for Petitioner, pp. 4-5) and by the union (Brief for Petitioner, p. 12). At oral argument, Mr. Gottesman, for the union (S. Ct. Transcript, p. 12), and Mr. Powers, for the company (S. Ct. Transcript, p. 4), made the point. Justice Blackmun's concurring opinion noted that "Kaiser and the Steelworkers established the training program in question here and modeled it along the lines of a Title VII consent decree later entered for the steel industry." 443 U.S. at 212.


The rationale for maximum self-regulation is two-fold. First, there is the general desirability that the citizenry understand and carry forward their obligations under the law. Secondly, there is the physical impossibility that the agency can effectively regulate, in a very detailed way, large numbers of institutions and highly technical programs with the resources which will be available. Therefore, you have no choice but to shape your regulatory program with a minimum input of your own agency's time, energy and effort.

The result of all this is that the initial public presentation of agency policies may make appropriate references to "voluntarism." But at the same time you should make clear that the voluntary compliance must take place within the framework of substantive policy which will be set out at the beginning of your administration.

The "voluntarism" which you should encourage, is voluntarism within an enforcement policy which you have articulated. You should outline what the statute requires at the beginning of your administration and call your policy statements to the attention of those who are regulated. You should immediately commence an enforcement program. You will recognize the impossibility of proceeding simultaneously against all who are subject to it. You will put them on notice of your requirements. You will call upon the regulated groups to act in light of your statement of policy without waiting for you to
In this sense, the course of industrial relations described in this paper represents voluntarism at its most useful. The various institutions involved—employers, unions, administrative agencies, and the courts—all participated to produce a workable result which comported with congressional objectives. The court and administrative decisions striking down the existing seniority system and requiring affirmative relief for black workers were the anvil on which the settlement was forged. Title VII suits and executive order proceedings provided the hammer.

II

THE FIRST FIFTEEN YEARS UNDER TITLE VII

The 1974 steel industry settlement, followed by the AT&T consent decree, signaled that major employers were prepared to take far greater steps to address the problem of minority employment opportunity than they had been willing to take before the enactment of the Civil Rights Acts. The law transmission system had led the employers to the conclusion that their optimum choice was to alter their industrial relations practices.\textsuperscript{61} Government compliance reviews under EO 11,246 and both private and government suits under Title VII continually reinforced the employers' conclusion throughout the 1970s.

The results of that period are striking. Analysis is made difficult by the absence of an initial consensus about the objective state of affairs that Title VII was to promote,\textsuperscript{62} as well as by inherent limitations in the data. In addition, any such appraisal of the past will inevitably be colored by concerns and desires for the future. Finally, the position of the observer in the stream of history will influence what is observed. The contrast between the 1960s and the present is vivid to those of us in the generation which is old enough to remember the passage of the Civil Rights Act. We cannot help being impressed with the peaceful social revolution through which we have lived and in which we have participated. To a generation for whom 1964 is ancient history, for whom the traditional patterns of segregation were both clearly wrong and apparently so easily eliminated, the "progress" may seem either maddeningly slow because the position of minorities in employment has not improved enough or terribly overreaching because the original problem has been so thoroughly addressed. Despite these limitations, the available data provide a solid basis for some general conclusions.

Since World War II, we have used three social indicators of em-
ployment discrimination: relative occupational status, relative unemployment rate, and relative income. Two of these indicators, relative income and relative unemployment, have remained nearly constant during the period. The period after World War II has seen a massive influx of younger minorities and of women of all ages into the labor force, as well as an increased tendency of older workers to postpone retirement. New employees are likely to be in lower-earning jobs, and to be delayed in advancement by the increased job retention of older workers. These factors contribute to the persistence of wage and unemployment differentials.

The third indicator, relative occupational status, gives rise to the conclusion that the law transmission system has been highly successful. One key measure of employment discrimination has been the concentration of minorities in the lower-paying "blue collar" jobs. Table 1 compares the participation rate of minority and white employees in each job category at five-year intervals beginning in 1950. The ratio figure of 100 would mean that the same percentage of the minority work force was employed in the job category as the percentage of the white work force. In 1950, for example, while 11.6% of white employees were officials and managers, only 2.5% of minority employees, were in that category, so that the ratio figure is 21.5.

The percentage of minorities in some of the higher occupational categories (professional and technical, clerical, and craftspersons) has approached the percentage of whites in these categories since 1965. At the other end of the scale, the percentage of minorities workings as unskilled laborers and in service occupations has declined significantly during the same period. Table 1 thus reflects vivid changes in the workforce between 1950 and 1980.

Table 1 also addresses the complex question of "causation" or "attribution" which may be raised whenever social or economic changes are attributed to the legal system. An argument frequently made is that factors and forces other than the legal system are primarily responsible for such results. A comparison of the movement between 1950 and 1960 with that between 1970 and 1980 shows that prior to the passage of Title VII and application of a more stringent executive order, the occupational distribution of minorities did not significantly improve. This at least shifts the burden of demonstrating that the changes are

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### Table 1
**Ratio of Minority Worker Employment to White Worker Employment.**

<table>
<thead>
<tr>
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<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Officials &amp; Managers</td>
<td>21.5</td>
<td>20.7</td>
<td>21.5</td>
<td>23.4</td>
<td>30.7</td>
<td>39.2</td>
<td>43.3</td>
</tr>
<tr>
<td>Professional &amp; Technical</td>
<td>37.5</td>
<td>35.7</td>
<td>36.7</td>
<td>52.3</td>
<td>61.5</td>
<td>73.5</td>
<td>77.0</td>
</tr>
<tr>
<td>Sales</td>
<td>17.3</td>
<td>18.8</td>
<td>22.2</td>
<td>26.7</td>
<td>31.3</td>
<td>39.1</td>
<td>42.6</td>
</tr>
<tr>
<td>Clerical</td>
<td>25.3</td>
<td>34.5</td>
<td>46.2</td>
<td>50.3</td>
<td>73.3</td>
<td>86.7</td>
<td>98.9</td>
</tr>
<tr>
<td>Craftspersons (Skilled)</td>
<td>35.0</td>
<td>36.8</td>
<td>43.0</td>
<td>49.6</td>
<td>60.0</td>
<td>65.7</td>
<td>72.2</td>
</tr>
<tr>
<td>Operatives (Semiskilled)</td>
<td>90.2</td>
<td>103.4</td>
<td>113.5</td>
<td>117.0</td>
<td>139.4</td>
<td>136.9</td>
<td>143.7</td>
</tr>
<tr>
<td>Laborers (Unskilled)</td>
<td>282.0</td>
<td>336.2</td>
<td>306.0</td>
<td>282.0</td>
<td>251.2</td>
<td>193.3</td>
<td>160.5</td>
</tr>
<tr>
<td>Services (Excluding Household)</td>
<td>233.3</td>
<td>233.3</td>
<td>213.4</td>
<td>218.3</td>
<td>194.6</td>
<td>184.9</td>
<td>176.1</td>
</tr>
</tbody>
</table>

Note: Ratio = \[ \frac{\text{percentage of minority workers in occupation}}{\text{percentage of white workers in occupation}} \times 100 \]
attributable to factors other than the legal system to those who make the argument. 65

A more fundamental flaw in any claim that factors other than law were responsible for the changes, however, is the assumption that the legal system is somehow separate from and independent of other forces operating in society. This is a false notion in a society where legislation is a reflection of public sentiment. The passage of the Civil Rights Act reflected public notions about the proper treatment of minorities in the labor force as well as the sentiment that regulated institutions were expected to act in accord with those expressed ideas. The actions thereafter taken by the myriad of persons and institutions to comply with the new standard were imbedded in individualized economic, social, and value systems. The effort to separate the force of law from these other factors in connection with millions of personnel decisions is theoretically inappropriate and practically impossible.

Census data also make feasible a determination of the extent to which minority members of the labor force have received better jobs and wages than they would have received under the occupational distributions of 1965. Table 2 compares the number of minorities who were in each standard occupational category in 1980 with the number who would have been in each such category if the minority labor force of 1980 had been distributed among the occupational categories in the same proportions in which they were distributed in 1965. Mean earnings of minority workers in each such category for 1980 are also known. 66 The difference, both in numbers of minorities in higher job categories and in the income coming to those persons, is a fair reflection of the change during this period.

The result of this analysis is that, in the year 1980 alone, 2,461,140 minority workers, or 22.6% of the 10,890,000 minority workers, were in higher-paying and higher-status jobs than would have been the case if

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65. For an analysis suggesting limits on the significance of these figures, see Westcott, Blacks in the 1970's: Did They Scale the Job Ladder? 105 MONTHLY LAB. REV. 29 (1982). Other indicia of discrimination, such as relative (minority/nonminority) unemployment rates and relative family income did not change during the 1970s. Continued high employment rates are explained by the massive baby boom among minorities from 1950-1965. See STATISTICAL ABSTRACT: 1981, supra note 64, at 25, 58, which placed greater numbers of minorities in the job-seeking category in the late 1960s, and the vast increase in female labor force participation (from 33% in 1960 to 42% in 1980; STATISTICAL ABSTRACT: 1981, supra note 64, at 390). This latter factor alone might have reduced the proportion of jobs available to minorities, if the pre-1965 employment pattern had continued. This same infusion of younger, lower paid workers also would prevent the average income of minorities, compared to whites, from reflecting improvement in minority occupational distributions.

66. Data on the occupational distribution of minorities are derived from sources supra note 64. Data on mean earnings of minorities in each occupational category are derived from sources supra note 64.
<table>
<thead>
<tr>
<th>Occupation</th>
<th>Column 1: Number of Minority Workers in Actual Distribution</th>
<th>Column 2: Number of Minority Workers in Hypothetical Distribution</th>
<th>Column 3: Difference in Number of Minority Workers (Column 1 - Column 2)</th>
<th>Column 4: Mean Wage in 1980, in dollars</th>
<th>Column 5: Difference in Mean Earnings, in dollars (Column 3 x Column 4)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Officials &amp; Managers</td>
<td>566,280</td>
<td>283,140</td>
<td>283,140</td>
<td>15,371</td>
<td>4,352,144,900</td>
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<tr>
<td>Professional &amp; Technical</td>
<td>1,383,080</td>
<td>740,520</td>
<td>642,510</td>
<td>14,554</td>
<td>9,351,090,500</td>
</tr>
<tr>
<td>Sales</td>
<td>315,810</td>
<td>206,910</td>
<td>108,900</td>
<td>7,191</td>
<td>783,099,900</td>
</tr>
<tr>
<td>Office &amp; Clerical</td>
<td>2,003,760</td>
<td>892,980</td>
<td>1,110,780</td>
<td>8,485</td>
<td>9,424,968,300</td>
</tr>
<tr>
<td>Craftspersons (Skilled)</td>
<td>1,045,440</td>
<td>729,630</td>
<td>315,810</td>
<td>12,065</td>
<td>3,811,195,000</td>
</tr>
<tr>
<td>Operatives (Semiskilled)</td>
<td>2,112,660</td>
<td>2,319,570</td>
<td>-206,910</td>
<td>9,591</td>
<td>-1,984,473,800</td>
</tr>
<tr>
<td>Laborers (Unskilled)</td>
<td>751,410</td>
<td>1,383,030</td>
<td>-631,620</td>
<td>6,951</td>
<td>-4,390,390,600</td>
</tr>
<tr>
<td>Service (Excluding Household)</td>
<td>2,515,590</td>
<td>3,452,130</td>
<td>-936,540</td>
<td>6,064</td>
<td>-5,679,178,500</td>
</tr>
<tr>
<td>Farm</td>
<td>196,020</td>
<td>882,090</td>
<td>-686,070</td>
<td>5,612</td>
<td>-3,850,224,800</td>
</tr>
</tbody>
</table>

the workforce had been arrayed as it was in 1965. These workers received a net increase in wages of $8,818,221,500, or nearly 9 billion dollars more than they would have received if minority workers had been distributed throughout the occupational categories in accordance with the pattern of 1965.67

The rate of pay of minorities as reported by the Census Bureau has been used in calculating mean earnings. These pay rates are generally lower than the rates of white employees. Had minority earnings in each of the job categories approximated those of whites, the dollar value of the improved occupational positions of minorities would have been correspondingly higher.

A comparison of EEOC data covering roughly fifty percent of the labor force collected on Form EEO-1 in 1966 and 1980 confirms these conclusions.68 All employers of 100 or more employees are required to report annually the racial, ethnic, and sexual composition of employees in the standard occupational categories on this form. Although the general conclusions drawn from these data parallel those of the Census Bureau, thus adding to the credibility of the EEOC data, several restrictions on the EEOC information should be recognized.


The evils of race discrimination were well known and documented prior to the passage of Title VII. The evils of sex discrimination were not so well known, at least to the male population. Thus, the first few years under Title VII involved “consciousness-raising” with respect to women’s problems. This process is reflected in the uncertain approach of the EEOC to issues such as separate help-wanted advertisements, the continued validity of state protective laws, and the treatment of pregnancy as a disability under benefits programs. Congress had to remind the courts and agencies more than once during the 1970s that sex discrimination was to be taken seriously. In 1978, for example, Congress reversed a Supreme Court decision which was based on the notion that a pregnancy disability was not “based on sex.” See General Electric Co. v. Gilbert. 429 U.S. 125 (1976). The result of this slow start with respect to sex discrimination is that issues of sexual harassment and wage discrimination are only now reaching the full level of legal and public understanding. See R. Blumrosen. Wage Discrimination, Job Segregation and Title VII of the Civil Rights Act of 1964, 12 U. Mich. J.L. Ref. 399 (1979).

Nevertheless, the impact of Title VII on women’s employment opportunities has been substantial. A comparison of the actual employment and earnings of women in 1980 with the employment and earnings expected if the occupational distribution of women has remained as it was in 1965 shows that women have substantially improved their distribution and income. Table 3 reflects the improvements.

These figures demonstrate that, of the female labor force in 1980, of 41,283,000, at least four million or ten percent are in higher pay and status jobs than would be the case had the 1965 distribution of female workers continued in effect, and that these workers had a net increase of more than 21 billion dollars over the income they would have received had that distribution remained.

68. Data discussed here are found in EEOC, EQUAL EMPLOYMENT OPPORTUNITY REPORT NO. 1, JOB PATTERNS FOR MINORITIES AND WOMEN IN PRIVATE INDUSTRY: 1966 (1968) and EEOC, JOB PATTERNS FOR MINORITIES AND WOMEN IN PRIVATE INDUSTRY: 1980 (1982).
### Table 3


<table>
<thead>
<tr>
<th>Occupation</th>
<th>Column 1: Number of Women Workers in Actual Distribution, in millions</th>
<th>Column 2: Number of Women Workers in Hypothetical Distribution, in millions</th>
<th>Column 3: Difference in Number of Women Workers, in millions (Column 1 - Column 2)</th>
<th>Column 4: Mean Wage in 1980, in dollars</th>
<th>Column 5: Difference in Mean Earnings, in billions of dollars (Column 3 x Column 4)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Officials &amp; Managers</td>
<td>2.852</td>
<td>1.836</td>
<td>1.016</td>
<td>12,389</td>
<td>12.587</td>
</tr>
<tr>
<td>Professional &amp; Technical</td>
<td>6.920</td>
<td>5.548</td>
<td>1.372</td>
<td>11,706</td>
<td>16.061</td>
</tr>
<tr>
<td>Sales</td>
<td>2.795</td>
<td>3.141</td>
<td>-.346</td>
<td>5,772</td>
<td>-1.997</td>
</tr>
<tr>
<td>Office &amp; Clerical</td>
<td>14.501</td>
<td>13.055</td>
<td>1.446</td>
<td>8,134</td>
<td>11.762</td>
</tr>
<tr>
<td>Craftsmen (Skilled)</td>
<td>.753</td>
<td>.461</td>
<td>.292</td>
<td>9,299</td>
<td>2.715</td>
</tr>
<tr>
<td>Operatives (Semiskilled)</td>
<td>4.422</td>
<td>6.364</td>
<td>-1.942</td>
<td>7,148</td>
<td>-13.881</td>
</tr>
<tr>
<td>Laborers (Unskilled)</td>
<td>.516</td>
<td>.163</td>
<td>.353</td>
<td>6,256</td>
<td>2.208</td>
</tr>
<tr>
<td>Service (Excluding Household)</td>
<td>8.039</td>
<td>9.750</td>
<td>-1.711</td>
<td>4,816</td>
<td>-8.240</td>
</tr>
</tbody>
</table>

First, because larger employers have been subject to more extensive enforcement activity, smaller employers, who are not required to file EEO-1 forms, may not have been pressed to make as much progress in EEO matters. Second, there is a six million employee difference in the reporting universe between 1966 and 1980. Finally, there is some incentive for employers to put the best face on their employment pattern, which may result in some "upgrading" of employees in assigning them to job categories.

Table 4 compares the occupational distribution of black workers reported in 1980 with the distribution which would have been observed if the patterns of 1966 had still existed. The difference between the hypothetical distribution and the 1980 actual distribution is then identified. This yields an estimate of how many more black workers were in different occupational categories in 1980 than they would have been in the 1966 distribution.

Table 4 indicates that 853,279, or 21.6% of all blacks included in the 1980 data, were employed in higher-paying and higher-status categories than would have been the case had black workers been distributed through the occupational categories in the proportions of 1966. This approaches the 22.6% figure obtained by analyzing the census data.69

III
THE RISE AND FALL OF "SOUTHERN JURISPRUDENCE" OF TITLE VII

A. The Emergence of "Southern Jurisprudence"

To understand the role of courts in the transmission of the policies of equal employment opportunity, one must examine the corpus of Title VII law which underlay the steel settlement and its progeny. This body of Title VII law was developed in important part by the circuit courts of appeal for the southern states, and confirmed in a crucial aspect by the Supreme Court in Griggs v. Duke Power Co.70 The key holdings in Griggs were (1) that under Title VII, employment practices which had an adverse effect on blacks were illegal unless justified by

69. Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia included 37.5% of all black employees reported (1,480,478). Of these, 355,000 or 23.9% were in improved occupational categories over the 1966 distribution.

It is perhaps a tribute to the now rejected southern jurisprudence that 355,000 of the 850,000 blacks or 41.7% with improved occupational positions in 1980 were employed in the south although only 37.5% of all black employees reported worked in those states. For additional evidence of improvement in minority opportunity, see Blumrosen, The Bottom Line Concept in Equal Employment Opportunity Law, 12 N.C. Cent. L.J. 1, 3-4 nn.8-11 (1980).

70. 401 U.S. 424 (1971).
### Table 4

**Comparison of Actual 1980 Occupational Distribution of Black Workers with Hypothetical 1980 Distribution Based on 1965 Percentages from EEO Reports.**

<table>
<thead>
<tr>
<th>Occupation</th>
<th>Column 1: Number of Black Workers in Actual Distribution</th>
<th>Column 2: Number of Black Workers in Hypothetical Distribution</th>
<th>Column 3: Difference in Number of Black Workers (Column 1 - Column 2)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Officials &amp; Managers</td>
<td>148,765</td>
<td>35,490</td>
<td>113,275</td>
</tr>
<tr>
<td>Professional</td>
<td>139,972</td>
<td>43,377</td>
<td>96,595</td>
</tr>
<tr>
<td>Technical</td>
<td>161,229</td>
<td>86,753</td>
<td>74,476</td>
</tr>
<tr>
<td>Sales</td>
<td>216,335</td>
<td>78,867</td>
<td>137,468</td>
</tr>
<tr>
<td>Office &amp; Clerical</td>
<td>603,404</td>
<td>283,920</td>
<td>319,484</td>
</tr>
<tr>
<td>Craftpersons (Skilled)</td>
<td>356,467</td>
<td>244,486</td>
<td>111,981</td>
</tr>
<tr>
<td>Operatives (Semiskilled)</td>
<td>1,115,255</td>
<td>1,324,959</td>
<td>-209,704</td>
</tr>
<tr>
<td>Laborers (Unskilled)</td>
<td>516,947</td>
<td>989,776</td>
<td>-472,829</td>
</tr>
<tr>
<td>Services</td>
<td>684,995</td>
<td>851,759</td>
<td>-166,764</td>
</tr>
</tbody>
</table>

business necessity, (2) that the “good intent” of the employer was no
defense, and (3) that the “present effects of past discrimination” consti-
tuted illegal behavior without a “new act” of discrimination.

These holdings confirmed, and thus laid a foundation for the ex-
pansion of, a series of southern courts of appeals decisions apparently
based on the assumption that a black plaintiff in a Title VII action had
probably been discriminated against. In this way, Griggs broadened
the substance of Title VII beyond previous expectations and provided
the legal foundation for the changes in employment practices which
followed.71 Numerous important decisions concerning Title VII from
circuits other than those located in the south also interpreted the statute
sympathetically. The decisions of the Fourth and Fifth Circuits, how-
ever, were particularly influential in the overall development of the
law, as reflected by extensive citation to them in the opinions of the
other circuits. The judges in the other circuits seemed to defer inform-
ally to their counterparts in the south who had intimately expe-
rienced the relationship between racial prejudice and employment
practices. The southeastern states had “open and notorious” job segre-
gation, dual lines of seniority and officially segregated school systems
which tended to assure inferior education and employment for minori-
ties. The district judges sitting in those states, with some notable excep-
tions, were unsympathetic to Title VII.72 With almost monotonous
regularity, they adopted a narrow construction of the statute and made
findings of fact in favor of defendants. Thereupon the Fourth and
Fifth Circuit Courts of Appeal wrote a remarkable chapter in the his-
tory of statutory interpretation. They created a jurisprudence of Title
VII which was calculated to simplify the attack on segregated employ-
ment systems.

A 1968 Fifth Circuit decision on a procedural point foreshadowed
the new jurisprudential approach. The issue in Oatis v. Crown
Zellerbach73 was whether the beneficiaries of Title VII were limited to
those who had filed charges with the EEOC or whether a class action
could include minorities who had not filed charges. The court con-
cluded that a Title VII suit could benefit all such minorities, basing its
decision on the premise that “[r]acial discrimination is by definition
class discrimination, and to require a multiplicity of separate, identical
charges before the EEOC, filed against the same employer, as a prereq-
usitae to relief through resort to the court would tend to frustrate our
system of justice and order.”74

71. Belton, supra note 22; Blumrosen, Strangers in Paradise: Griggs v. Duke Power Co. and
73. 398 F.2d 496 (5th Cir. 1968).
74. Id. at 499.
In a subsequent decision rejecting a plethora of procedural objections to a Title VII suit, the Fifth Circuit, in *Miller v. International Paper Co.*, discerned "beneath the legal facade, a faint hope . . . rising like a distant star over a swamp of uncertainty and perhaps despair . . . it is unthinkable that a citizen of this great country should be relegated to unremitting toil with never a glimmer of light in the midnight of it all."\(^7\)

The southern circuits proceeded to mark out in bold strokes the interpretations which would transform the "faint hope" into legal reality. In *Local 189 Papermaker v. United States*, the Fifth Circuit determined "how to reconcile equal employment opportunity today with seniority expectations based on yesterday's built in racial discrimination."\(^7^6\) The court required the employer and the union to give seniority credit to blacks for time worked in "black jobs" when they competed with whites, until they reached their "rightful place." In its opinion, the court emphasized Judge Butzner's comment in *Quarles* that "Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act,"\(^7^7\) and adopted his view that the "bona fide seniority" clause in Title VII did not protect seniority systems which had that effect.

In *Jenkins v. United Gas Corp.*, the court sustained a class action suit against a charge of mootness even though the plaintiff had been offered the job he sought: "Whether in name or not, the suit is perforce a sort of class action for fellow employees similarly situated."\(^7^8\) On this premise, the court later permitted "across the board" class actions reaching many employment practices of the employer, on the theory that the facts concerning the policies and practices of racial discrimination were the common questions required by Federal Rule 23.\(^7^9\) Furthermore, the court, in *Baxter v. Savannah Sugar Refining Corp.*,\(^8^0\) developed the bifurcated burden of proof in class actions, which permitted the general facts about discriminatory policies of the employer to be established *prior* to careful scrutiny of individual cases of discrimination. These two rulings required the district courts to determine the legality of employer discriminatory practices even though the claims of individual plaintiffs might be weak. A liberal interpretation of the attorney fee provision of Title VII supported this type of "private attor-
ney general” litigation.81

For individual cases of discrimination, the Fifth Circuit developed a presumption of discrimination upon a showing that a vacancy existed, and that the plaintiff had applied, been rejected, and was qualified for the job. After the plaintiff had made such a showing, the employer had to persuade the judge that the rejection had been for nondiscriminatory reasons.82

To insure that the district courts would apply this body of law vigorously, the court took at least three unusual actions. First, it enhanced its authority to reverse a district court by emphasizing that the clearly erroneous rule did not apply to the ultimate fact of whether discrimination had occurred.83 In this way, the court could control those district court findings of fact based on a narrow interpretation of Title VII. Second, the court decided class certification questions which district courts had erroneously neglected rather than remand to lower courts which had not carried out their obligation under Rule 23.84 Third, the court set forth the terms of a decree after reversing a district judge rather than remand to the district court.85

The knowledge of traditions of racial discrimination shaped the judges’ attempt to provide a body of substantive and procedural law that would give a “glimmer of hope” to the intended beneficiaries of Title VII. The premise that discrimination permeated employment patterns in the South lay at the heart of the line of cases discussed above.86 The way to cut through this fabric of discrimination was to simplify the plaintiff’s case while making it difficult for employers to rely on denials of discriminatory intent. These decisions helped prompt both the steel industry consent decree and the nationwide settlement between the EEOC and AT&T.


In 1977, the Supreme Court rejected the course of decision not

85. United States v. H.K. Porter, 491 F.2d 1105 (5th Cir. 1974). See also Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972).
86. See, e.g., Rowe v. General Motors Corp., 457 F.2d 348, 359 (5th Cir. 1972) (“Blacks may very well have been hindered in obtaining recommendations from their [white] foremen since there is no familiar or social association between these two groups . . . . We and others have expressed a skepticism that Black persons dependent directly on decisive recommendations from Whites can expect non-discriminatory action. . . .”).
EMPLOYMENT DISCRIMINATION

only of the Fourth and Fifth circuits but of all the circuits which had
subjected previously segregated seniority systems to judicial review.\textsuperscript{87} In \textit{International Brotherhood of Teamsters v. United States,}\textsuperscript{88} the Court held that the bona fide seniority systems exemption of Title VII protected seniority systems which perpetuated past discrimination. Concluding that Congress \textit{did} intend to exempt an otherwise "bona fide" seniority system under Title VII even if that system perpetuated pre-Act discrimination, the Court held that such a system was lawful unless it was the product of an intent to discriminate.\textsuperscript{89} Teamsters was extended in 1982 in \textit{Patterson v. American Tobacco Co.}, which held that


\textsuperscript{88} 431 U.S. 324 (1977).

\textsuperscript{89} This intention had not been proved in pre-Teamsters cases because the issue did not appear open. The southern jurisprudence had concluded that the "bona fide seniority" provision did not insulate a seniority system which perpetuated pre-Act discrimination. Therefore, plaintiffs simply produced either statistical or "live" proof of pre-Act discrimination (which was not seriously controverted), demonstrated how the system carried forward the effect of pre-Act discrimination (which was easy), and prevailed. Thus, it could be argued that the pre-Teamsters discrimination cases on which the steel industry settlement was based may have been wrongly decided. The Supreme Court suggested in Teamsters that these cases might have been properly decided the same way even if evidence of discriminatory intent had been required. If the issue of pre-Act intent had been litigated, the outcome would have been predictable. The lines of progression in the steel industry in the south had been structured around racially segregated job assignments. In the Whitfield case, for example, the lines of progression had been openly established and maintained by race. This situation is as well known and as well documented as the discrimination in the construction industry of which the Supreme Court took judicial notice in Weber.

The Teamsters decision also stated that a seniority system which had its genesis in discrimination, or was based on an intent to discriminate, would not be "bona fide." \textit{See} James v. Stockham Valves & Fittings Co., 559 F.2d 310 (5th Cir. 1977); EEOC Interpretive Memorandum, 46 U.S.L.W. 2028 (July 12, 1977). Since many employers and unions administered pre-Act systems without change well into the post-Act period, few cases would depend solely on the "perpetuation of pre-Act discrimination." In the steel industry cases, \textit{deliberate} pre-Act discrimination was either established or taken for granted. Had proof been thought necessary, it would have been—and sometimes was—presented. \textit{See} James v. Stockham Valves & Fittings Co., 559 F.2d 310 (5th Cir. 1977). Ironically, the facts in Whitfield show a seniority system which "had its genesis" in discrimination in the separation of line 1 and line 2 jobs. Were it necessary to litigate the question of discrimination in the steel industry in light of Teamsters, the result would confirm the wisdom of the unions and company in taking the actions discussed above. \textit{See supra} note 35 and accompanying text. \textit{See also} United Steelworkers v. Weber, 443 U.S. 193, 198 n.1 (1979) (where the court took judicial notice of discrimination in the construction industry).

Furthermore, because the hesitancy of management and labor to change their practices noted at the beginning of this paper, few employers in the south actually ended discriminatory patterns by July 2, 1965. Many, as the steel industry illustration shows, continued these patterns into the late 1960s or the 1970s. Thus, post-Act intentional discrimination could normally be established if it were necessary to do so.
even a seniority system which reflects post-Act job segregation does not violate Title VII unless it is the result of "discriminatory intent." 

The Court has repudiated many of the procedural as well as substantive aspects of the southern jurisprudence. The Supreme Court first cast doubt on the Fifth Circuit's practice of allowing widespread "across-the-board" class actions in 1977, then made its reservations explicit five years later in General Telephone Co. v. Falcon, requiring specificity in pleading individual harm and its connection with class harm as a predicate for Title VII class actions. The court expressly rejected the presumption that a minority plaintiff was an appropriate representative of minority applicants and employees.

In 1981, the Supreme Court rejected the Fifth Circuit rule requiring an employer in an individual discrimination case to bear the burden of persuasion that there existed a nondiscriminatory reason for an action adverse to a minority plaintiff who had established a prima facie case. The burden of persuasion in employment discrimination cases was held never to shift from the employee.

Finally, the Supreme Court in 1982 rejected the special supervising power over district courts which the Fifth Circuit had exercised.

Thus, by 1982, the Supreme Court had rejected much of the edifice of Title VII law which the southern courts of appeals had developed around an underlying assumption that a black person denied employment had probably been discriminated against along with all other black prospective employees. Despite its repudiation, this line of cases left its mark on American society, including the south, because of the operation of the law transmission system and the regulated community's of the values represented by this body of law, which the steel industry settlement exemplifies.

C. The Impact of Southern Jurisprudence

The strong medicine of southern jurisprudence profoundly affected southern discrimination in employment. The steel industry settlement had signaled the acceptance by employers and unions of the responsibility for abolishing job segregation. This task had been accomplished to a significant extent before the Supreme Court repudiated much of the southern jurisprudence. Half of the work force in 1964, the year Congress passed the Civil Rights Act, had retired by 1980, and

90. 456 U.S. 63 (1982).
91. See supra note 84 and accompanying text.
92. See supra note 79 and accompanying text.
93. See supra note 82 and accompanying text.
94. See supra note 83 and accompanying text.
half of the work force had entered a system which by the mid-1970s no longer reflected the segregation of the past.

The Supreme Court's rejection of the southern jurisprudence does not mean that the practices condemned by Congress are now lawful. It means that the illegality must now be proved; it can no longer be presumed. One consequence of the narrowing of legal rules may be an increase in litigation as employers are emboldened not to settle. If Title VII has in fact altered workplace behavior in the last fifteen years, employers may prevail in a greater number of cases because the extent of discrimination has been reduced.

A distinction between first and second generation Title VII cases is important in understanding this conclusion. The first generation cases were based on situations which existed in the late 1960s, where many employment or promotion standards carried forward the previous pattern of explicit segregation and discrimination. Southern judges who had lived with the traditional practices and were committed to implementing the national policy requiring its change deemed proof of the discriminatory legacy unnecessary.

But second generation cases are different. The facts of those cases arose in the 1970s, after employers and unions had implemented changes. The discrimination pattern is no longer so clear. The precise practices which were easily identified as discriminatory in first generation cases are now difficult—or impossible—to locate.95 Plaintiffs' cases are therefore less substantial, and less winnable under any standard.

Furthermore, the statistics concerning minority employment demonstrate that the presumption of discrimination which southern jurisprudence developed is no longer as valid a social fact in either the south or the nation as a whole. The sharp alteration in patterns of employment over the past fifteen years has made statistically vivid what personal impression suggests. Judges are bound to sense this change just as they once recognized the pervasive quality of discrimination.

Both general statistics collected by the Bureau of Labor Statistics and specialized data collected under Title VII's reporting requirements converge to describe the change in occupational distribution of blacks and other minorities between 1965 and 1980. The occupational distribution figures are important because they deal with place, role, and status. These statistics persuasively demonstrate that the pattern of occupational stratification has been shattered. In 1980, some 2,461,000

minority employees, or 22.6% of the minority employees, were in significantly higher occupations than those in which they would have been if the occupational distribution of 1965 had been current. This fact alone demonstrates how much weaker any presumption of discrimination must have been in 1980 than it was in 1965.

In assessing the Supreme Court decisions cutting back on the southern jurisprudence, one should recognize how significant a part of the underlying evil which Title VII addressed has been corrected. The system of seniority in basic steel, the heavy industry of Alabama, and the paper industry, which so heavily dominates Mississippi, has been changed. The pattern of employment in the textile industry in the Carolinas has changed. The segregated systems in the petrochemicals industry in Texas and in Louisiana have been altered.

At this point, the questions become political. How much of a change is "enough" is a basic value judgment which cannot be made through rational processes alone. Considering the improvement in assessing whether the Supreme Court should have continued the presumption of discrimination of the southern jurisprudence is not akin to supporting the repeal of the civil rights law, or the abandonment of affirmative action. The statistics presented suggest that the Court rightly rejected the web of rules which assumed that blacks were usually the victims of discrimination. The changes reflected in the statistics are sufficient to vitiate the assumption that minorities are being "kept in their place" because of race in the way that they were in 1965. Therefore, demanding proof beyond that which the southern jurisprudence required is appropriate.

Even those who accept the assertion that more than two million minority workers were in improved circumstances in 1980 when measured by 1965 standards, however, may not view this difference as indicating a major improvement in employment opportunity. Minorities are still predominantly employed in the lower blue collar jobs. High unemployment rates and lower income levels persist, and in some instances have worsened. In addition, there is a serious concern that once the Supreme Court has narrowed the scope of Title VII, a resurgence of discrimination could resegregate the work force. This will probably not happen. Any attempt to change back to a segregated system would of course create new acts of intentional discrimination. But there is a deeper reason why the work force will not be resegregated. This lies in the widespread recognition that the "southern pattern" of discrimination was wrong. The new generations of workers, managers and union officials will not seek to revive the old system. The work of

legal rules developed by the southern circuits and the passing of the generations have destroyed it.

Some evidence that the changes wrought by the southern jurisprudence are deeply imbedded in our industrial relations system can be gleaned from EEO-1 statistics for the nine southern states in the period after the 1977 Teamsters decision. The problem of pre-Act discrimination in seniority systems was most prominent in the southern states with open and notorious segregation practices in the pre-Act period. Therefore, backsliding was an obvious risk in that area. Any significant regression would have manifested itself in two ways: first, the pace of infusion of blacks into white collar and craft jobs would have slowed, and second, the proportion of blacks in the traditional laborer and operative jobs would have increased.

A comparison of the occupational distribution of black workers in 1978 and in 1980 with the distribution which would have occurred if the pattern of 1966 were in place suggests that, in the south, the pattern of discrimination did not reappear in the three years immediately following the Teamsters decision. In 1978, 310,000 of 1,386,676 black workers (22.3%) were “better off” in terms of occupational categories than they would have been under the 1966 distribution. In 1980, 355,000 of the 1,480,478 black workers (23.9%) were better off than under the 1966 distribution. These figures indicate that the pattern of continued inclusion of blacks which began under the regime of southern jurisprudence persisted at least to the end of the decade.

The Weber case has helped preserve the pattern. It protects those employers and unions who followed the course marked by the Fifth Circuit decisions. Kaiser Aluminum and the steelworkers responded to the southern jurisprudence in the mid-1970s when they adopted the programs that were involved in Weber. The concept of permissible affirmative action in Weber means that the benefits to minorities and women resulting from the southern jurisprudence may be maintained.

Having allowed the southern circuits to dismantle the fabric of segregation which gave rise to Title VII, the Supreme Court decisions which limit the manner in which the law controls employment decisions may have expressed a deeper wisdom: that the law should withdraw when the industrial relations system operates fairly without such extensive judicial or administrative supervision.

97. See supra text accompanying note 69.
98. Data for 1978 are from 1 EEOC 1978 REPORT, MINORITIES AND WOMEN IN PRIVATE INDUSTRY (1980). Data for 1980 are from sources identified supra note 68.
99. To the same effect is United Air Lines v. Evans, 431 U.S. 553 (1977), which requires the timely filing of a complaint to challenge a seniority system. In the reverse discrimination context, Evans precludes as untimely most attacks on the new seniority system in the steel industry.
This conclusion does not offend democratic principles. The key decision of Congress in passing Title VII was to repose authority not in a regulatory agency, but in the federal courts *sitting in equity*. The confidence of Congress in the flexibility of equity justifies the course of decision described here. The need for the massive judicial intervention of southern jurisprudence had substantially lessened by 1982. The success of the law in changing the patterns of discrimination was a sufficient reason for the Supreme Court to reject the presumption of discrimination which underlay the edifice of southern jurisprudence. Given the vast changes in the south—and in the nation—since 1965, this presumption, having done its work, should be put aside. The strong medicine of the southern jurisprudence should be replaced by more traditional, if less potent, ways of the law.100

**CONCLUSION**

The development of Title VII law may be analyzed from the perspective of the final authority of the Supreme Court to interpret federal statutes. From this viewpoint, the “law” is that developed by the Supreme Court; the jurisprudence of the southern circuits was wrong and may be dismissed. Then analysts can debate whether the Supreme Court decisions properly reflected legislative intent.

This approach to an assessment of the law is inadequate in three respects. First, it ignores the immense social and economic consequences of the jurisprudence of the southern circuits in shattering the fabric of discrimination. Second, it ignores the relationship between this social change and the presumption of discrimination which the Supreme Court rejected in 1982. Third, it ignores the problem of the individual employer caught in the change from the broad southern jurisprudence to the narrower role of law assigned by the Supreme Court. Formal legal doctrine would hold the employer *only* to the Supreme Court standard. Equity and *Weber* will protect the employer who acted in reliance on the law as developed in the courts of appeal.

The *Griggs* decision of 1971 provided authoritative support for the southern jurisprudence which was the bedrock on which the steel industry settlement was founded. This settlement illustrated that unions and employers would give up the “southern way” in employment without the “massive resistance” of school segregation cases. In *Weber*, the Court protected employers and unions which adopted “voluntary” programs in response to the southern jurisprudence. That the Court has now disavowed the southern jurisprudence does not detract from that body of law’s achievement. Rather, the Court’s approach emphasizes

that the southern jurisprudence did properly improve the employment prospects of minorities who would have been confined to low-paying jobs. It precipitated the abandonment of many discriminatory industrial relations practices. Once these practices had ended, the role of law was properly confined to narrower channels.

In the 1980s, the Reagan Administration verbally opposed "goals and timetables" and severely cut back on the number of employees available, particularly in the Labor Department, to enforce anti-discrimination laws. As of the end of 1983, however, the administration had not repealed either the goals and timetables regulations or the affirmative action guidelines of the EEOC which supported this approach; and toward the end of the year, the EEOC and General Motors (GM) entered into a major settlement in which GM agreed to adopt goals and timetables. Thus, while the reduction in administration pressures for affirmative action may have some negative impact on informal decisionmaking by employers, the apparatus of the goals and timetables program remains intact.

Only after the fact will we know whether there has been a slowdown in affirmative action attributable to these administrative developments or to Court decisions narrowing the sweep of the statutes. If that should happen, then the Court, pursuing the same policies described above, could swing back to a more vigorous approach to implementation of Title VII. The Court is no less able than a regulatory agency to adapt to changing circumstances and can alter its subsidiary rules within the ambit of permissible constructions of a statute.

The halcyon days of Title VII may be over, however, for reasons beyond the control of either the Court or any particular presidential administration. The extraordinary pace of improvement in occupational status may have slowed because the worst of the pattern of discrimination has been shattered by the law transmission system.

The other two indicators of discrimination, wage disparities and relative unemployment rates, did not improve between 1965 and 1980. The wage disparity issue is only now being litigated under Title VII. The continued high minority unemployment rate may require an approach that is beyond Title VII, such as a reduction in the normal work week. While Title VII may still be a viable instrument to challenge

wage disparities, I believe that other approaches, such as amending the Fair Labor Standards Act, are necessary to address persistently high levels of minority unemployment.

The concept of a law transmission system is central to understanding not only how legal norms are transmuted into social reality, but also where the limits of such norms lie and when alternative methods of achieving social goals should be considered. In our complex and rapidly changing society, the realization of social ideals cannot be channeled for long into any single legal form.106

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