EMPLOYMENT DISCRIMINATION: RIGHTFUL PLACE SENIORITY UNDER TITLE VII AND SECTION 1981: THE TEAMSTERS ROADBLOCK MAY BE ONLY A DETOUR

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The Development of Rightful Place Seniority Under the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 as amended by the Equal Opportunity Employment Act of 1972, broadly prohibits discrimination in employment by employers engaged in interstate commerce on the basis of race, color, religion, sex or national origin. Pushed through the Congress in the wake of John Kennedy's assassination, the Act has served a major role in attempts to eliminate discrimination in the work place. The Act was modeled on earlier state fair employment laws, and the Federal Fair Employment Practices Commission created by President Roosevelt. As originally passed it envisioned conciliation as the major tool in persuading employers to cease practicing discriminatory policies. Its extensive amendment in 1972 reflected both the growing realization that employment discrimination was not a problem easily remedied through conciliation and education, and the recognition that the accomplishments of the Act were largely the result of extensive litigation encouraged by liberal and creative construction of the new law by the courts. More recent decisions, however, are providing major roadblocks to the continued effectiveness of all civil rights litigation.


2. Between 1941 and 1963 hundreds of bills seeking federal fair employment practice legislation were introduced in the House and Senate. Most died in committee; a few reached the Senate floor and died in filibuster. See Vaas, Title VII: Legislative History, 7 B.C. INDUS. & COM. L. REV. 431, at 431 & n.2 (1966).
5. Id.
By its terms, Title VII prohibits discrimination in "compensation, terms, conditions, or privileges of employment," and discriminatory treatment "which would deprive or tend to deprive any individual of employment opportunities," subject to a few narrow exceptions. One exception, however, is highly significant. It exempts from the operations of the Act any "bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate . . . ." Since seniority is the essential element of job security the meaning of this statutory exemption is of intense interest to both minority workers and the American labor movement. To the extent that a rift has appeared between the labor movement and the civil rights movement, the problem of seniority in a depressed economy has been a major cause. Although white workers may see seniority as a synonym for security, for many minority workers it is a system that locks in an entire generation to the discrimination of the past.

Because of the great speed with which the final version of the bill was pushed through Congress, and the unusual manner by which it made its way to the Senate and House floors, the problem of sorting out the status of seniority rights under Title VII must be accomplished without the aid of a clarifying legislative intent. This problem has been addressed at great length in other essays, and will be only briefly reviewed here.

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pregnancy are gender-neutral); Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977)(limiting the basis on which housing discrimination may be found); Washington v. Davis, 426 U.S. 229 (1976)(requiring proof of discriminatory intent in cases brought under the fourteenth amendment)(see text accompanying notes 61-62 infra).

12. See text accompanying notes 23-35 infra.
13. See generally Vaas, supra note 2.
Section 703(h), the provision of the Act including the seniority exemption, was not included in the initial civil rights bill passed by the House in 1963. Nowhere in the House Report on the bill is the question of seniority even mentioned. Instead of being routed to a Senate committee, where it was expected that the bill would die, the bill was submitted to the Senate floor directly. A substitute bill was then drafted by a bipartisan committee headed by Senators Mansfield and Dirksen. The new bill appeared after extensive Senate debates, including some discussion of the problem of seniority, and included the current provision of section 703(h). This bill was passed, as amended, on June 19, 1964, and was then passed, unchanged by the House, on July 2, 1964. It was signed into law by President Johnson on the same day.

The Senate debate produced a total of three documents addressing the issue of seniority. However, since the bill was never reported out of a Senate committee, it lacked a committee report, which is usually the most helpful form of legislative history. The three documents that do exist are: (1) an interpretive memorandum drafted by Senators Clark and Case responding to critics of the bill; (2) a Justice Department statement on seniority, including a series of questions posed by Senator Dirksen and answered by Senator Clark; and (3) a statement by Senator Humphrey, who spoke in support of the bill after the appearance of section 703(h), stating that he believed the section did not alter the general mean-

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17. 110 CONG. REC. 14,511 (1964).
18. Id. at 15,897.
19. The portion of the memorandum relating to seniority reads:
Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer’s obligation would be simply to fill future vacancies on a non-discriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier. (However, where waiting lists for employment or training are, prior to the effective date of the title, maintained on a discriminatory basis, the use of such lists after the title takes effect may be held an unlawful subterfuge to accomplish discrimination.)
110 CONG. REC. 7213 (1964).
These three documents constitute the total legislative history of the seniority exemption of section 703(h).

In an early attempt both to fill the vacuum of legislative intent and suggest the substantive and remedial scope of section 703(h), the Harvard Law Review published a note that has become a classic in the field of employment discrimination law. The Note began by reviewing the manner in which seniority systems operate, concentrating on the areas where discriminatory abuse is likely. The most common and troubling system, the author asserted, was that arrangement by which minorities and whites are hired into entirely separate departments, often performing entirely different kinds of jobs, under separate "departmental" seniority systems. Transfer between the black and white departments was forbidden. If with the coming of integration, transfer was permitted, it could be generally accomplished only with a concomitant loss of seniority. With seniority typically forming the basis for layoffs, promotion, and job bidding procedures, minority workers of long tenure transferring into a formerly white job would lose their accumulated seniority and begin again at the bottom of a ladder, stripped of job security. The effect of this system was that white workers with less total time with an employer would be senior in status to the now transferring minority workers, whose only alternative to transfer would be to continue working in a less desirable, lower paying job. However, as the author noted, such systems would often be difficult to condemn as discriminatory because they may also serve legitimate business purposes.

Having identified the problem the Note then analyzed what remedies could be available under Title VII given the statutory exclusion of section 703(h):

First, does this rule immunize from Title VII proceedings discriminatory action adversely affecting Negro employees taken after the title's effective date but pursuant to a seniority clause agreed to before that date? Second, can the seniority rights or expectations of white employees "acquired" under a discriminatory system prior to the title's effective date be modified in Title VII proceedings in order to eliminate discriminatory disparities in the competitive status of whites and Negroes from the future operation of the system?

24. Id. at 1266-67.
The author concluded that the answer to the first question was “no” and to the second was a qualified “yes.” To do so, the author considered the legislative history of section 703(h) and noted that:

Congress did not, at any point in the debate or related hearings, directly confront the problem of seniority systems in which discrimination had subordinated Negro workers to whites of equal or lesser tenure. As the Clark-Case memorandum indicates, proponents of Title VII concentrated on refuting charges that the bill authorized “reverse discrimination” and that it would interfere with the normal operation of non-discriminatory seniority systems.6

Thus, remedies that “do not accelerate the advancement of Negroes simply because of their race . . . [but] prefer them only if they are senior employees who have been denied advancement which, absent discrimination, their length of service would have secured for them,”7 do not conflict with the congressional purpose in including the statutory exemption.

The Note suggested three possible models for seniority discrimination remedies, calling them “freedom now,” “rightful place,” and “status quo.” The freedom now model called for the victims of discrimination to be awarded full competitive seniority back to the date the discrimination began and allowed them the right to “bump” white workers out of their positions in order to immediately remedy the discrimination. On the other hand, the status quo model called for completely protecting the seniority rights earned by white workers by denying the victims of discrimination any seniority relief, endorsing the present discriminatory effects of pre-Act discrimination as immune under the Act, and leaving the achievement of racial equity in the workplace for another generation. Somewhere between the two extreme models lay the rightful place solution. It called for granting the victims of discrimination full competitive seniority but without bumping privileges. Under this model minority workers would move up the seniority ladder as vacancies occurred, eventually reaching their rightful place without forcing any white worker to drop on that ladder. The Note took the position that either the freedom now or the rightful place remedies should be available under the Act.

Shortly after publication of the Harvard Note the question first reached the federal courts in the case of Quarles v. Philip Morris,

25. Id. at 1271-72.
26. Id. at 1272.
The Philip Morris Company, a large producer of cigarettes and other tobacco products, had maintained a racially-segregated operation in its Richmond, Virginia plants. Negotiating with racially-segregated locals of the Tobacco Workers International Union, the company's seniority plan created departmental seniority for the segregated departments. Until 1966, only blacks were permitted to work in the green leaf stemmery and prefabrication departments while the warehouse and fabrication departments were almost entirely white.

In 1966, the company began hiring large numbers of black workers into the more desirable warehouse and fabrication departments. However, they retained the departmental seniority system. Thus, a black prefabrication or green leaf stemmery worker wishing to transfer into one of the more desirable departments was forced to forfeit all accumulated seniority to begin as an entry level employee in the department from which he or she had previously been excluded on racial grounds. Seniority that could have been accrued but for the departmental discrimination was lost, and the older black workers were “locked in” to the system of racial segregation.

Judge Butzner considered the central issue in the case to be whether “present consequences of past discrimination [are] covered by the act.” Carefully reviewing the scant legislative history available for statutory interpretation, he concluded that “[t]he act does not condone present differences that are the result of intention to discriminate before the effective date of the act, although such a provision could have been included in the act had Congress so intended.” In considering the statutory exemption for seniority systems Judge Butzner emphasized the limitation of the exclusion to bona fide seniority systems: “[A] departmental seniority system that has its genesis in racial discrimination is not a bona fide seniority system.”

Turning to the problem of the remedy, the court ordered that those black workers hired before 1966 be allowed to transfer into the fabrication and warehouse departments, bidding for jobs as vacancies appeared, without losing any accumulated seniority. In so doing, the court rejected both the status quo and freedom now reme-

28. Id. at 510.
29. Id. at 517-18.
30. Id. at 517.
31. The court had determined that the company had stopped discriminating in its hiring practices in 1968. Id. at 508.
dies and put the first of many stamps of judicial approval on the rightful place doctrine. The Quarles opinion has since become a hallmark of Title VII litigation.

If Quarles marked the judicial birthdate of rightful place seniority, it was only another year until its coming of age, in Local 189, United Papermakers and Paperworkers v. United States. The employer, Crown Zellerbach, ran a paper mill in Bogalusa, Louisiana which effectively separated seniority systems for minority and white workers through racially-segregated departments. The plan provided that all promotions be governed by seniority, accumulated on a job-by-job basis as the workers progressed along a job line. The rationale of the system was that each job provided the necessary training and experience for the next promotion. These lines were either all-white or all-black, and, with only a few exceptions, the lowest jobs on the white lines paid more than the top jobs on the black lines.

In 1966, the company and union agreed to eliminate the system of segregation by merging the departments, tacking the black lines at the bottom of the white lines. Since the best black jobs paid less than the entry level white jobs, the tacking resulted in single lines beginning with the lowest paying jobs and progressing to those that paid most, a facially reasonable system. The result for black workers, however, was the appearance of integration without the reality. Black workers with substantial accumulated seniority within the mill were forced to move very slowly through the job line due to the slow appearance of vacancies. As the court explained, "[W]hen Negroes bid for jobs above the former entry level of white lines of progression, Crown in effect penalized them for not having what it denied them on account of their race until a short time ago—'white' job seniority."

Judge Wisdom, for the court, first considered the question of whether the present effects of pre-Act discrimination could be reached by the Act. He relied heavily on both Quarles and the Harvard Note in reaching his conclusion that "[t]he Act should be construed to prohibit the future awarding of vacant jobs on the basis of a seniority system that 'locks in' prior racial classification." Turning to the statutory exemption, he endorsed the Quarles view that "one characteristic of a bona fide seniority system must be

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33. Id. at 986.
34. Id. at 988.
lack of discrimination."

In considering the question of remedy, Judge Wisdom discussed the freedom now, rightful place, and status quo remedies and concluded, as Judge Butzner did in Quarles, that the bumping of white workers under the freedom now approach was not demanded by, and the status quo approach would violate, the Act. The court ordered: (1) that mill seniority be substituted for job seniority; (2) that the job lines be altered by eliminating the requirement of working in any one job before progressing to the next unless the company could show that experience in the former job was a valid skills prerequisite for performance in the latter; (3) that minimum periods required in one job before promotion to the next be either eliminated or individually justified as necessary for training purposes; and (4) that promotions be permitted only into job vacancies—that is, that incumbent white workers not be bumped from their jobs.

The rightful place seniority doctrine established by Quarles and Local 189 was adopted without dissent by every circuit court considering the question. In at least twenty-seven decisions in six circuits, seniority systems that perpetuated the effects of past discrimination were either found unlawful and ordered remedied by the

35. Id. (quoting Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 517 (1968)).
36. The Second, Fourth, Fifth, Sixth, Eighth, and Ninth Circuits. See note 37 infra.
imposition of rightful place seniority, or remedied in light of the rightful place doctrine. Cases were brought based on race, sex, and national origin discrimination in many different quarters of commerce and industry and in every section of the country.

The Quarles decision had spoken of seniority systems having their "genesis in racial discrimination" and could have been narrowly read to include only those systems where the intent in creating the seniority system was to discriminate against minorities. But Quarles did not lend itself to such a narrow reading. The essence of Philip Morris' violation was in segregating their black and white workers, giving the white workers the more desirable jobs; the seniority plan merely reflected, and after 1966 perpetuated, that racial discrimination. In applying the Quarles rightful place doctrine, the courts did not fall into the trap of a narrow reading which emphasized intent, but rather looked to see if the system in effect perpetuated past discrimination. Following Quarles, discriminatory effect was all that courts required to find the system unlawful.

An especially fertile ground for rightful place seniority relief has been the trucking industry. At least ten of the circuit cases in which such relief was ordered were trucking cases. No less than thirty such cases have been brought in the federal district courts.

The standard pattern in the industry is to separate drivers who operate within a single community (city drivers) from those who drive on the longer runs between cities (over the road, or line drivers). Each group is placed in a separate bargaining unit and accu-
mulates non-transferable bargaining unit seniority. The bargaining unit seniority is used both for layoff purposes and to determine precedence in bidding on "runs" (regular routes within or between cities). A driver with a significant amount of accumulated seniority has not only more job security but the opportunity to choose the best runs.

Throughout the industry, both whites and minorities had been hired for many years as city drivers, but only whites had been hired as line drivers. The line jobs, while often demanding grueling hours and working conditions, paid more, had a certain romantic attraction, and were generally considered more desirable. While some workers, given the choice, might prefer the city jobs to the line jobs, others undoubtedly would not. That choice was never given to minority workers.

When trucking firms began, haltingly, to hire minorities as line drivers, incumbent minority city drivers were generally excluded by two policies. The first, typically but not uniformly found in the industry, was a policy against any transfers from city jobs to line jobs. An incumbent city driver would have to quit his or her job, losing all seniority, and hope to be hired back by the company as an entry level line driver. The second, which was uniform throughout the industry, was the policy of separate bargaining unit seniority for layoff and bidding purposes. This meant that an incumbent minority worker who was permitted to transfer would lose all competitive seniority and begin as a line driver with little job security and the least desirable runs.

*International Brotherhood of Teamsters v. United States:*

**The Roadblock ERECTED**

Unsurprisingly, a trucking industry case, *International Brotherhood of Teamsters v. United States,* was the first rightful place-departmental seniority case to reach the Supreme Court. The Fifth

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43. See generally cases cited at notes 6 & 41 supra.
45. See, e.g., any "Country & Western" radio station.
46. See, e.g., Sagers v. Yellow Freight Sys., Inc., 524 F.2d 721 (5th Cir. 1974).
48. Teamsters was not, however, the first seniority case or the first Title VII trucking case to reach the Supreme Court. The previous term the Court decided Franks v. Bowman Transp. Co., 424 U.S. 747 (1976), a case involving a claim for retroactive seniority for minorities who were victims of post-Act refusal-to-hire discrimination. The Court permitted retroactive seniority to the date of discrimination or the effective date of the Act, whichever was later. On the date that Teamsters was decided, the Court also decided another trucking
Circuit, affirming in part and reversing in part the district court, found that the employer, T.I.M.E.-D.C., Inc., had discriminated against minorities in its hiring practices for line drivers and held that the seniority provisions prohibiting transfer of seniority for layoff and job bidding purposes violated Title VII under the Quarles continuing-effects-of-past-discrimination doctrine. The court ordered that minority city drivers who wished to transfer to line jobs be given their rightful place seniority—in this case, competitive seniority back to the first date on which there was a vacancy for line drivers and for which the minority driver was qualified, or would have been qualified but for the company's discrimination.

In a shocking decision whose tremors will be felt for years to come by minority and women workers, the Supreme Court reversed the Fifth Circuit's decision. Justice Stewart, writing for the seven-member majority, found that the United States had shown that the company had discriminated in its hiring practices but held that the seniority agreement between T.I.M.E.-D.C., Inc. and the Teamsters Union was immune from attack under Title VII.

The Court's analysis began with findings welcomed by civil rights advocates. The company had argued, despite evidence offered by individual employees that they had been victims of discrimination, that the finding of discrimination in hiring was based on statistical proof, which was prohibited by section 703(j) of the Act. The United States had introduced an impressive array of statistical evidence showing a gross pattern of discrimination. In rejecting the company's argument the Court held that the purpose of section 703(j) was not to prevent the use of statistical proof but, rather, to

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52. The Act provides:

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


53. See 431 U.S. at 337-38 & n.17.
prevent courts from ordering that a work force be racially balanced without proof of discrimination.

Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that non-discriminatory hiring practices will in time result in a work force more or less representative of the population in the community from which employees are hired. Evidence of longlasting and gross disparity between the composition of a work force and that of the general population thus may be significant even though § 703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population. As the Court noted, its endorsement of statistical proof marked no departure from previous decisions. Nonetheless, in a period in which new and higher barriers are constantly being created for civil rights litigants the endorsement was significant.

In its analysis of the seniority system, the Court began by analyzing the system under the “effects” test of Griggs v. Duke Power Co. Griggs, a landmark Title VII case, held that in reviewing tests given to applicants for employment, courts must look to the consequences, or effects, of the test rather than to its intent. If the impact of the test disparately harmed a complaining group, the test must either be validated as job-related or eliminated. This “disparate effects” test made it possible to attack facially-neutral practices solely on the basis of their impact on minorities or women. The Teamsters decisions endorsing the use of statistics as evidence revitalized Griggs, a decision which had come into considerable doubt due to the Court’s holding in Washington v. Davis. In Davis, a case much like Griggs, black police department applicants challenged the employment tests of the District of Columbia Police Department under the fourteenth amendment. In that case the

54. Id. at 339 n.20.
55. See cases cited at note 6 supra.
57. Id. at 432. In perhaps the most often quoted line in all employment discrimination literature, the Court in Griggs held that “Congress directed the thrust of the Act to the consequences of the employment practices, not simply the motivation.” Id. (emphasis in original).
60. Until amended in 1972, Title VII applied only to private employment.
Court held that the *Griggs* effects test was not applicable to cases brought under the fourteenth amendment.\(^{61}\) The *Teamsters* Court, however, stated in the text of the opinion that the *Griggs* test was still valid in Title VII analysis.\(^{62}\) A reading of the text alone would thus encourage the conclusion that the Court had halted the steamroller borne of *Davis* which had threatened the continuing validity of effects analysis in Title VII cases.\(^{63}\) However, a closer reading of the opinion lays waste this conclusion. In a wholly gratuitous footnote the Court states:

"Disparate treatment" such as is alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. See, e.g., Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265-266. . . . Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity . . . . Either theory may, of course, be applied to a particular set of facts.\(^{64}\)

This footnote may severely limit *Griggs* and its progeny and spell disaster for much employment discrimination litigation. It marks the first time the Court has held that the *Griggs* test does not apply in all Title VII cases, relying for authority on *Arlington Heights*, a non-Title VII case. The Court had never before suggested that in any Title VII case it was necessary, having proved discriminatory effects, to also prove discriminatory motive. Any such showing is, of course, extremely difficult.\(^{65}\)

In creating the distinction between disparate impact and dis-

\(^{61}\) 426 U.S. at 239; see text accompanying notes 130-47 infra.

\(^{62}\) 431 U.S. at 349.

\(^{63}\) Indeed, some courts have relied on the *Teamsters* text without reference to the conflict created by footnote fifteen and have narrowly construed the decision in finding a seniority system to not be bona fide. See Chrapliwy v. Uniroyal, Inc., 458 F. Supp. 252 (N.D. Ind. 1977); James v. Stockham Valves and Fittings Co., 559 F.2d 310 (5th Cir. 1977), cert. denied, 434 U.S. 1034 (1978); *But see* EEOC v. United Air Lines, 560 F.2d 224, 235-36 (7th Cir. 1977); Alexander v. International Ass'n of Machinists, 565 F.2d 1364 (6th Cir. 1977).

\(^{64}\) 431 U.S. at 335 n.15.

parate treatment the Court, paradoxically, is discouraging individual, more than class, claims under the Act. Typically, an individual claim will seek relief for the treatment of the plaintiff alone, who will introduce evidence on the treatment of his or her group merely to support the claim. Before Teamsters, the difference in treatment alone was sufficient to shift the burden to the defendant to come forth with a non-discriminatory explanation. Such an explanation could then be rebutted by a statistical showing that the protected group of which the plaintiff is a member had experienced the same treatment. After Teamsters, the plaintiff may have to make a showing of discriminatory motive in order to establish a prima facie case. Thus, these individuals may discover that despite the apparent congressional purpose, the Court is now directing the thrust of Title VII to the intent, not the consequences, of employment practices.

In class actions, on the other hand, cases typically involve claims of disparate impact rather than the treatment of any one individual. In such cases, the Court expresses that it will continue to apply the effects test. However, as the footnote itself concludes, either theory may be applied to most sets of facts. The question then, is which theory courts will find appropriate to apply. A clue may be found in the Court’s characterization of the claim in Teamsters as one alleging disparate treatment rather than impact. Since the seniority system challenged in Teamsters is facially neutral, purporting to effect all city drivers in the same manner, the case appears to be one challenging a facially-neutral practice as having a discriminatory impact. Indeed, the Court itself, in the text of the opinion, analyzes Teamsters under the Griggs test for this very reason. But it then characterizes the claim, in the footnote, as alleging disparate treatment, not impact. Thus, the question of where the line between impact and treatment analysis will be drawn is presently unanswered. However, both the tone of footnote fifteen and the manner in which its new treatment of the Act was announced give little cause for optimism among civil rights advocates.

Turning to the meaning of section 703(h), which the Court deemed an open question, the legislative history of the exemption was examined. The Court considered the Case-Clark memorandum, the Justice Department memorandum (including the

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68. Note 19 supra.
69. 110 Cong. Rec., supra note 20.
Dirksen-Case questions and answers\textsuperscript{70}, and the remarks of Senator Humphrey.\textsuperscript{71} Unlike previous courts and commentators, they found the meaning of this legislative history unambiguous:

[T]he unmistakable purpose of § 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII . . . . [T]his was the intended result even where the employer's pre-Act discrimination resulted in whites having greater existing seniority rights than Negroes. Although a seniority system inevitably tends to perpetuate the effects of pre-Act discrimination in such cases, the congressional judgment was that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act.

That conclusion is inescapable even in a case, such as this one, where the pre-Act discriminatees are incumbent employees who accumulated seniority in other bargaining units. Although there seems to be no explicit reference in the legislative history to pre-Act discriminatees already employed in less desirable jobs, there can be no rational basis for distinguishing their claims from those of persons initially denied any job but hired later with less seniority than they might have had in the absence of pre-Act discrimination.\textsuperscript{72}

Turning to the meaning of the term “bona fide” the Court rejected the previously-accepted theory that the very perpetuation of pre-Act discrimination destroyed the bona fides of a seniority plan. Without suggesting any specific procedure for testing a seniority plan, the Court held that the Teamsters plan was entirely bona fide [because] [i]t applies equally to all races and ethnic groups. To the extent that it “locks” employees into non-line-driver jobs, it does so for all. The city drivers and servicemen who are discouraged from transferring to line-driver jobs are not all Negroes or Spanish-surnamed Americans; to the contrary, the overwhelming majority are white. The placing of line drivers in a separate bargaining unit from other employees is rational, in accord with the industry practice, and consistent with NLRB precedents. It is conceded that the seniority system did not have

\begin{itemize}
  \item \textsuperscript{70} 110 Cong. Rec., supra note 21.
  \item \textsuperscript{71} 110 Cong. Rec., supra note 22.
  \item \textsuperscript{72} 431 U.S. at 352-54 (emphasis in original).
\end{itemize}
its genesis in racial discrimination, and that it was negotiated and has been maintained free from any illegal purpose.\textsuperscript{73}

The Court's conclusions suggest the application of a two-step process of analysis. First, they held, a seniority system is exempted from analysis under the \textit{Griggs} effects test either because Congress provided a special exemption for seniority systems or, alternatively, because the case was brought, or at least was analyzed by the Court, as a challenge to a practice resulting in disparate treatment, not disparate impact. Second, since it therefore comes under a less severe test, the absence of any conclusive showing of an intent to discriminate, or discriminatory motive, is enough to totally exempt the system from the reach of Title VII.

The majority's single reference to the \textit{Quarles} line of cases appears, characteristically, in a footnote. The Court noted that

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\item [concededly, the view that \textsection 703(h) does not immunize seniority systems that perpetuate the effects of prior discrimination has much support. . . . The \textit{Quarles} view has . . . enjoyed wholesale adoption in the Courts of Appeals. . . . Insofar as the result in \textit{Quarles} and in the cases that followed it depended upon findings that the seniority systems were themselves "racially discriminatory" or had their "genesis in racial discrimination," . . . the decisions can be viewed as resting upon the proposition that a seniority system that perpetuates the effects of pre-Act discrimination cannot be bona fide if an intent to discriminate entered into its very adoption.\textsuperscript{74}
\end{itemize}

The Court's willingness to condemn seniority plans established and maintained with a discriminatory intent will be of little help to most minority or female workers. As previously noted,\textsuperscript{75} despite this possible narrow reading of \textit{Quarles}, \textit{Quarles} itself and the cases following it did not rest on such a finding. Rather, they were concerned with the effects of seniority systems that, despite facial neutrality, perpetuated past discrimination. According to \textit{Quarles}, an employer engaging in discriminatory hiring policies has no need to specifically intend discrimination in the creation of a seniority plan that will perpetuate the discrimination. Such a plan will, of course, serve such a purpose, but it may easily serve rational non-discriminatory purposes as well. To establish discriminatory intent in hiring is difficult enough, but to establish it in a seniority system

\begin{itemize}
\item[73.] \textit{Id.} at 355-56 (footnote omitted).
\item[74.] \textit{Id.} at 346 n.28 (citations omitted).
\item[75.] See text accompanying notes 38-40 supra.
\end{itemize}
common in American industry may be impossible. Had such a requirement been applied in *Quarles*, it is highly doubtful that the result would have been to strike the seniority plan.76

Justice Marshall, joined by Justice Brennan, decimated the *Teamsters* majority’s opinion concerning pre-Act relief in an impassioned dissent.77 He began by pointing out that the previously unquestioned line of cases beginning with *Quarles* had been endorsed without dissent by every circuit court considering the question,78 as well as the Equal Employment Opportunity Commission79 [hereinafter EEOC] and numerous commentators.80 He carefully examined the scant available legislative history and concluded that the only clear intent of Congress in section 703(h) was the prevention of fictional seniority created to benefit minority workers merely due to minority status. He pointed out that the Congress had never addressed the problem of equalizing seniority for minority employees actually discriminated against in job placement, and who, without a seniority remedy, would be locked into the effects of the pre-Act discrimination throughout their working lives. He insisted that since the 1964 legislative history was inclusive, the Court must give a broad reading to the statute consistent with the broad congressional purpose of eradicating employment discrimination. “I am aware of nothing in the legislative history of the 1964 Civil Rights Act to suggest that if Congress had focused on this fact it nonetheless would have decided to write off an entire generation of minority group employees.”81

Turning to the position of the EEOC, Marshall argued that the agency was entitled to great deference from the courts in its interpretation of the statute it is charged with enforcing.82

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76. In some cases, such intent, although difficult to show, will be established. In such cases, the rightful place remedy will still be available. See James v. Stockham Valves and Fittings Co., 559 F.2d 310 (5th Cir. 1977), cert. denied, 434 U.S. 1034 (1978).
77. 431 U.S. at 377.
78. Id. at 378 n.2, 379 n.3.
79. Id. at 380 n.4.
80. Id. at 380 n.5.
81. Id. at 388.
82. The Court’s treatment of EEOC guidelines has been incredibly erratic in recent years, and suggests perhaps more than any other single factor in this area the “result” orientation of the current Court. In *Griggs*, in discussing the EEOC’s guidelines for test validation, the Court held that the agency’s guidelines were “entitled to great deference.” 401 U.S. at 433-34. The Court reiterated this view in Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975), another testing case. But in *General Electric Co. v. Gilbert*, 429 U.S. 125, 140-45 (1976), the Court refused to follow EEOC guidelines establishing that discrimination on the basis of pregnancy was sex discrimination, in part because the guidelines on pregnancy
Finally, Marshall raised what may be the most serious flaw in a remarkably unprincipled decision, the majority's failure to consider the legislative history of the 1972 amendments to Title VII. As the Court had explained in *Franks v. Bowman Transportation Co., Inc.*, the Congress, in amending the Act, had taken the position that "'[i]n any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.'" The *Franks* Court cited this legislative history in defense of the use of rightful place seniority as a remedy for post-Act discriminatory hiring, despite the existence of section 703(h). The report is equally persuasive on the question of pre-Act discrimination, given the then-present case law as developed by the courts. Moreover, the House Report cites with approval the *Quarles* and *Local 189* cases, and specifically approves of the "perpetuation principle" as applied to seniority systems. Thus, the intent of the Congress in 1972 is unquestionable on this issue.

The *Teamsters* majority responded to this problem in its analysis by noting without explanation that the 1972 history "is itself susceptible of different readings." Furthermore, they continued, "[t]he views of members of a later Congress, concerning different sections of Title VII, enacted after this litigation was commenced, are entitled to little if any weight. It is the intent of the Congress that enacted § 703(h) in 1964 . . . that controls." Yet it is hardly clear, as the Court's reference to the timing of the litigation suggests, that a case brought under a rightful place theory after 1972 would be subjected to a different analysis by the majority. Thus are

were promulgated eight years after the passage of the Act and contradicted an earlier EEOC view. In *Teamsters* the Court declined to follow the position that had been held by the EEOC at least since 1969. 431 U.S. at 380 & n.4 (Marshall, J., concurring in part and dissenting in part). However, in the more recent Title VII case of *Dothard v. Rawlinson*, 433 U.S. 321 (1977), the Court cited with approval those EEOC guidelines on sex discrimination which supported the Court's holding. Id. at 334 n.19.

84. Id. at 764-65 n.21 (emphasis added by the Court) (quoting from section-by-section analysis of H.R. 1746, accompanying the Equal Opportunity Employment Act of 1972—Conference Report, 118 Cong. Rec. 7166 (1972)).
87. 431 U.S. at 354 n.39.
88. Id.
the views of Congress, endorsing the broad construction of its earlier actions by the courts, summarily dismissed. The majority's determination here, concluded Marshall, was "contrary to both principle and precedent."\(^8\)

For many women and minorities,\(^9\) the rejection of rightful place seniority in *Teamsters* has sealed their fate.\(^10\) Workers who have accumulated significant seniority in undesirable jobs now have a tremendous incentive for inertia. Their seniority and resulting job security make their otherwise undesirable jobs much more valuable, and make better-paying more-fulfilling jobs correspondingly unattainable. They have been locked in to a history of racism and sexism; despite the fact that they may have many years in the work force ahead of them, the 1964 Civil Rights Act came too late to help them. In a few instances, minority or women workers may persuade their unions to renegotiate their seniority plans. Despite the Court's reference to seniority rights as "vested" rights, such renegotiation is always possible,\(^11\) but in unions dominated by white men who have gained, even if inadvertently, from past discrimination, it is unlikely.

**THE BIRTH, HIBERNATION, AND RE-AWAKENING OF THE CIVIL RIGHTS ACT OF 1866**

Another possibility for minority workers, though not for women, may arguably be found in the use of 42 U.S.C. § 1981 (1976)\(^12\) de-
rived from the Civil Rights Act of 1866. The 1866 Act was passed pursuant to the enabling clause of the thirteenth amendment. It was enacted in order to create true equality for the newly-freed former slaves by providing that all citizens have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Enacted by a Congress dominated by the reconstruction period Radical Republicans, the bill was seen at the time of its passage as a broad sweeping act intended to "break down all discrimination between black men and white men." From the floor of the House, Representative Thayer of Pennsylvania, a key sponsor, stated:

[W]hen I voted for the amendment to abolish slavery . . . I did not suppose that I was offering . . . a mere paper guarantee. And

punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.


94. Civil Rights Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27 (1868).
95. The amendment reads in full:
Section 1. Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
Section 2. Congress shall have the power to enforce this article by appropriate legislation.
U.S. CONST. amend. XIII.
96. Civil Rights Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27 (1868).
when I voted for the second section of the amendment, I felt . . . certain that I had . . . given to Congress ability to protect . . . the rights which the first section gave . . . .

The bill which now engages the attention of the House has for its object to carry out and guaranty the reality of that great measure. It is to give to it practical effect and force. It is to prevent that great measure from remaining a dead letter upon the constitutional page of this country . . . . The events of the last four years . . . have changed [a] large class of people . . . from a condition of slavery to that of freedom. The practical question now to be decided is whether they shall be in fact freemen. It is whether they shall have the benefit of this great charter of liberty given to them by the American people. 

Although the 1866 Act was seen by its drafters as a broad charter, it was narrowly construed by the courts early in its history and remained essentially useless in its first 100 years. In the *Slaughter-House Cases*, decided just six years after passage of the Act, the Supreme Court first interpreted the scope of the thirteenth and fourteenth amendments. The case was brought by Louisiana butchers challenging the constitutionality of a state-created slaughterhouse monopoly. The Court gave the fourteenth amendment the narrowest possible interpretation, holding that it was passed to ensure the effectiveness of the thirteenth amendment's bar on slavery and involuntary servitude. That ban, in turn, was narrowly construed as well, the term "servitude" being interpreted only to extend to institutions functionally equivalent to slavery. In a dissenting opinion, Justice Field pointed in vain to the broad character of the 1866 Civil Rights Act as proof that the Act and the thirteenth amendment were intended to apply to a much broader concept of servitude.

While the *Slaughter-House Cases* failed to note the possible breadth of the 1866 Act, the *Civil Rights Cases*, decided in 1883, truly began to narrow the Act. The cases were challenges under a later civil rights act to segregation in public accommodations. The Court held that the thirteenth amendment could only apply to slavery directly, not access to accommodations, public conveyances, or places of public amusement. Cases where state action is present, the

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98. *Id.* at 1151 (quoted in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 433-34 (1968)) (emphasis added by the Court).
100. *Id.* at 69.
101. *Id.* at 90-93 (Field, J., dissenting).
102. 109 U.S. 3 (1883).
majority determined, may be covered by the fourteenth amendment, but not the thirteenth. In referring to the 1866 Act the Court held that it was merely "corrective," only prohibiting state laws that impair those rights guaranteed therein to black citizens. The Court suggested that if the Act were considered under the thirteenth amendment alone it might be forced to find it unconstitutional. The Court, however, declined to do so, holding instead that since the Act was re-enacted after passage of the fourteenth amendment, and was merely corrective in scope, it was legitimate as interpreted under the fourteenth amendment.

Finally, in Hodges v. United States, decided in 1906, the Court determined that federal courts were without jurisdiction in criminal actions brought under the 1866 Act by the United States on behalf of black citizens threatened out of employment contracts by white vigilantes. This decision was premised upon a finding that under the thirteenth amendment there was federal jurisdiction only in cases of actual slavery. With the federal courts unavailable to vindicate rights under the Act, Representative Thayer had the answer to his "practical question": the thirteenth amendment was, after all, to remain "a dead letter upon the constitutional page of this country."

For over sixty years, from 1906 until 1968, the 1866 Civil Rights Act lay dormant, apparently dead. Its long hibernation has now ended, and a new spring of civil rights litigation under the Act is at hand. Its awakening came with the Supreme Court's opinion in Jones v. Alfred H. Mayer Co., holding that 42 U.S.C. § 1982 provided a private remedy for housing discrimination.

Jones, rebuked in his attempts to purchase housing outside of St. Louis, had brought an action against the Mayer Company, a real estate developer, under section 1982. The action was brought be-
fore the passage of the 1968 Fair Housing Act.\footnote{111} The district court\footnote{112} dismissed Jones' complaint because it failed to prove state action. The Eighth Circuit affirmed.\footnote{113} On certiorari, the Supreme Court reversed. The Court first considered in great detail the legislative history of section one of the 1866 Act, the source of both sections 1982 and 1981. The Court concluded that the Congress in 1866 had clearly intended in enacting the statute to create a private enforcement mechanism for the thirteenth amendment.

The Court next considered whether the Civil Rights Act of 1968 acted as a statutory repeal of the 1866 Act.\footnote{114} This argument was rejected for several reasons. First, the Court noted that the 1866 and 1968 Acts were not co-extensive; the 1866 Act, for example, applied only to race or color, while the 1968 Act also applied to religion, sex, and national origin.\footnote{115} The 1968 Act also provided for administrative remedies not available under the 1866 Act. Finally, the 1866 Act was, in some substantive respects, both broader and narrower than the 1968 Act.\footnote{116}

The Court's second reason was based on the knowledge of Congress at the time the 1968 Act was passed. The Jones case was by then in the lower federal courts and its existence had been acknowledged in the Congress, where, noting the 1866 Act's possible application to housing discrimination, it had considered and rejected making the 1968 legislation the sole remedy for such discrimination.\footnote{117} The Court thus concluded that section 1982 provided a distinct and separate remedy for private acts of housing discrimination.

Finally, the Court turned to the constitutionality of the 1866 Act. Re-examining the thirteenth amendment, which, it held, gives Congress the power to pass all laws necessary and proper for abolishing all badges and incidents of slavery,\footnote{118} the Court held that the amendment went far beyond simply abolishing involuntary servi-
tude. They found that private racial discrimination was clearly and correctly seen by the Congress of 1866 as a badge and incident of slavery. No limitation of state action had been put on either the thirteenth amendment or the 1866 Act, and thus, the Act was within the congressional powers granted by the thirteenth amendment. There was no need to re-enact it under the fourteenth amendment, limiting it to state action, to assure its constitutionality. The Hodges requirement of actual slavery, and the Hurd v. Hodge requirement of governmental action were thus overruled, and the 1866 Act reborn.

While Jones clearly opened the door to section 1982 suits, it was at first unclear whether it would be extended to section 1981 claims. The most likely area for section 1981 cases to be brought was employment discrimination, where blacks have been frequently denied the right to make employment contracts, formal or informal, on the same basis as whites. But employment discrimination was already broadly covered by Title VII, and a much stronger case for a finding of implied statutory repeal could be argued as Congress had no knowledge of the possible use of the 1866 Act when it enacted Title VII in 1964. Nevertheless, Title VII was subject to significant restrictions, both procedural and jurisdictional, that would not have to be met under section 1981. And, since the Court had concentrated on such differences in Jones, and had noted that sections 1981 and 1982 were of a mutual source, civil rights advocates had cause for optimism.

After findings in several of the circuits that section 1981 was available in employment discrimination cases as a separate statutory prohibition granting separate remedies, the question reached

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120. Section 706, 42 U.S.C. § 2000e-5 (1976), requires persons alleging discrimination to file a charge with the EEOC within 180 days of the action upon which the complaint is based. It further provides for deferral of the claim to state fair employment agencies. The commission then has a minimum of 180 days to investigate the complaint and attempt conciliation before issuing permission to the complaining party to bring suit. Once permission is given, the complainant has just 90 days to file suit.

121. Title VII applies, for example, only to employers with more than 15 employees. Section 701(b), 42 U.S.C. § 2000e(b) (1976).

the Supreme Court in Johnson v. Railway Express Agency, Inc.\textsuperscript{123} In Johnson, the plaintiff, following the procedures of Title VII, filed a charge of discrimination with the EEOC, where the claim sat stalled for over three years. After receiving his "right to sue letter" from the agency, a necessary prerequisite to suit under Title VII,\textsuperscript{124} he filed an action in federal court claiming violations of both Title VII and section 1981. The defendant, R.E.A., Inc., argued that the section 1981 action was time barred under the applicable state statute of limitations.\textsuperscript{125}

The Court first considered the question of whether Johnson had any claim under section 1981. Reviewing the standards used in Jones, the Court determined that such a claim did exist. A crucial consideration of the Court was the legislative history of the 1972 amendments to Title VII. Considering the congressional report that approved of the Quarles line of cases on rightful place seniority, which the Court later refused to recognize in Teamsters,\textsuperscript{126} the majority noted the House committee's statement that "the remedies available to the individual under Title VII are co-extensive with the individual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and that the two procedures augment each other and are not mutually exclusive."\textsuperscript{127} The Court also noted that during the 1972 debates an amendment was introduced and rejected that would have made Title VII the exclusive federal remedy for employment discrimination.\textsuperscript{128}

The Court thus found that "the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent."\textsuperscript{129} Since the actions were independent, the Court went on to hold that filing a charge with the EEOC did not toll the statute of limitations under section 1981, resulting in the dismissal of Johnson's section 1981 claim.

\textsuperscript{123} 421 U.S. 454 (1975).
\textsuperscript{125} Because § 1981 provides no limitations period, the comparable state period is used. In this case the Tennessee limitations period for actions brought under federal civil rights statutes was one year. Tenn. Code Ann. § 28-304 (Supp. 1974).
\textsuperscript{126} See text accompanying notes 87-89 supra.
\textsuperscript{128} Id. See 118 Cong. Rec. 3371-73 (1972).
\textsuperscript{129} 421 U.S. at 461.
The Application of the 1866 Act to Rightful Place Seniority: The Roadblock May Be Only a Detour

The Supreme Court's decision in Johnson providing that Title VII and section 1981 are separate, distinct, and independent claims, strongly suggests that the Court's decision in Teamsters does not shut the door on a rightful place seniority remedy in a section 1981 action. There are, however, three serious obstacles to such a conclusion. The first is the question of what test should be used to find discrimination under section 1981, the intent test of Davis and footnote fifteen of Teamsters, or the effects test of Griggs. The second is the question presented by United Airlines v. Evans, and its effect on the statute of limitations in section 1981 rightful place seniority actions. The third is the lingering problem of whether Title VII in some manner limits the scope of section 1981 actions; that is, whether the 1964 Act is a partial implied statutory repeal of the 1866 Act. While each of these questions creates serious detours in an attempt to bypass Teamsters, none constitutes a total roadblock.

Concerning the first question, of what test to apply in finding discrimination, if the traditional Title VII effects test of Griggs is applied, Quarles and its progeny are alive and well under section 1981. But if the intent test of Davis is applied, a seniority plan to be scrutinized under section 1981 would have to satisfy the new strict intent test demanded in the seniority area by Teamsters.

Until the Court's decision in Davis it had been assumed that the standard for finding employment discrimination was the same under the fourteenth amendment, section 1981, and Title VII. In Davis, black applicants to the District of Columbia Police Department brought suit under the fourteenth amendment, section 1981, and a local fair employment act, claiming that application tests administered by the city discriminated against blacks. The district court concluded that since the city had engaged in affirmative recruiting for black candidates and had been successful in recruiting large numbers of such applicants, and since the test administered was shown to be a valid indicator of police training school performance, the test was valid. The circuit court, applying the Griggs test, reversed, finding an inadequate relationship between the test's

131. Title VII had not yet been amended to apply to government employees.
indication of training class performance and job requirements, and
that the effect of the test was to exclude a much higher proportion
of blacks than whites. On certiorari, the Supreme Court\textsuperscript{134} reversed
the court of appeals and affirmed the district court judgment. The
Court first considered the question of whether the \textit{Griggs} test was
applicable to a claim brought under the fourteenth amendment.
"We have never," the Court began,

held that the constitutional standard for adjudicating claims of
invidious racial discrimination is identical to the standards
applicable under Title VII, and we decline to do so today.

The central purpose of the Equal Protection Clause of the
Fourteenth Amendment is the prevention of official conduct dis-
criminating on the basis of race. . . . But our cases have not
embraced the proposition that a law or other official act, without
regard to whether it reflects a racially discriminatory purpose, is
unconstitutional \textit{solely} because it has a racially disproportionate
impact.\textsuperscript{135}

After reviewing prior constitutional cases that may have suggested
that the Court had embraced such a proposition, the Court turned
to the standard under Title VII. "Under Title VII, Congress pro-
vided that when hiring and promotion practices disqualifying sub-
stantially disproportionate numbers of blacks are challenged, dis-
criminatory purpose need not be proved . . . ."\textsuperscript{136}

The Court then turned to the question of whether the test was
valid under the statutory standards. At this point in the Court's
analysis it could have extended the new constitutional rule to sec-
tion 1981.\textsuperscript{137} Instead, it noted that the district court had assumed
that the \textit{Griggs} standard applied and under that standard had
found that the test was valid. The Court held that the court of
appeals' conclusion that the test was not valid under \textit{Griggs} was
erroneous, and affirmed the district court.

While the Court's conclusion in \textit{Davis} could be the basis of a
possible barrier to a \textit{Griggs} disparate-impact analysis, it clearly
does not reject such an analysis in a section 1981 claim. At most, it
presents an open question.

Since \textit{Davis}, several district courts have concluded that section
1981 claims must be decided under the fourteenth amendment, not

\textsuperscript{134} Washington v. Davis, 426 U.S. 229 (1976).
\textsuperscript{135} Id. at 239 (emphasis in original).
\textsuperscript{136} Id. at 246-47.
\textsuperscript{137} In both \textit{Davis} and \textit{Teamsters} the complaints stated claims under § 1981 but the
courts throughout based their rulings on other statutes.
the Title VII standard. In Johnson v. Hoffman, a black man who was refused enlistment into the army on the basis of a regulation excluding persons who had had "[f]requent encounters with law enforcement agencies" challenged the regulation under section 1981 as well as several other statutes. On the section 1981 claim the court held:

Title 42 U.S.C. § 1981 is based upon section 1 of the 1866 Civil Rights Act which was passed pursuant to the Thirteenth Amendment. . . . Congress, however, incorporated the 1866 Act into the Fourteenth Amendment and the 1870 Civil Rights Act based thereon. . . . Under these circumstances, the Court must conclude that claims under § 1981 parallel claims under the Fourteenth Amendment. Since the conduct complained of herein is not prohibited by the Fourteenth Amendment, Washington v. Davis, supra, the Court must conclude that it is not prohibited by § 1981.

This conclusion is clearly in error. The court may have been correct had it held section 1981 inapplicable to the federal government as an employer. But in finding that the 1866 Act was incorporated into the fourteenth amendment the court repeated the error made by the Supreme Court in Hurd v. Hodge and repudiated in Jones. The logical conclusion of this holding would be that since the fourteenth amendment applies only to state action, section 1981 is likewise limited. This is clearly wrong. On the other hand, in Johnson v. Perini the District Court for the District of Columbia held that in a section 1981 action claiming disparate impact there was no need to show intent. The court cited, among other authorities, Teamsters for this proposition.

This view has now been adopted by the D.C. Circuit and the Ninth Circuit but in different contexts. However, in analyzing the problem here, the Court’s express reasons in Davis, in refusing to

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139. Id. at 491 (quoting Army Reg. 40-501, ¶ 2-34(a)).
140. Id. at 494.
142. 334 U.S. 24 (1948).
146. Davis v. County of Los Angeles, 566 F.2d 1334 (9th Cir. 1977), cert. granted, 98 S. Ct. 3087 (1978)(No. 77-1553).
extend the *Griggs* test to the fourteenth amendment generally, help in illustrating why the *Griggs* test should continue to be applicable in section 1981 employment discrimination suits. The Court there expressed the fear that

[a] rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white. 147

While the result of using an effects test under the fourteenth amendment may be far reaching, this is not true of using such a test under section 1981. Rather, in the context of employment discrimination contested under section 1981, any expansion of liabilities is minimal. Such a result would merely create an analytical symmetry between Title VII and section 1981 for the purpose of determining whether certain acts constitute employment discrimination. Only in those few areas of employment discrimination not covered by Title VII, such as bona fide seniority plans and employers with fewer than fifteen employees, would there be any expansion at all.

Moreover, the Court in *Davis* attributed the more liberal effects test to the intent of the Congress in 1964. As previously noted, the intent of the 1866 Congress was at least as broad and liberal as the intent of the 1964 Congress. Although an admittedly close question, the process used by the Court in limiting the *Griggs* test to Title VII in *Davis* gives much greater support to the view that that test is equally applicable to employment discrimination cases brought under section 1981.

A related problem is raised by footnote fifteen in the *Teamsters* decision. Without footnote fifteen *Teamsters* would have clearly stood for the proposition that the *Griggs* effects test is the Title VII test except in those areas where Congress, by creating a statutory exemption, intended to create a greater burden in proving discrimination under the Act. If this is the intended holding of *Teamsters*, then the use of section 1981 to bring identical claims is clearly open. Under the effects test the seniority plan in *Teamsters*, because of the employer's pre-1965 but post-1866 discrimination against minorities, had a continuing disparate effect on those minority group

147. 426 U.S. at 248.
members who were denied the opportunity to work as line drivers. The maintenance of two bargaining units, one for white line drivers and one for white and minority city drivers, clearly violated Title VII were it not for section 703(h). Since no such exemption exists under section 1981, the system is in violation of that act and should be invalidated by the court. The proper remedy would be the rightful place remedy of Quarles.

However, footnote fifteen’s characterization of the claim in Teamsters as one involving disparate treatment rather than disparate impact, indicates that the intent test may have to be applied. If this characterization is compelled, the result under section 1981 would be the same as under Title VII. However, there are at least two reasons why courts should not so hold. The first, recognized in the concluding sentence of the footnote, is that either theory may be applied to a particular set of facts. Although the anomaly raised by the footnote probably will not be satisfied until the Court clarifies its meaning at some future point, the fairest assumption is that plaintiffs will be held to one standard or the other depending on what they attempt to prove; if they attempt to show that discrimination took place absent a showing that there was a disparate impact, they must prove discriminatory intent. If, however, the plaintiffs claim and show that a procedure or policy does have a disparate effect, such intent need not be proven. Certainly, such a showing is consistent with the rightful place departmental seniority problem.

Additionally, the Court’s determination that the claim in Teamsters was one demanding intent rather than effects analysis may have been influenced less by the theory of the claim than by the fact that the Court had already determined that section 703(h) created a greater barrier to proving discrimination. As such, the characterization in the note may have been merely tautological.

If an effects test is proper in a section 1981 claim, a second barrier in a Teamsters type situation is created by United Airlines, Inc. v. Evans. In Evans, decided the same day as Teamsters, the Supreme Court first considered the question of when a seniority system’s effects could constitute a continuing violation of Title VII. Carolyn Evans, a United flight attendant, was forced to resign pursuant to a company regulation when she married in 1968. After her resignation the rule was found to violate Title VII and was

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changed, but Evans was not a party to that lawsuit. In 1972 she successfully sought re-employment with United but was hired as a new employee. She requested and was denied her past accumulated seniority, which governed bidding for flights, and brought suit under Title VII. While acknowledging that the rule under which she was forced to resign was a violation of Title VII, the Court refused to hold that the effects of that unlawful act on her seniority constituted a continuing violation of the Act. The Court explained that:

Respondent is correct in pointing out that the seniority system gives present effect to a past act of discrimination. But United was entitled to treat that past act as lawful after respondent failed to file a charge of discrimination within the 90 days then allowed by § 706(d). A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. . . . [I]t is merely an unfortunate event in history which has no present legal consequences.

This opinion would seem to doom any rightful place seniority case based on pre-Act discrimination that has not already been filed, since the limitations period under Title VII has long since passed for any such action. The same would presumably be true under section 1981, since discrimination, be it continuing or not, is generally defined in the same manner under each act, and by now, the limitations period in almost all states under this statute must also have passed. However, once again it is necessary to look to the footnotes to comprehend the full meaning of the Court's opinion. Footnote ten of the opinion reads: "[t]his case does not involve any claim by respondent that United's seniority system deterred her from asserting any right granted by Title VII. It does not present the question raised in the so-called departmental seniority cases. See, e.g., Quarles v. Philip Morris, Inc." Thus, the Court appears to be holding that in those cases where a discriminatory decision to fire, or, arguably a discriminatory hiring decision resulting in a total failure to hire was made, the victim

150. 431 U.S. at 554-55.
151. The Court has since held that when an employer's pregnancy leave policy includes a loss of all accumulated seniority for employees who are forced upon pregnancy to take such a leave, the loss of seniority for time actually worked does constitute a violation of Title VII. Nashville Gas Co. v. Satty, 434 U.S. 136 (1977).
152. 431 U.S. at 558.
153. See note 120 supra.
154. See note 125 supra.
155. 431 U.S. at 558 n.10.
must file a charge within 180 days or lose his or her rights. But when a discriminatory hiring decision resulting in discriminatory job placement occurs, the violation is a continuing one. While such a distinction may seem inexplicable, especially given the Court's treatment of the discriminatory hiring decision in *Franks v. Bowman Transportation Co.*, it does not appear to create a new limitations problem for departmental-rightful place seniority claims brought under section 1981.

The *Evans* limitation of the continuing violation doctrine will surely, given its potential effects and obscure meaning, give rise to extensive litigation. Viewed as a seniority case, it can be read very broadly to prohibit relating back to earlier discriminatory decisions, which the Court endorsed in *Franks*. It is, however, probably better viewed as uniquely tied to the firing of employees, and not the seniority problem. While *Evans* sought seniority relief, the Court viewed her complaint as premised on a discharge that completely removed her from any relationship with the airline, which did not give rise to a timely complaint. The employee routed into a discriminatory job assignment, in which she or he remains, is, of course, in a very different position.

In interpreting *Evans*, the EEOC has given it the narrowest possible reading, viewing the Court's decision as holding "only that discharges are not continuing violations." As decisions begin to appear interpreting the case, some courts have endorsed the EEOC view while others have read the decision more broadly. But in the context of rightful place seniority the proper application should be clear from the Court's citation to *Quarles* as fully outside the scope of the *Evans* limitation.

Finally, the question of implied statutory repeal must be considered. Reflecting upon the history of section 1981, it is clear that the Court's decisions in both *Jones* and *Johnson* established that the 1968 and 1964 Civil Rights Acts did not act as statutory repeals of the 1866 Act. The Court in those cases relied on the standard ex-
pressed in \textit{Posadas v. National City Bank},\textsuperscript{160} which held that

\begin{quote}
the cardinal rule is that repeals by implication are not favored. Where there are two acts upon the same subject, effect should be given to both if possible. There are two well settled categories of repeals by implication—(1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest . . .\textsuperscript{161}
\end{quote}

It is clear that the 1964 Act does not cover the whole subject of the 1866 Act.\textsuperscript{162} Title VII is both broader and narrower than section 1981. Title VII's limitations on employers covered\textsuperscript{163} and its brief limitations\textsuperscript{164} period makes it unavailable to many litigants who can state a claim under section 1981. Its coverage of sex, national origin, and religious discrimination,\textsuperscript{165} and of public employees,\textsuperscript{166} make it simultaneously broader than the 1866 Act. Moreover, as the Court noted in \textit{Johnson}, Congress has made it clear that it did not intend Title VII to act as a repeal of section 1981.

What is much less apparent is whether there are irreconcilable conflicts between the two statutes. While the \textit{Posadas} rule, by its

\begin{quote}
\textsuperscript{160} 296 U.S. 497 (1936).
\textsuperscript{161}  Id. at 503.
\textsuperscript{162} \textit{But see} Preiser v. Rodriguez, 411 U.S. 475 (1973), where the Court held that 42 U.S.C. § 1983 is not available to attack state custody, in and of itself, in federal court. The Court, in an opinion by Justice Stewart, conceded that the language of § 1983 would allow such an attack but held the statute unavailable "because Congress has passed a more specific act to cover that situation." \textit{Id.} at 489. Note, however, that the Court's holding simply directed the procedures by which an admittedly available remedy was to be invoked. In the seniority problem, the very existence of the remedy is at question. Note also that the effects of \textit{Preiser} have been limited by Wolff v. McDonnell, 418 U.S. 539 (1974), where the Court held that § 1983 damage actions challenging the conditions of confinement could be brought in federal court simultaneously with state habeas corpus proceedings alleging the same constitutional violation based on the same facts but asserting a separate remedy.
\textsuperscript{163} \textit{See} note 121 \textit{supra}.
\textsuperscript{164} \textit{See} note 120 \textit{supra}.
\textsuperscript{165} \textit{See} § 703(a), 42 U.S.C. § 2000e-2(a) (1976).
\textsuperscript{166} In Brown v. General Services Administration, 425 U.S. 820 (1976), the Court held that § 1981 was not available to a federal employee alleging employment discrimination because Congress intended, by extending Title VII to federal employees in 1972 (§ 717, 42 U.S.C. § 2000e-1), to create in Title VII an exclusive remedy. The Court distinguished \textit{Johnson}, where the congressional intent was found to retain § 1981 for \textit{private} discrimination. The Court noted that the chief differences between the two were the legislative intent and the sovereign immunity problem present in suits against the government, but while \textit{Preiser} was cited on statutory repeal, \textit{see} note 162 \textit{supra}, \textit{Posadas} was not.
\end{quote}
language, would ignore such a conflict if the congressional intent to save the earlier statute was clear, the use of the 1972 legislative history upon which such an argument would rest must be approached with caution after the Teamsters decision. In Johnson, when the Court considered the problem of whether Title VII and section 1981 were in conflict, they were examining procedural differences between the requirement under Title VII of attempted EEOC conciliation and the brief limitations periods sometimes applied in section 1981 actions. The Court found no irreconcilable conflict since a person could file a charge with the EEOC and file suit under section 1981 within the appropriate limitations period. But the possible conflict in the rightful place seniority area is substantive, not procedural. The question is, when Congress created a special exemption for seniority plans under Title VII did it intend to permit these exempted plans to be subject to a finding that they were discriminatory under an earlier civil rights act?  

Before Teamsters was decided, this question, in a different context, was addressed by four circuits. Three of the four cases involved challenges to “last hired-first fired” seniority plans under both Title VII and section 1981.  

In a last hired-first fired seniority plan, layoffs are governed by a worker’s accumulated seniority. The workers with the least accumulated seniority are the first to be laid off when employment is reduced. Where employers hired few minorities or women until after the passage of the Civil Rights Act the effect of a last hired-first fired plan may be to erase any gains that women or minorities, as a group, had made in any particular part of the work force. A layoff may affect only some white males while affecting all minorities or women, or at least affect them as a group in a greater proportion than the white men. During the Vietnam war-induced boom of the sixties, when protracted layoffs were rare, the problem was largely hypothetical. But in the recession of the seventies it has become a ...
significant question, and has received much attention from commentators and in litigation. The discussion below concerns only those last hired-first fired cases which raised possible conflicts between Title VII and section 1981.

In *Waters v. Wisconsin Steel Workers*, a class of black plaintiffs charged that the employer's last hired-first fired system of layoffs violated both Title VII and section 1981 because of its disparate effect on minority workers. The minority workers, as a group, had less accumulated seniority than the white workers. The Seventh Circuit first considered the charge under Title VII. Looking to the legislative history and case law on section 703(h), the court concluded that a last hired-first fired system was bona fide and thus protected under Title VII. The court then turned to the section 1981 claim and determined that "in fashioning a substantive body of law under Section 1981 the courts should, in an effort to avoid undesirable substantive law conflicts, look to the principles of law created under Title VII for direction," and concluded that "[h]aving passed scrutiny under the substantive requirements of Title VII, the employment seniority system utilized by Wisconsin Steel is not violative of 42 U.S.C. § 1981."

In *Chance v. Board of Examiners*, the Second Circuit considered the validity of a last hired-first fired plan applied to New York City Board of Education supervisory personnel and concluded that "Congress has clearly placed its stamp of approval upon seniority systems in 42 U.S.C. § 2000e-2. Whether this Section be considered a repeal by implication of any possible contrary construction of § 1981, or simply a statement of guiding legal principles, we agree


170. 502 F.2d 1309 (7th Cir. 1974).

171. Id. at 1316.

172. Id. at 1320 n.4.

with the court in Waters . . . ."\textsuperscript{174}

In Patterson v. American Tobacco Co.,\textsuperscript{175} a departmental seniority plan had been replaced by the district court with a freedom now seniority remedy allowing black workers with greater plant-wide seniority to bump white workers from their jobs. The remedy was ordered under section 1981. In reversing the district court and ordering a rightful place plan substituted, the court relied on Waters and its concern for avoiding substantive conflicts between Title VII and section 1981.

Watkins v. United Steel Workers\textsuperscript{176} was another last hired-first fired case brought under both Title VII and section 1981. The Fifth Circuit carefully distinguished the problem of last hired-first fired systems from the departmental seniority-rightful place cases. In the former, the court explained, the plaintiffs did not allege that at some earlier date they had been refused any job or discouraged from applying for any job. They received a job when first sought and received it in a non-discriminatory manner. Thus, the court concluded, they had never been displaced from their rightful places in the seniority system. There was no discrimination to remedy. Any person who had been discriminated against could, the court ruled, bring an action for back seniority to the date of discrimination. But the plaintiffs here had no such claim. Having analyzed the problem in an entirely different manner from Waters and Chance, the Watkins court then gratuitously noted the Waters view and endorsed it.\textsuperscript{177}

If the Waters view is correct, then the Court's decision in Teamsters removes any possibility of using section 1981 to resurrect Quarles and rightful place seniority. There are, however, two critical flaws in the Waters decision. The first is the Waters court's implied conclusion that but for section 703(h) the last hired-first fired plan would have violated Title VII. As Watkins points out, the crucial problem with the last hired-first fired claim is that the plaintiffs are seeking relief for discrimination that affected others, not themselves. Essentially, the plaintiffs are claiming that since an employer at one time failed to hire women or minorities, there should be an award of fictional seniority to current women or minorities who were never affected by the employer's earlier discriminatory

\textsuperscript{174} Id. at 998.
\textsuperscript{175} 535 F.2d 257 (4th Cir. 1976), cert. denied, 429 U.S. 920 (1977).
\textsuperscript{176} 516 F.2d 41 (5th Cir. 1975).
\textsuperscript{177} Id. at 50.
acts. Even without section 703(h), this argument does not necessarily establish a violation of Title VII or section 1981. Thus, no real conflict existed at this point between the two acts.

Secondly, if a conflict had existed, as one now does after Teamsters in the rightful place arena, the desire to avoid substantive conflicts between the acts, however laudable, is insufficient to rewrite the 1866 Act. Posadas demands, even in the face of an irreconcilable conflict, a clear congressional intent to repeal the earlier Act. As one commentator has remarked, "'[i]t is difficult to conceive of Congress repealing existing civil rights legislation in the spring of 1964.'"\(^\text{178}\)

The fact that remedies may differ under different civil rights acts covering some of the same subjects, or even that actions permissible under one act be unlawful under a second, is hardly unprecedented. The Equal Pay Act of 1963\(^\text{179}\) is entirely consumed by Title VII, yet each has an independent existence and different enforcement mechanisms.\(^\text{180}\) The Railway Labor Act\(^\text{181}\) and National Labor Relations Act\(^\text{182}\) both provide a duty of fair representation enforceable against unions engaging in discrimination.\(^\text{183}\) Such a breach may also constitute a violation of Title VII, although it would not necessarily, and would be subject to different sanctions under the different acts. Union contract provisions guaranteeing non-discrimination may be enforced through grievance-arbitration procedures, with a wide array of remedies available. Yet a decision to use the arbitration procedures is not an election of remedies foreclosing suit under Title VII.\(^\text{184}\) Similarly, state fair employment laws may prohibit practices that do not violate federal law,\(^\text{185}\) and the standards for a finding of discrimination may fluctuate widely de-

\[^\text{180}\] Enforcement of the Equal Pay Act is either through private suits; administrative action or suits filed by the Secretary of Labor. 29 U.S.C. § 216 (1976).
\[^\text{183}\] See Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192 (1944); Local Union No. 12 v. NLRB, 368 F.2d 12 (5th Cir. 1966).
\[^\text{185}\] See, e.g., District of Columbia Human Rights Act of 1977, which prohibits discrimination by reason of marital status, personal appearance, sexual orientation, family responsibilities, matriculation, political affiliation, physical handicap, source of income, and place of residence or business in addition to the protections afforded by Title VII. D.C. Code Encycl. §§ 6-2201 to 2297 (West Supp. 1979).
pending on the statute under which a claim is brought. Given all of these substantive conflicts in fair employment laws, the congressional intent in passing both the 1866 and 1964 Civil Rights Acts, and the Posadas rule discouraging implied repeals, the Waters decision should not stand.

The fact that Congress exempted bona fide seniority plans under Title VII from charges of race, sex, color, religion, and national origin discrimination, thereby preventing the EEOC, in its conciliatory function, from becoming a third party at the bargaining table whenever labor and management negotiate seniority agreements, cannot be taken as a repudiation of an individual's right to redress racial discrimination, when guaranteed by an Act of Congress never repealed.

Since the Teamsters decision, the question of statutory repeal has again been addressed in several cases. In Johnson v. Ryder Truck Lines, Inc., the Fourth Circuit reconsidered a rightful place remedy that it had imposed, pre-Teamsters, on facts similar to those in the Teamsters case. In the opinion, the court vacated its Title VII decision, but considered whether the plaintiffs had a right to the same relief under section 1981. Judge Butzner, in the lead opinion, held that they did not. The problem, according to his analysis, was not whether a distinct and separate remedy was available under section 1981 (he stated that there clearly was), but whether a violation of section 1981 had occurred. Section 1981, he noted, simply provides blacks the same rights as whites. Since the seniority plan in issue was neutral in its operation, it was not violative of section 1981. Although the plaintiffs had been placed in their jobs and corresponding seniority units in a discriminatory manner, such acts had occurred more than three years before their action was brought, and were thus outside of the applicable state statute of limitations.

The opinion addresses the question of whether the seniority system's operation was itself discriminatory, thus bringing the action within the applicable limitations period, by reference to 42 U.S.C. § 1988. Waters and its progeny are mentioned, but not

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186. For example, the Equal Pay Act of 1963 requires equal pay for equal work but permits an employer to discriminate on "a differential based on any other factor other than sex. . . ." 29 U.S.C. § 206(d)(1)(iv) (1976). This language has created a much broader standard than that used under Title VII. See, e.g., Dunlop v. General Electric Co., 401 F. Supp. 1353 (W.D. Va. 1975).
187. 575 F.2d 471 (4th Cir. 1978).
188. 42 U.S.C. § 1988 (1976) provides in part: "The jurisdiction in civil . . . matters conferred on the district courts by the provisions of this Title, and of Title 'CIVIL RIGHTS' would confer on the district courts the power to hear and determine, in accordance with the provisions of this Title and Title 'CIVIL RIGHTS'
relied on in the court's opinion. Rather the opinion concludes that since section 1988 directs federal courts to enforce section 1981 in conformity with the laws of the United States, so far as suitable, the court must look to Title VII to determine the correct analysis of the section 1981 suit. And, since the Griggs continuing effects test is not applied to a rightful place seniority problem, as demanded by Teamsters, and is crucial to a finding of continuing discrimination, the acts fell outside the scope of section 1981. In a separate opinion, Judge Winters concurred with the holding that the plaintiffs were treated no differently than the whites, but rejected the use of section 1988 to arrive at the conclusion.

Judge Butzner's decision can be faulted on several grounds. Foremost is his conclusion that the Court, in Teamsters, invalidated the continuing effects doctrine as applied to seniority systems. The Teamsters decision is better read as specifically concerning the special seniority system exemption provided in Title VII. The inapplicability of Griggs is simply the result of the exemption, not its cause. Given the Court's footnote in Evans affirming Judge Butzner's decision in Quarles which held that such discrimination is continuing discrimination, the continuing operation of the seniority system should be deemed sufficient to bring its current effects under the scrutiny of section 1981. Moreover, the use of section 1988 to repeal section 1981 is subject to the same criticism as the use of Title VII to the same end. The continuing discrimination analysis was articulated in Griggs, but flows from the congressional intent in passing the Civil Rights Act. This intent, as noted, was at least as broad as in the 1866 Act as in the 1964 Act. Finally, as Judge Winter points out in his concurrence, section 1988 is appropriately addressed to the availability of remedies, not the existence of substantive rights.

The Ryder Truck Lines holding has been endorsed by the Fifth Circuit but rejected by the Third. The Third Circuit view, explained in Bolden v. Pennsylvania State Police, is that nothing found in Evans, or Teamsters, nor in the legislative history of the 1964 Acts, suggests that Congress intended in 1964 to restrict the remedial powers of the federal courts under section 1981. While the question in Bolden arose in a different setting, its conclusion is applicable here. No case in which section 1981 is found to be limited

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189. See text accompanying notes 151-52 supra.
by Title VII applies the current test for statutory repeal. None recognizes, as \textit{Bolden} does, the immense burden needed to overcome the clear intent of the 1866 Congress to afford the victims of racial discrimination the legal right to be free of the continuing effects of that discrimination through the broadest possible operation of federal law.

In conclusion, the Court's decision in \textit{Teamsters} was clearly a major step in the narrowing of the Civil Rights Act of 1964. While the Court did endorse the use of statistics in proving discrimination despite the language of section 703(j), they also took several steps that will make proof of discrimination much more difficult. The continued validity of the ruling of \textit{Griggs v. Duke Power Co.}\textsuperscript{192} may have been put into serious question, and, at best \textit{Griggs} was slightly limited and not seriously narrowed. Only future rulings clarifying the import of the majority's footnote fifteen will tell. The Court reversed a doctrine that had been previously endorsed by six of the circuit courts of appeals without a single dissent, in an area of critical importance to minority workers. In so doing, they threw new doubt into both the accepted meaning of the 1964 legislative history of the Act and the relevance to statutory interpretation of the 1972 legislative history.

Although \textit{Teamsters} tolls the death knell for \textit{Quarles}\textsuperscript{193} and its progeny under the rightful place seniority doctrine of Title VII, a statutory alternative exists for race cases in 42 U.S.C. § 1981. Section 1981, derived from the Civil Rights Act of 1866, which was passed pursuant to the thirteenth amendment, is a separate, independent, and distinct statutory prohibition of racial discrimination in employment. Its scope should not be limited by Title VII; thus the analysis of Title VII's statutory exemption for seniority systems is inapplicable in a section 1981 action. The standards for finding discrimination under the two acts, however, are identical; so it is not limited by \textit{Washington v. Davis}\textsuperscript{194}. Chief Justice Burger wrote just a few years ago, "[u]nder the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."\textsuperscript{195} While this statement may no longer apply to actions under Title VII, it continues to apply to

\textsuperscript{192} 401 U.S. 424 (1971).
\textsuperscript{194} 426 U.S. 229 (1976); see text accompanying notes 134-36 supra.
section 1981. Because of this statute, the apparent roadblock of *Teamsters* may be only a detour.