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New Definition of Seniority System Violations under Title VII: He Who Seeks Equity...

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The New Definition of Seniority System Violations Under Title VII: "He Who Seeks Equity . . ."

I. Introduction

A commonly preferred method of allocating work-related benefits focuses on the length of the worker's employment with a given employer or in a single department of the employer's operation, conferring the greater portion of benefits on the more senior employees. Seniority rules thus discriminate, but they may appear to do so on a reasonable basis and help to forestall other less acceptable discrimination. Unions apparently favor them because they limit employers' discretion. The cure, however, proves worse than the disease when seniority works against women or minorities and thereby prolongs the effects of earlier bias in hiring or promotional policies. In some cases, the award of seniority credit is a permitted remedy[1] under Title VII of the Civil Rights Act of 1964,[2] which condemns employment discrimination on the basis of race, religion, color, sex, or natonal origin.[3] But the Title VII period of limitations is brief. Currently, one has 180 days from the date of the discriminatory act, or its termination if the violation is deemed "continuing,"[4] to file charges with the Equal Employment Opportunity Commission (EEOC).[5] If after three months a discriminatory act is beyond the reach of Title VII, a seniority system may lawfully preserve the act's effects, unless a court finds that the system "continues" the wrongful conduct. Last Term, the Supreme Court rejected a form of "continuing violation" theory that had succeeded in all the circuits, holding that the mere continuity under a seniority system of bias-related disadvantages does not toll the Title VII period of limitations.[6] For a claim to lie, the seniority system must represent independent discriminatory action.[7]

1. Franks v. Bowman Transp. Corp., 424 U.S. 747, 762 (1976).
2. 42 U.S.C. §§ 2000e to 2000e-17 (1970 & Supp. V 1975).
3. 42 U.S.C. § 2000e-2 (1970).
4. *See* text accompanying notes 82-87 *infra*.
5. 42 U.S.C. § 2000e-5(e) (Supp. V 1975). *See* text accompanying notes 94-96 *infra*.
6. International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977).
7. This states the requirement broadly. *See* text accompanying note 106 *infra*.

As a consequence, many who may have benefited from the anti-discrimination policy of Title VII may forfeit what they had gained.[8] Suppose, for example, that an employer refused a person a job for discriminatory reasons, but hires him at a later date. The new employee's name is thus lower on the seniority list than it would have been had the employer not initially discriminated, and he will be laid off before other employees who were hired after his first application for a job. If the employer's initial discrimination occurred after the effective date of the Act,[9] the discriminatee could have filed EEOC charges then or as late as 180 days after entering the culprit's employ. Even though a new employee might not realize the consequences of the seniority disadavantage at the moment he or she enters the work force, the limitations period would begin to run at that time unless the seniority system itself, independently of the employer's past discriminatory hiring policy, reflects a discriminatory purpose.

The Supreme Court's winnowing out of continuing-violation claims, while ostensibly grounded in a close reading of the language and legislative history of Title VII,[10] calls in question the balance struck by the lower courts among the interests of discriminatees, other employees, unions, management, and the government. What a discriminatee gains by an award of seniority credit other employees lose; a question of reverse discrimination may thus arise. When seniority credit is appropriate, a claim for damages against the employer or union for back pay may also be appropriate; the extension of the time period for asserting a seniority challenge thus increases the employer's or union's potential liability.[11] Moreover, judicial revision of seniority lists may disturb collective bargaining relationships between unions and employers that the labor laws were designed to foster and to protect.[12] The less generous treatment of discriminatees may therefore have support in considerations of equity and the national labor policy. This Note will first deal with certain problems of interpretation posed by the Court's most recent holdings, and then assess their policy ramifications in relation to the issues just mentioned. It will appear that the new holdings are, at best, crudely responsive to such considerations.

II. Legislative and Judicial Background

Section 703(h) of Title VII provides that an employer's operation of a

8. Stacy, *Title VII Seniority Remedies in a Time of Economic Downturn*, 28 VAND. L. REV. 487 (1975); Note, *Last Hired, First Fired Seniority, Layoffs and Title VII: Questions of Liability and Remedy*, 11 COLUM. J.L. & SOC. PROB. 343 (1975).

9. July 2, 1965.

10. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 350-51 (1977).

11. The possible increase in back pay liability is, however, quite limited. *See* 42 U.S.C. § 2000e-5(g) (Supp. V 1975).

12. *See* the Taft-Hartley Act, 29 U.S.C. §§ 141-187 (1970).

seniority system is not in violation of the Act if the seniority system is bona fide and if differences in treatment of employees under the system do not result from an intention to discriminate.[13] "Bona fide" and "intention to discriminate," however, are not defined, and while the section invites the courts to shape a rule for the protection of *some* seniority systems, it offers little guidance for the task. Accordingly, courts have strained to find instruction in the legislative record.

The original House Bill included Title VII's present blanket prohibitions against discrimination in the hiring and treatment of employees, but did not specifically address seniority systems.[14] Since the purpose of a seniority system is the orderly but disparate treatment of employees, a distribution of seniority rights that treats one race, gender, or ethnic or religious group less favorably than another would seem to violate Title VII's basic prohibitions. There was nothing in the first version of the Bill considered by the House to contradict this impression. Critics brought up the possibility that already-acquired seniority rights might be destroyed,[15] but the Bill's proponents made no reply and when the Bill passed the House its language was essentially unchanged.[16]

In response to similar criticism in the Senate, Senator Clark, majority sponsor of the Bill, presented two interpretive memoranda, one prepared by the Justice Department and another by himself and Senator Case, together with written answers to questions submitted by Senator Dirksen.[17] All three documents denied that existing seniority rights would be affected. In particular, the Clark-Case memorandum stated that the effect of the Bill would be prospective and not retrospective.[18] It was after a later meeting of Senate leaders, however, that section 703(h) was added to the original bill.[19] No formal debate took place concerning the addition.[20] Senators Dirksen[21] and

13. 42 U.S.C. § 2000e-2(h) (1970) provides in pertinent part:
Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .
14. *See* H.R. REP. No. 914, 88th Cong., 1st Sess. 10 (1963).
15. *Id.* at 64-66, 71-72; 110 CONG. REC. 2726 (1964).
16. 110 CONG. REC. 2510-804 (1964).
17. *Id.* at 7207, 7212, 7216.
18. *Id.* at 7213.
19. *Id.* at 11,935-36.
20. Representative McCulloch of Ohio, who supported the Bill's passage, stated just before the final vote that it would not permit the destruction of already acquired seniority rights. *Id.* at 15,893.
21. *Id.* at 11,935-37.

Humphrey[22] stated that the changes, among which section 703(h) was only one, were intended to clarify the bill. The earlier congressional debate and comments have posed problems for courts and commentators interpreting the final version of Title VII.[23]

Quarles v. Philip Morris, Inc.,[24] an early district court decision, became the leading case on the application of Title VII to seniority systems. Philip Morris' seniority system had allocated most employment benefits according to length of employment in a particular department within the employer's plant, rather than according to length of employment with the company. Departments in the plant were originally strictly segregated along racial lines, although in the early 1960's a complex transfer system permitted small numbers of black employees to move into formerly all-white departments. Under this transfer system, only two transferees a year could retain the seniority they had accumulated in their original job assignments; others had to accept positions at the bottom of the seniority rosters of their new departments. Until 1963, black and white workers belonged to separate unions that negotiated distinctly unequal union contracts for the two groups. Some or all of these facts about Philip Morris' seniority system led the court to describe it as having "its genesis in racial discrimination."[25] Both Philip Morris and the union contended that section 703(h) immunized the seniority system from challenge under Title VII. But Judge Butzner concluded from the legislative history of the section that while Congress did not contemplate reverse discrimination, it nevertheless "did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act."[26] He held that a departmental seniority system is not "bona fide" if it had its genesis in discrimination, and found an apparently distinct reason to condemn the seniority system in that its differential treatment of black and white employees resulted from the discriminatory intention behind the company's hiring policies prior to the effective date of Title VII.[27]

Subsequently, every circuit court of appeals examining the issue agreed with the main principle of *Quarles*, that a facially neutral employment practice is not protected by section 703(h) if it preserves the effects of prior discrimination.[28] Many of the cases dealt, as *Quarles* had, with attacks on

22. *Id.* at 12,707.

23. *See generally*, Cooper & Sobol, *Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1607-14 (1969); Vaas, *Title VII: Legislative History*, 7 B.C. IND. & COM. L. REV. 431 (1966).

24. 279 F. Supp. 505 (E.D. Va. 1968).

25. *Id.* at 517.

26. *Id.* at 516.

27. *Id.* at 517-18.

28. Significantly, even courts that accepted functionally equivalent versions of the *Quarles* principle as applied to seniority systems did so on the basis of apparently different readings of

seniority systems.[29] More than a few of those cases concerned the seniority system's preservation of disadvantages resulting from pre-Act discrimina-

§ 703(h). The following peculiarities of their interpretations illustrate the diversity of views the courts have appended to the *Quarles* principle. First, the Second and Fourth Circuits spoke of a seniority system's preservation of the effects of prior discrimination as a "continuing violation" of Title VII. United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971). The *Bethlehem Steel* court stated that a seniority system's role in such a continuing violation was incompatible with the bona fides requirement for protection under § 703(h). 446 F.2d 661. Since this Second Circuit decision relied in part on *Quarles*, it appears to offer a reinterpretation of *Quarles*' statement that a seniority system with its genesis in discrimination is never bona fide: *Quarles* had not made the issue of the seniority system's bona fides turn in any way on the system's *preservation* of disadvantages although this factor was considered as a separate ground for finding a violation. Second, the seniority systems examined in *Quarles* and later circuit opinions were, without exception, facially neutral. By implication, all federal courts that had dealt with discrimination-preserving seniority systems considered facial neutrality insufficient to establish bona fides. The Eighth Circuit made this explicit, stating that such a seniority system, "although neutral on its face . . . rejuvenates the past discrimination in both fact and law regardless of present good faith." Marquez v. Omaha Dist. Sales Office, Ford Div., 440 F.2d 1157, 1160 (8th Cir. 1971). This may be taken to mean either that the employer's present good faith does not make his advancement policy bona fide or that even a bona fide policy may have consequences that result from a past intention to discriminate. Third, the cases rarely distinguish the questions of bona fides and presence of discriminatory intent; yet they must be read in the light of similarly reasoned cases that do draw the distinction. *E.g.*, United States v. N.L. Indus. Inc., 479 F.2d 354, 360-61 (8th Cir. 1973); United States v. Bethlehem Steel Corp., 446 F.2d 652, 659 (2d Cir. 1971); Marquez v. Omaha Dist. Sales Office, Ford Div., 440 F.2d 1157, 1160 (8th Cir. 1971). Last, Judge Butzner, the author of *Quarles*, intimated a different view of the *Quarles* prineiple in a later opinion, stating that a combination of discrimination in pre-Act hiring and present restrictions on transfer between formerly segregated departments "depicts a present pattern of discrimination." United States v. Chesapeake & O. Ry. Co., 471 F.2d 582, 590 (4th Cir. 1972). *See* United States v. International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 1, 438 F.2d 679, 683 (7th Cir. 1971); Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980, 995-97 (5th Cir. 1969). It is impossible to be certain whether these cases use the term "pattern" merely as a synonym for violation or as a label for a special kind of violation. All three were "pattern or practice" suits, *i.e.*, suits brought by the United States Attorney General under 42 U.S.C. § 2000e-6 (1970), so that a court might refer to the alleged offense as a "pattern of discrimination." On the other hand, the requirement that in order to maintain a claim of continuing violation plaintiff must allege a "pattern" of like wrongful conduct is common in cases not involving the "pattern or practice" elements or seniority system preservation of the effects of prior discrimination. *See* text accompanying notes 84-87 *infra*.

Despite these minor variations in rationale, the cases have formed a "unanimous body of authority" for the proposition that preservation of the effects of prior discrimination violates Title VII. Local 104, Sheet Metal Workers Int'l Ass'n v. EEOC, 439 F.2d 237, 243 (9th Cir. 1971). *See also* Heard v. Mueller Co., 464 F.2d 190, 193 (6th Cir. 1972).

29. *See, e.g.*, Acha v. Beame, 531 F.2d 648 (2d Cir. 1976); Nance v. Union Carbide Corp., 540 F.2d 718 (4th Cir. 1976); Swint v. Pullman Standard, 539 F.2d 72 (5th Cir. 1976); Gibson v. Longshoremen Local 40, 543 F.2d 1259 (9th Cir. 1976); Jersey Cent. Power & Light Co., 508 F.2d 687 (2d Cir. 1975); EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975); Rogers v. International Paper Co., 510 F.2d 1340 (8th Cir.), *vacated*, 423 U.S. 809 (1975); Waters v. Wisconsin Steel Works of Int'l Harvester Co., 502 F.2d 1309 (7th Cir. 1974); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971).

Some cases relying on *Quarles* did not deal with seniority systems. *See, e.g.*, United States v. City of Chicago, 549 F.2d 415 (7th Cir. 1977); United States v. Hayes Int'l Corp., 456 F.2d 112 (5th Cir. 1972); Contractors' Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir. 1971); United States v. International Ass'n of Bridge, Structural and Ornamental Iron Workers, Local No. 1, 438 F.2d 679 (7th Cir. 1971).

tion.[30] Even the Supreme Court's discussion of a facially neutral employment test in *Griggs v. Duke Power Co.*[31] echoed *Quarles*' observation that Congress did not intend to freeze pre-Act discriminatory patterns.

Quarles left open, however, the scope of the remedy to be applied when an employer has unlawfully discriminated in its pre-Act hiring. Specifically, courts have reached different conclusions about the propriety of remedies adjusting "company" and "departmental" seniority. The distinction between company and departmental seniority is common in collective bargaining agreements.[32] An employee's company seniority continues to accumulate with his or her service in the bargaining unit covered by the seniority system, regardless of the employee's transfers or promotions during that period of employment. Departmental seniority, on the other hand, is lost with transfer from one department to another, and the transferee begins again in the least favorable position on the seniority roster of the new department.[33] The Fifth Circuit in *Local 189, United Papermakers & Paperworkers v. United States*[34] reasoned that while it would be appropriate to award departmental seniority equal to a discriminatee's company seniority after a remedial transfer, a person hired belatedly as a result of previous hiring discrimination could not be granted "fictional" seniority credit back to the time when he would have been hired in the absence of discrimination. Suggesting that fictional seniority assignments constituted preferential treat-

30. United States v. City of Chicago, 549 F.2d 415 (7th Cir. 1977); Acha v. Beame, 531 F.2d 648 (2d Cir. 1976); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974); Bing v. Roadway Express, Inc., 485 F.2d 441 (5th Cir. 1973); United States v. Chesapeake & O. Ry. Co., 471 F.2d 582 (4th Cir. 1972); United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971); Long v. Georgia Kraft Co., 450 F.2d 557 (5th Cir. 1971); Local No. 104, Sheet Metal Workers Int'l Ass'n v. EEOC, 439 F.2d 237 (9th Cir. 1971); United States v. National Lead Co., 438 F. 2d 935 (8th Cir. 1971); Taylor v. Armco Steel Corp., 429 F.2d 498 (5th Cir. 1970); Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969); United States v. Sheet Metal Workers Int'l Ass'n, Local No. 36, 416 F.2d 123 (8th Cir. 1969).

31. 401 U.S. 424, 430 (1971).

32. Franks v. Bowman Transp. Corp., 424 U.S. 747, 766-68 (1976).

33. The practical basis for the distinction lies in the nature of the employment benefits to be allocated according to seniority. Some of these benefits, such as vacation rights and medical and pension benefits, are among those "terms and conditions of employment" that are mandatory subjects of collective bargaining under the Taft-Hartley Act. 29 U.S.C. § 158(d) (1970); *see* Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203 (1964). A union may charge an employer with the unfair labor practice of refusing to bargain in good faith if the employer fails to consider proposals concerning such subjects. The supply, if not the allocation, of other important employment benefits such as priority for promotion, immunity from layoff, priority for recall, and shift opportunities, remains exclusively within the employer's prerogative. During collective bargaining, an employer is not required to entertain union proposals concerning the amount, size, or frequency of such benefits. Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971). Seniority for these benefits is competitive in the sense that employees compete for them and the union can do nothing to increase their availability. Seniority for these scarce benefits is usually assigned on a departmental basis, while company seniority controls other benefits.

34. 416 F.2d 980 (5th Cir. 1969).

ment[35] and perhaps reverse discrimination,[36] the court repeated *Quarles'* observation that nothing in the legislative history of Title VII indicated an intention to immunize *departmental* seniority systems.[37] In the Fifth Circuit's view, the implication was that the exception embodied in section 703(h) did not apply to departmental seniority but prohibited the courts from assigning retroactive seniority as a remedy for discrimination when a discriminatee has not accumulated equivalent company seniority.[38] The Third and Seventh Circuits accepted this reasoning,[39] but the Sixth Circuit held that while the facts of each case should be carefully considered, Title VII does not prohibit such "superseniority" assignments.[40]

The United States Supreme Court first granted certiorari in a Title VII seniority case to examine the Fifth Circuit's rule against the "fictional seniority" remedy. *Franks v. Bowman Transportation Corp.*[41] presented several claims, including minority employees' claims for retroactive seniority based on allegations that the employer had refused to hire them for discriminatory reasons after Title VII was in force. The district court had refused such relief, and the Fifth Circuit affirmed.[42] Reasserting the principle of *Local 189*, it stated that once a seniority system is established, an employer's subsequent discriminatory refusal to hire does not extinguish the system's bona fides; accordingly, section 703(h) applies.[43] The Supreme Court rejected this reasoning as "clearly erroneous."[44] The Court's opinion drew attention to a distinction that had eluded the lower federal judiciary: while section 703(h) states that the operation of a seniority system under certain circumstances does not violate Title VII, it implies no restriction on section 706(g), the Title's provision on remedies.[45] In *Albemarle Paper Co.*

35. Title VII expressly stops short of requiring preferential treatment. 42 U.S.C. § 2000e-2(j) (1970).
36. 416 F.2d at 994-95.
37. *Id.*
38. *Id.* at 995.
39. Jersey Cent. Power & Light Co. v. Local 327, Elec. Workers, 508 F.2d 687 (3d Cir. 1975); Waters v. Wisconsin Steel Works of Int'l Harvester Co., 502 F.2d 1309 (7th Cir. 1974).
40. Meadows v. Ford Motor Co., 510 F.2d 939 (6th Cir. 1975).
41. 424 U.S. 747 (1976).
42. 5 Empl. Prac. Dec. 7367 (N.D. Ga. 1972), *aff'd*, 495 F.2d 398 (5th Cir. 1974), *rev'd*, 424 U.S. 747 (1976).
43. 495 F.2d at 417.
44. 424 U.S. at 757.
45. *Id.* at 758-59. 42 U.S.C. § 2000e-5(g) (Supp. V 1975) provides in pertinent part:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.

v. Moody,[46] the Court had stated that a central purpose of Title VII is to "make [victims of discrimination] whole."[47] *Franks* made it clear that remedies that include the award of retroactive seniority may therefore be appropriate for any violation, including discriminatory refusal to hire.[48]

Franks' distinction between violation and remedy is based on the fact that section 703(h) appears only to define what is and is not an unlawful employment practice with regard to seniority systems' post-Act preservation of the effects of pre-Act discrimination.[49] Because the precise issue presented in *Franks* concerned only the appropriate remedy, the effect of that definition on seniority system challenges was beyond the scope of the case, and the majority said nothing to indicate that its understanding of the provision would contradict the settled law of the lower courts on what constitutes a violation of Title VII. It was possible to suppose, as the Seventh Circuit did in *Evans v. United Air Lines, Inc.*,[50] that after *Franks* retroactive seniority relief was proper whenever a seniority system gave continuing effect to earlier discrimination, without regard to the discriminatee's time spent on the job.

That misperception underscores the importance of the partly concurring, partly dissenting views expressed by three members of the *Franks* Court.[51] In a brief opinion, Chief Justice Burger stated his opposition to competitive seniority relief in all but the most exceptional circumstances, preferring a "front pay" monetary award as more equitable. He characterized the kind of relief approved by the majority as "robbing Peter to pay Paul" in complete disregard of "the rights of innocent employees" whose seniority status would suffer by the award of seniority credit to others, and suggested that these innocent employees might have claims for equitable relief on their own behalf.[52] Justice Powell, with the concurrence of the Chief Justice and Justice Rehnquist, noted his "agreement" with the majority that section 703(h) "[insulates] an otherwise bona fide seniority system from a challenge that it amounts to a discriminatory practice because it perpetuates the effects of pre-Act discrimination."[53] He went on to stress

46. 422 U.S. 405 (1975).
47. *Id.* at 418.
48. 424 U.S. at 779.
49. *Id.* at 761.
50. 534 F.2d 1247 (7th Cir. 1976), *rev'd*, 431 U.S. 533 (1977).
51. Justice Stevens did not take part in *Franks*.
52. 424 U.S. at 780-81.
53. *Id.* at 781. This statement is considerably stronger than its counterpart in the majority opinion:

> [I]t is apparent that the thrust of [section 703(h)] is directed toward defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act.

Id. at 761.

the difference between "benefit"-type and "competitive"-type seniority relief in order to contrast their equitable significance.[54] While the employer pays for the former, other "innocent" employees pay for the latter. Accordingly, Justice Powell argued that "normal equitable considerations"[55] as well as the advice against preferential treatment in section 703(j)[56] should prevent courts that apply section 706(g) from automatically awarding competitive seniority to discriminatees who had lost the opportunity to acquire it. Instead, the courts should fashion competitive-seniority remedies for individual cases in the light of the impact on other employees.[57] The dissenting portions of the separate opinions in *Franks* foreshadowed the Supreme Court's more recent construction of section 703(h).

III. Last Term's Decisions

Although *Franks* professed to deal only with the remedial aspect of seniority system challenges under Title VII, the Court has now spoken concerning the violation aspect in two closely related decisions. While *Franks* seemed to weaken the resistance of seniority systems to the antidiscrimination law, *International Brotherhood of Teamsters v. United States*[58] and *United Air Lines, Inc. v. Evans*[59] reassure certain seniority systems of significant immunity under section 703(h).

A. The pre-Act discriminatees' seniority challenge

The cornerstone of the two decisions is the *Teamsters* holding that section 703(h) protects facially neutral seniority systems that do not provide

54. "Benefit"-type seniority refers to the use of a worker's earned seniority credits in computing his level of economic fringe benefits. Examples of such benefits are pensions, paid vacation time, and unemployment insurance. "Competitive"-type seniority refers to the use of those same earned credits in determining his right, relative to other workers, to job-related "rights" that cannot be supplied equally to any two employees. Examples range from the worker's right to keep his job while someone else is laid off, to his right to a place in the punch-out line ahead of another employee at the end of a workday. *Id.* at 782 n.1.

55. *Id.* at 785.

56. *Id.* at 792. 42 U.S.C. § 2000e-2(j) (1970) provides in pertinent part:

> Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

57. 424 U.S. at 795.

58. 431 U.S. 324 (1977).

59. 431 U.S. 553 (1977).

for adjustment in the seniority assignments of pre-Act discriminatees.[60] *Teamsters* was the consolidation of two class actions brought by the United States Attorney General on behalf of black and Spanish-surnamed individuals, charging a nationwide common carrier, T.I.M.E.-D.C., Inc., and the Teamsters, who represent a large group of that company's employees, with discriminatory employment practices.[61] Jobs with T.I.M.E.-D.C. were traditionally divided into four categories, of which "over-the-road" (OTR) or long-distance drivers were the best paid. The complaints alleged that members of the specified minorities were hired only into less desirable, lower paying positions and were not allowed to transfer into OTR positions without loss of departmental seniority, while others were hired directly into OTR positions and could accumulate departmental seniority from the beginning of their employment.[62] After a partial resolution of the dispute establishing an affirmative action recruiting program,[63] the issues remaining before the district court were whether the minority employees had suffered from unlawful employment practices, and if so, the extent and nature of the appropriate remedy.[64] The district court found that all incumbent black and Spanish-surnamed employees at T.I.M.E.-D.C. terminals with OTR operations had been victims of discrimination and ordered that they be given priority in filling OTR vacancies, subject to the prior recall rights of previously laid-off OTR employees.[65] The class of discriminatees was divided, however, into three groups according to the court's ranking of the severity of individual injuries.[66] The decree provided retroactive seniority upon transfer to only two of these groups and subordinated the transfer priority of the groups one to the other. On appeal, the Fifth Circuit found fault with this division, and construed the trial court's decree as misunderstanding the demand for proof of injury in "pattern or practice" actions

60. 431 U.S. at 353. Significantly, the Court formulated the issue as follows: "whether § 703(h) validates otherwise bona fide seniority systems that afford no constructive seniority to victims discriminated against prior to the effective date of Title VII." *Id.* at 348.

61. United States v. T.I.M.E.-D.C., Inc., 517 F.2d 299, 303 (5th Cir. 1975), *vacated and remanded sub nom.* International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977). The district court opinion is unofficially reported at 6 Empl. Prac. Dec. 6148 (N.D. Tex. 1973).

62. 517 F.2d at 307.

63. T.I.M.E.-D.C., without admitting to the discriminatory employment practices, consented to entry of a decree requiring it to establish an affirmative action recruiting program. *Id.* at 306. The partial decree is reported at 4 Empl. Prac. Dec. 6144 (N.D. Tex. 1972).

64. 517 F.2d at 307.

65. *Id.* at 309.

66. *Id.* The decree divided the affected class into the following groups: Group A consisted of 30 individuals who "produced the most convincing evidence of discrimination and harm resulting therefrom"; Group B consisted of four individuals who "were very possibly the objects of discrimination and . . . were likely harmed by such discrimination"; Group C consisted of over three hundred individuals who "either presented no evidence of discrimination against themselves and resulting harm or [were] no longer in the employ of TIME." *Id.*

under Title VII.[67] While proof of individual injury is essential for injunctive relief in an individual plaintiff's Title VII suit, the purpose of Attorney General suits under section 707(a) is to vindicate the rights of an entire class when an employer has engaged in more than occasional or sporadic acts of discrimination.[68] The court of appeals remanded with instructions that the trial court abandon the threefold division of the affected class.[69]

The Supreme Court granted certiorari. Its holding turned on an issue the parties had not briefed. Several Title VII decisions by the Court, especially *Griggs v. Duke Power Co.*, had stressed that the Act condemns not only overtly discriminatory employment practices, but also other practices that have discriminatory effects even if "neutral on their face and in intent."[70] This second category clearly includes practices that preserve the effects of past discrimination.[71] It would seem to follow, as even the Court conceded, that the seniority system challenged in *Teamsters* violated Title VII,[72] but the Court asserted that section 703(h) sets seniority systems apart[73] and concluded that mere seniority disadvantages resulting from pre-Act discrimination will not support a Title VII complaint.[74]

67. *Id.* at 319.
68. *Id.*
69. *Id.* at 321.
70. 401 U.S. 424, 431 (1971). *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 422, 425 (1975); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.14 (1973).
71. 431 U.S. at 349.
72. *See id.* at 349-50.
73. *Id.* at 350. The Clark-Case and Justice Department memoranda, which belong to the phase of Senate debate before the addition of section 703(h), stated that the bill would not make it necessary to assign recently hired blacks "special seniority rights at the expense of the white workers hired earlier," 110 CONG. REC. 7231 (1964), and that the last hired, first fired rule central to many seniority systems would not be affected, even if whites had more seniority than blacks as a result of pre-Act discrimination, *id.* at 7207. These remarks might be construed to mean only that persons refused jobs on discriminatory grounds should not be slotted into better positions on a seniority roster than others who had earned their positions there. But *Franks* implied that nothing ought to turn on whether the discrimination that lead to seniority disadvantages consisted of discriminatory job assignments or discriminatory refusal to hire. *See* text accompanying notes 41-42 *supra*.
74. 431 U.S. at 353-54. In the Court's view, the relevance of the Clark-Case and Justice Department memoranda to section 703(h) was confirmed by the comments of Senators Dirksen and Humphrey that section 703(h) was intended to resolve ambiguities of the original Bill. The Court reasoned that this precludes interpreting the final version of Title VII as increasing governmental interference with seniority systems. *Id.* at 352. The lower courts' view that a seniority system's preservation of pre-Act discrimination is unlawful would "disembowel" section 703(h). *Id.* at 353. The opinion goes on to brush aside arguments against the new reading of the section that are based on other passages from the legislative history. *Id.* at 354 n.39. The footnote refers to *Franks'* argument that since in 1972 Congress added the words "other equitable relief" to section 706(g), and since an accompanying Senate report stressed the existing "earnings gap" between white and black workers and described the correct approach as one providing a "rightful place" to former discriminatees, "rightful place seniority, implicating an employee's *future* earnings, job security, and advancement prospects, is absolutely essential to obtaining this congressionally mandated goal." (emphasis in original) 424 U.S. at 764 n.21. "Rightful place" is the phrase the Fifth Circuit coined to describe its approach to the

Up to this point, the Court had merely rejected the Government's continuing violation theory. That rejection raises the additional problem of determining whether, on the evidence, the T.I.M.E.-D.C. seniority system satisfies the requirements for section 703(h) protection in other respects. In this connection *Teamsters* makes its only concession to the views of the lower courts, deferring to *Quarles'* rule that a seniority system that has its genesis in discrimination cannot be bona fide.[75] Nevertheless, the Court concluded that since the T.I.M.E.-D.C. seniority system was neutral in operation and there was no allegation that it had its genesis in discrimination, the Government's charges on behalf of the minority employees hired before the effective date of Title VII failed to state a claim.[76]

B. The Ambiguous Link between Evans *and* Teamsters

Carolyn Evans was a flight attendant with United Air Lines. A company rule required female flight attendants to resign if they married, and after her marriage in 1968 Evans was forced to resign. United soon dropped the rule, and shortly thereafter, *Sprogis v. United Air Lines, Inc.* declared that the rule had violated Title VII.[77] Under a collective bargaining agreement executed within a year of Evans' resignation, all those in her position who had filed charges with the EEOC or grievances with the union could claim reinstatement if they wished.[78] Evans was neither a party in *Sprogis* nor a grievant. She filed EEOC charges in 1972 when, after repeated informal requests for reinstatement, United took her on as a new employee. She then brought a Title VII action for back pay and her original position on the seniority roster. The district court dismissed the claim as barred under Title VII's then ninety-day limitation of claims.[79] The Seventh Circuit at first agreed, then reversed unanimously on rehearing, under the influence of the intervening *Franks* decision.[80] The Supreme Court held that the trial court had properly dismissed the complaint.[81]

remedy aspect of seniority cases. Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980, 988 (5th Cir. 1969). The *Teamsters* footnote dismisses the argument that Congress had approved the lower courts' continuing violation approach to seniority cases on the grounds that the legislative history of the 1972 amendments "is itself susceptible of different readings," and that since the amendments did not affect section 703(h), the views of members of the later Congress should not be considered in interpreting that section. 431 U.S. at 354 n.39.

75. 431 U.S. at 346 n.28, 356.

76. *Id.* at 356.

77. 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971).

78. Evans v. United Air Lines, Inc., 534 F.2d 1247, 1248 n.2 (7th Cir. 1976), *rev'd*, 431 U.S. 553 (1977).

79. *Id.* at 1248.

80. Evans v. United Air Lines, Inc., 11 Empl. Prac. Dec. 6810 (7th Cir.), *rev'd per curiam on rehearing*, 534 F.2d 1247 (7th Cir. 1976), *rev'd*, 431 U.S. 553 (1977).

81. 431 U.S. 553 (1977).

Writing for the Court, Justice Stevens discussed Evans' claim as if it were clearly analogous to the *Teamsters* claim on behalf of pre-Act discriminatees.[82] This approach was not inevitable, nor are its implications obvious. An appreciation of the problems this approach raises must begin with some distinctions concerning what the courts have indiscriminately called "continuing violations."

Most discriminatory acts affecting employees or applicants for employment have significant continuing effects in that the discriminatees are deprived, over time, of employment benefits they would otherwise enjoy. The obvious types of ostensibly isolated managerial decisions that can cause long-term injuries are refusal to hire, discharge, and denial of transfer or promotion opportunities. Nothing in Title VII expressly precludes continuing violation claims based on these or any other form of discrimination, and indeed section 706(g) on remedies implies that continuing violation claims may be asserted.[83] It should be apparent from these examples that the operation of a seniority system need not figure in a putative continuing violation.

The significance of alleging a continuing violation is that the relatively brief period for filing charges under Title VII does not begin to run until the violation has terminated. Lower federal courts have frequently acknowledged this principle.[84] The general view has been that a discriminatory act, standing alone, does not constitute a continuing violation regardless of the duration of the act's consequences;[85] but a pattern of discriminatory acts will support a continuing violation claim, even when the plaintiff has suffered from only one such act.[86] Although no court has thus far permitted the

82. *See* text accompanying notes 52-76 *supra*.

83. The section provides in part that "[b]ack pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission." 42 U.S.C. § 2000e-5(g) (Supp. V 1975).

84. *See, e.g.*, cases cited in note 86 *infra*.

85. Marlowe v. Fisher Body, 489 F.2d 1057, 1063 (6th Cir. 1973); Macklin v. Spector Freight Sys., Inc., 478 F.2d 979, 986-88 (D.C. Cir. 1973); Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186, 1188 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971).

86. Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975) (sex-based discriminatory hiring and promotion policy grounded continuing violation class action); Marlowe v. Fisher Body, 489 F.2d 1057,1063 (6th Cir. 1973) (continuous series of promotion decisions, one of which affected plaintiff, is a continuing violation); Macklin v. Spector Freight Sys., Inc., 478 F.2d 979, 987-88 (D.C. Cir. 1973) (conspiracy between employer and union to discriminate in hiring is a continuing violation); Belt v. Johnson Motor Lines, Inc., 458 F.2d 443, 445 (5th Cir. 1972) (series of refusals to recurring oral request for promotion may ground a continuing violation claim); Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186, 1188 (7th Cir.) (gender-based discriminatory retirement policy grounded EEOC charges four months before plaintiff was forced to retire), *cert. denied*, 404 U.S. 939 (1971); Cox v. United States Gypsum Co., 409 F.2d 289, 290 (7th Cir. 1969) (charges filed more than 90 days after discriminatory layoff were timely since further discriminatory acts took place after those complained of). The Supreme Court gave indirect approval to such continuing violation theories in the § 1981 case of Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462 (1975): "[I]n the

theory of continuing violation with regard to a discharge,[87] discriminatory discharges are usually isolated expressions of bias, accompanied perhaps by discrimination in other employment practices, but unlikely to figure in the wholesale firing of a victim class.

Having stressed that plaintiff alleged a "continuing violation," the *Evans* opinion stated, ominously for future Title VII plaintiffs, that "mere continuity" is insignificant absent a "present *violation*."[88] Yet plaintiff's theory, as presented to the Court in *Evans*, was not at all typical of continuing violation claims. If plaintiff ever meant to argue that United was actionably culpable without intermission from the time of her forced discharge to the time she brought suit, that contention had disappeared before the case reached the appellate level.[89] By the end of trial her apparent view of the violation was that it started with her forced resignation, ceased at some early date, and then revived when United took her on as a new employee.[90] The trial court described Evans' claim as being based on the supposed "resuscitation" of a past violation.[91]

Without deciding whether discriminatory discharge is a continuing violation, the Court could have ruled that while continuing violations are possible, later acts never resuscitate a terminated violation. Alternatively, the Court could have held that although resuscitation is possible, United's mere refusal to reinstate plaintiff's original seniority on rehiring her was not enough to resuscitate the wrong in question here. But the question whether discriminatory discharge is a continuing violation was not properly before the Court;[92] this fact and the absence of any direct statement about that issue

absence of some circumstance that suspended the running of the limitation period, petitioner's [claim of discriminatory discharge] was barred . . . ."

87. Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975); King v. Seaboard Coast Line R.R., 538 F.2d 581 (4th Cir. 1976); Collins v. United Air Lines, Inc., 514 F.2d 594 (9th Cir. 1975); Olson v. Rembrandt Printing Co., 511 F.2d 1228 (8th Cir. 1975); Phillips v. Columbia Gas, 474 F.2d 1342 (4th Cir. 1973), *aff'g mem.*, 347 F. Supp. 533 (S.D. W. Va. 1972).

88. 431 U.S. at 558 (emphasis in original).

89. While the original complaint requested seniority credit from the date of plaintiff's initial employment *and* back pay "lost as a result of [United's] discriminatory employment practices," *id.* at 558 n.8, the trial court did not consider the theory that her claim of forced resignation was never barred. *See* note 97 *infra*. At any rate, in her brief to the Supreme Court, plaintiff specifically requested only reinstatement of her original seniority assignment together with an increment of back pay to the date of her return to United's employ.

90. 431 U.S. at 558 nn.7 & 8.

91. *Id.* at n.9.

92. Contrary to this analysis, the EEOC Interprets *Evans* to hold "only that discharges are not continuing violations." EEOC Interpretive Memorandum, July 12, 1977, 2 EMPL. PRAC. GUIDE (CCH) ¶ 5029. This interpretation is apparently more restrictive than the Court's in *Teamsters* and Justice Marshall's dissenting opinions in both cases. 431 U.S. at 377, 560. The EEOC's reading of Evans agrees with the majority view of the lower federal courts concerning discriminatory discharge. *See* note 94 *supra*. Yet if the Court had restricted itself to the issue of discriminatory discharge it would have overlooked the distinguishing feature of Evans' claim,

seem to confine the Court's intended advice on continuing violation claims to the unusual class that Evans' claim exemplifies.

The idiosyncracy of Evans' claim calls into question the reasoning by which the *Evans* opinion linked its result to the *Teamsters* holding regarding pre-Act discriminatees. In a crucial passage,[93] Justice Stevens found the admittedly continuing impact of plaintiff's seniority assignment insufficient to support a Title VII claim on the basis of two unsupported and unexplained premises: first, the employer was "entitled" to regard its past discriminatory act as lawful after Evans failed to file EEOC charges within the limitations period;[94] and second, once time had barred a claim based on the discriminatory discharge, the discharge became the "legal equivalent" of pre-Act discrimination.[95]

It is well to consider the second premise carefully. With it Justice Stevens asserted an analogy between Evans' claim and the claim on behalf of the pre-Act discriminatees in *Teamsters*. The remainder of the *Evans* opinion found section 703(h) dispositive,[96] without adverting to the atypical character of the claim of continuing violation that was before the Court. In particular, Justice Stevens apparently alluded to section 703(h) in commenting on Evans' failure to charge the seniority system with a lack of neutrality[97] or to claim that the system had deterred her from asserting a right granted by Title VII.[98] On these grounds, the Court held that the complaint's allegations failed to make out a claim.

But the coordination of the holdings of *Evans* and *Teamsters* depends on conceptual sleight. *Teamsters* did not deal with charges of continuing violation. The claims brought on behalf of the post-Act discriminatees were timely by any reckoning, and the claims brought for the pre-Act discriminatees proceeded on the theory that a seniority system's preservation of pre-Act discrimination constitutes an *original* violation. Despite this, the

i.e., her "resuscitation" theory. It seems clear, then, that the EEOC misconstrued *Evans* to the extent of ignoring the Court's ruling on the resuscitation theory. The better view is that the affirmative holding the Court imputed to *Evans* is simply not there. As to the latter point, however, the Court had already intimated in Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462 (1975), that discharges are not continuing violations. The lower federal courts already apply that rule, *see* note 86 *supra*, and the limitations policy served by it is comparatively secure from challenge.

93. 431 U.S. at 558.

94. *See* note 92 *supra*. The opinion does not indicate when the limitations period began to run.

95. The exact words are: "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." 431 U.S. at 558.

96. *Id.* at 558 n.10.

97. *Id.* at 558.

98. *Id.* at 558 n.10.

Evans reasoning implies that *Teamsters* and *Evans* stand for a single proposition: the mere "continuing impact"[99] of seniority assignments linked with pre-Act discrimination or unlawful discrimination not timely challenged is not a violation. Mere continuity of seniority disadvantages, then, is irrelevant in determining whether a continuing violation exists. Almost all forms of employment discrimination have a continuing impact on their victims, and except in seniority cases—such has been the influence of *Quarles* and *Local 189*—courts have unhesitatingly given less weight to such continuity than to the clearly expressed Title VII policy in favor of limiting the life of claims. Justice Stevens' unnecessary reliance on *Teamsters* in his *ipse dixit* about the legal equivalence of Evans' forced resignation and pre-Act discrimination, forces *Evans* into the mold that will support the Court's new-found rule: continuing impact alone is no more indicative of continuing violation in seniority cases than in other cases involving continuing violation claims.

C. *Bona fides and Absence of Discriminatory Intent*

The new construction of section 703(h) evidently disallows many seniority system challenges that previously would have succeeded in lower courts. But while *Teamsters* and *Evans* warned that this would be so, indicating clearly that the mere continuity of a seniority system's impact should not preclude a section 703(h) exemption, they refrained from an express delineation of the substantive concepts of bona fides and intent to discriminate. The Court's advice in this regard was written into its assessment of the United Airlines and T.I.M.E.-D.C. seniority systems.

Teamsters found that the challenged seniority system was bona fide and free from discriminatory purpose.[100] The significant facts mentioned by the Court were as follows: the seniority system applied equally to all employees in that the departmental seniority rosters impeded other employees, as well as black and Mexican-American employees, from transferring into other departments; departmental rosters were traditional in the industry and consistent with the precedents of National Labor Relations Board; the seniority system did not have its genesis in discrimination; and the defendants neither negotiated nor maintained the seniority system with a discriminatory purpose. The phrase "genesis in discrimination" alluded to the opinion's earlier approval of an aspect of the *Quarles* holding,[101] but this allusion presents an interpretive puzzle. In *Quarles*, Judge Butzner found that Philip Morris' seniority system was not bona fide because it had its

99. *Id.* at 558.
100. 431 U.S. at 355-56.
101. *See* text accompanying note 75 *supra*.

genesis in discrimination and, apparently as a separate matter, found that the disparate impact of the system on black and white employees resulted from an intention to discriminate as represented by the company's assignment of employees to segregated departments prior to 1966.[102] Since *Teamsters* made it clear that preservation of the effects of pre-Act discrimination alone is insufficient to put a seniority system in violation of the Act, the Court's agreement with *Quarles* appears confined to the principle that a genesis in discrimination is incompatible with bona fides. In a footnote to the *Teamsters* opinion, however, Justice Stewart explained that a seniority system may have its genesis in discrimination if an intention to discriminate "[enters] into its very adoption."[103] It seems to follow that the Court believed that a genesis in discrimination is sufficient to make a seniority system fail *both* tests for section 703(h) protection, since an intention to discriminate is necessary for such a genesis, which is in turn sufficient to destroy bona fides. In the passage summarized above, Justice Stewart assayed the bona fides of the T.I.M.E.-D.C. seniority system by examining its neutrality and similarity to other NLRB-approved seniority systems in the industry. Thus, a system's lack of bona fides may appear from a lack of neutrality, a deviation from what is customary and in accord with national labor policy, or a genesis in discrimination. The second criterion might remove a seniority system's putative section 703(h) protection on purely classificational grounds by showing it not to be a seniority system at all. All three criteria, however, can evince a present discriminatory purpose. Even genesis in discrimination, though it involves the past discriminatory intent that entered into the adoption of the seniority system, may indicate present wrongful intent since the maintenance of a seniority system originally adopted for a discriminatory purpose suggests a current discriminatory scheme. Accordingly,the *Teamsters* reading of section 703(h) did not imply separate tests for bona fides and the relevant sort of intention to discriminate.

Evans applied only the neutrality test to United's seniority system, and thus added nothing to *Teamsters*.[104] The reason for the simplification in *Evans* was apparently that on the facts presented there the system could not otherwise have lost the protection of section 703(h).[105]

The tests applied in the two cases point to a rigorous standard of proof of discriminatory intent.[106] On one extreme, a seniority system that fails the

102. 279 F. Supp. at 517.
103. 431 U.S. at 346 n.28.
104. 431 U.S. at 558.
105. *Id.* at 558 n.10.
106. This interpretation is supported by an aside in Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977); "Here . . . the operation of the seniority system itself is said to violate Title

neutrality test is overtly discriminatory, quite apart from any other discriminatory employment practice; on the other, a seniority system that gives present effect to a past act of discrimination may nevertheless be immune to challenge. A successful challenge will therefore require proof of events that specifically render the adoption or maintenance of the seniority system suspicious. As *Teamsters'* partial approval of *Quarles* indicated, circumstances surrounding the inception of a seniority system may show discriminatory purpose even absent such direct evidence as statements by the defendant employer or union that discrimination was intended. The relevant factors are as follows: a previous history of segregated unions, of different pay scales for the same work, or of prohibition of transfer between departments with overwhelmingly racial identities; the institution of a departmental seniority system based on the separate seniority rosters of formerly separate unions for minority and majority employees; and artifically restrictive rules for transfer between departments. A court must weigh these factors, however, in much the same way that it would weigh circumstantial evidence of intent on the part of an alleged tortfeasor.[107]

It should be clear from the facts of *Teamsters* that discriminatory purpose will not be inferred from disparate impact. Even if all members of a protected class bear a greater burden under a seniority system, the system is immune if it applies equally in the sense that others are also burdened and the system's operation is neutral. A court might not consider a facially neutral seniority rule sufficiently neutral if it reserves substantial discretion to the employer and there are statistically disproportionate adverse consequences for women or minorities.[108]

An analogy can be drawn between the new interpretation of section 703(h) and the constitutional rule of equal protection announced in *Wash-*

VII. In such circumstances, § 703(h) unequivocally mandates that there is no statutory violation in the absence of a showing of discriminatory purpose. *See* United Air Lines, Inc. v. Evans, 431 U.S. 553, 558-60 (1977)." 432 U.S. at 82 n.13.

107. The EEOC declares that in looking for possible discriminatory intent, it "will review all available evidence, including the respondents' collective bargaining history and employment practices." EEOC Interpretive Memorandum, July 12, 1977, 2 EMPL. PRAC. GUIDE (CCH) ¶ 5029. The Commission also declares that it will infer discriminatory intent in the adoption of a departmental seniority system if unions or departments were originally segregated. *Id.* Both pronouncements fairly reflect the *Quarles* facts, which the Court apparently found sufficient to deprive a seniority system of § 703(h) protection.

On the other hand, the EEOC threatens to infer the relevant sort of discriminatory purpose if an employer or union has reason to know that their seniority system locks minorities or women into less advantageous positions and "the system is renegotiated or maintained when an alternative system is available." *Id.* It is not at all clear that such circumstances satisfy the *Teamsters-Evans* standard of proof. The scienter required by the EEOC's rule was certainly present in *Evans*.

108. The EEOC affirmatively states that it does not consider § 703(h) to immunize a seniority system when the employer or union has failed to follow the system in allocating benefits. *Id.* at n.2.

ington v. Davis.[109] In *Davis*, the Court reviewed a decision of the Court of Appeals for the District of Columbia that applied Title VII standards to a request for summary judgment on an employment discrimination claim arising under the equal protection clause and section 1981 of the Civil Rights Act of 1866.[110] The District of Columbia Police Department had rejected plaintiffs' applications for employment on the basis of a personnel test that excluded a disproportionately high number of black applicants.[111] Plaintiffs based a charge of discrimination in hiring on this disproportionate impact and on the allegation that the test was not significantly related to job performance; they did not allege discriminatory intent. The court of appeals held that plaintiffs' motion for summary judgment should have been granted on fifth amendment grounds alone. *Griggs* would have required such a result if the case had arisen under Title VII, which did not apply to the federal government at the time the complaint was filed, but previous constitutional decisions concerning employment discrimination had not distinguished the constitutional from the statutory standard.[112] The Court rejected this reasoning and asserted instead that state action is not "unconstitutional *solely* because it has a racially disproportionate impact,"[113] when no racially discriminatory purpose is established. Disproportionate impact is some evidence of discriminatory purpose, and a discriminatory purpose may be inferred from the totality of relevant facts, including the fact that a disproportionate impact under the circumstances is inexplicable but for discriminatory purpose. In other than exceptional cases, however, statistical evidence of discrimination is not enough.[114] Clearly, *Teamsters* and *Evans* adopted the same rule for seniority system challenges under Title VII.[115]

109. 426 U.S. 229 (1976).

110. 42 U.S.C. § 1981 (1970).

111. Whether the number of black applicants who failed the test was disproportionately high was disputed. Plaintiffs produced evidence that a higher percentage of blacks than of whites failed the test. On the other hand, the percentage of blacks among those recruited since 1969 was roughly equal to the percentage of blacks between ages 20 and 29 living within the territory on which the recruitment program concentrated. 426 U.S. at 235.

112. Washington v. Davis, 512 F.2d 956, 958 n.2 (D.C. Cir. 1975), *rev'd*, 426 U.S. 229 (1976).

113. 426 U.S. at 239 (emphasis in original).

114. *Id.* at 242.

115. This does not mean that the Court had read seniority system discrimination out of the Act, since most employers subject to Title VII are nongovernmental and equal protection would not ordinarily bind them. *See* The Civil Rights Cases, 109 U.S. 3 (1883).

Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977), lends support to this analogy. There the Court examined a claim that a single-family-unit zoning ordinance violated the equal protection clause by virtually excluding minorities from the village. The Court held this evidence of disproportionate impact legally insufficient. Elaborating on the requirement of proof of discriminatory motive, Justice Powell said that if the respondent's property had suddenly been rezoned after respondent's announcement that it intended to erect low-cost multifamily housing, "we would have a far different case." *Id.* at 267. This hypothetical situation is similar to the one presented by a seniority system that has its genesis in discrimination.

Despite the clear conceptual precedent for the *Teamsters-Evans* burden-of-proof rule, the rule provides blurry guidance for seniority cases. Two months after those cases came down, the Second Circuit announced its decision in *Cates v. Trans World Airlines, Inc.*,[116] which factually resembled *Evans*. Plaintiffs were black airline pilots with defendant, TWA. Two had been furloughed or laid off pursuant to the seniority system provided for in a collective bargaining agreement between the airline and the other defendant, the Air Line Pilots Association. The third plaintiff feared that he too would be furloughed. All three filed charges with the EEOC in 1972, alleging that TWA had followed a discriminatory hiring policy during the first years after the effective date of Title VII and that TWA and the union jointly had maintained a seniority system that preserved the effects of the prior hiring discrimination. Plaintiffs sought a revision of their seniority assignments to reflect the dates at which they were qualified for employment with the airline. The EEOC charges, however, were not filed within 180 days of their initial employment when seniority positions were assigned, nor within 180 days after the layoff, and by 1970 the airline had stopped hiring new pilots altogether, so that the discriminatory hiring policy was no longer in effect. Resting its decision squarely on *Evans*, the court of appeals affirmed the lower court's dismissal of the complaint, and noted that plaintiffs did not claim that the seniority system lacked bona fides or was not operated neutrally. Since a claim based on the earlier discrimination in hiring was clearly time-barred, the court concluded that no claim had been stated. Arguably, the allegations raised a question whether the seniority system was intentionally discriminatory.[117] At the time the complaint was filed, only fourteen of the airline's 4468 pilots, on regular service or on furlough, were black; all of the black pilots were hired after the effective date of Title VII.[118] The employer's continued adherence to the seniority system, which was presumably reaffirmed in collective bargaining agreements after the effective date of Title VII, surely exhibited a knowing acceptance of the black pilot's layoff jeopardy. The question of discriminatory intent is difficult here because the seniority system, like that in *Evans*, was nondepartmental, yet all members of the affected minority group were significantly disadvantaged by its operation. But, the female flight attendants in *Evans* who had been forced to resign under the discriminatory "no marriage" rule were at least given an opportunity to seek prompt adjustment of their seniority positions under a collective bargaining agreement.[119] The

116. 561 F.2d 1064 (2d Cir. 1977).
117. *Id.* at 1072.
118. Brief for Appellant at 4-5, Cates v. Trans World Airlines, Inc., 561 F.2d 1064 (2d Cir. 1977).
119. *See* text accompanying notes 77-78 *supra*.

court of appeals should have weighed this difference carefully in the light of *Teamsters'* recognition that a genesis in discrimination deprives a seniority system of section 703(h) protection. Instead, it apparently assumed that since the facts of *Cates* otherwise resembled those of *Evans*, only the neutrality of the seniority system needed to be examined.[120]

IV. The National Labor Policy and "Normal Equitable Considerations"

A. *The Collective Bargaining Relationship*

Seniority system challenges under Title VII involve the interests of employees who have suffered discrimination, their fellow employees who have not, and the employers and unions whose divergent interests meet in the adoption of seniority systems. In a sense, these interests of individuals are reflected as governmental interests, whose definition must be found in Title VII and the Taft-Hartley Act.[121] It would be more realistic to describe these governmental interests as governmental projects, precariously initiated by the legislature, but entrusted for success or failure to the judiciary. Yet the courts have for the most part silently passed over the inevitable jostling of the national policies relating to collective bargaining and employment discrimination in the seniority cases. The new direction announced in *Teamsters* and *Evans* arguably leads to a proper adjustment of these concerns.

The analogy between the burden-of-proof rule of section 703(h) and the equal protection rule adopted in *Davis* suggests that the Court may have sought to reconcile the policy against employment discrimination with a concern for the collective bargaining relationship. The law of equal protection has evolved against the background of judicial deference to legislative discretion.[122] The Court has steadfastly refused to find discriminatory state action when classifications built into a statute or implicit in state policy or custom bore a reasonable relationship to proper legislative goals.[123] *Davis* stands for the proposition that even when the statutory singling out of a given class would present a suspect classification and shift the burden of proof in an equal protection action from members of that class to the government, proof that state action adversely affects more members of that

120. *Evans* may provide support for this. In a footnote to his discussion of the neutrality of United's seniority system, Justice Stevens pointed out that the case "does not present the question raised in the so-called departmental seniority cases. *See, e.g.*, Quarles v. Philip Morris, 279 F. Supp. 505 (E.D. Va. 1968). 431 U.S. at 558 n.10. This statement may be interpreted as implying that *only* departmental seniority systems raise the issue of genesis in discrimination.

121. 29 U.S.C. §§ 141-87 (1970).

122. *See, e.g.*, Jeffrey Mfg. Co. v. Blagg, 235 U.S. 571, 577 (1915).

123. Geduldig v. Aiello, 417 U.S. 484, 495 (1974).

class than other classes shifts the burden only in unusual circumstances.[124] The *Davis* rule is significant because it denies that statistics alone can show prima facie that a governmental policy indirectly relies on a suspect classification. Consequently, the *Davis* rule can be understood either as an application of the rational relationship test to situations in which a suspect classification is not overtly used, or as a refinement of the rule of proof applicable to suspect classifications. In either guise, the rule further implements judicial deference to legislative discretion. Adoption of a similar rule in the context of a challenge to a seniority system therefore suggests judicial deference to the judgment of the framers of seniority provisions—the collective bargaining partners in their roles as lawmakers for units of "industrial self-government."[125]

The scheme of the national labor policy centers on the roles of management and labor organizations as collective bargaining partners in ways that give legal significance to their characterization as lawmakers. Fundamental to the interpretation of the Taft-Hartley Act is the idea that while employers and duly recognized unions are required to bargain in good faith concerning subjects properly related to employment,[126] administrative and judicial oversight of that duty stops short of imposing substantive terms of agreement upon the bargaining partners.[127] Their own administration of a collective bargaining agreement requires a continuing duty to bargain in good faith, so that this primary discretion of employers and unions as well as the qualified prohibition of governmental interference persists throughout the life of the agreement.[128] Accordingly, provisions calling for arbitration of grievances received judicial backing at a time when, despite the doctrine of "the law of the contract," courts often refused to enforce commercial arbitration provisions.[129] While the freedom of collective bargaining partners is cir-

124. *See* 426 U.S. at 241-42 (1976).

125. A collective bargaining agreement is an effort to erect a system of industrial self-government. When most parties enter into contractual relationship they do so voluntarily, in the sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties. This is not true of the labor agreement. The choice is generally not between entering or refusing to enter into a relationship, for that in all probability pre-exists the negotiations. Rather it is between having that relationship governed by an agreed-upon rule of law or leaving each and every matter subject to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces.

United Steel Workers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 580 (1960).

126. 29 U.S.C. § 158(a)(5), (b)(3) (1970).

127. 29 U.S.C. § 158(d)(1970) provides that the duty to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession." *See, e.g.*, United Steelworkers v. NLRB, 389 F.2d 295 (D.C. Cir. 1967), *rev'd sub nom.* H.K. Porter, Inc. v. NLRB, 397 U.S. 99 (1970).

128. Union News Co. v. Hildreth, 295 F.2d 658 (6th Cir. 1961).

129. United Steel Workers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 579 (1960).

cumscribed, the courts' self-restraint in matters affecting the bargaining relationship calls to mind the judicial attitude toward the separation of powers.

If the *Teamsters-Evans* construction of section 703(h) suggests deference to the quasi-legislative discretion of collective bargaining partners, the reasons for such deference in the narrow context of seniority system challenges are slight. Employers and unions should be free within limits to shape seniority provisions to suit the bargaining unit. This freedom, however, would not be less if provision were made to halt the perpetuation of seniority disadvantages due to past discrimination;[130] as Justice Brennan observed in *Franks*, parties challenging a seniority system under Title VII often "do not ask modification or elimination of the existing seniority system, but only an award of the seniority status they would have individually enjoyed under the present system but for [past discrimination]."[131] In those few cases in which alteration of the seniority system would be necessary to accomodate the claims of discriminatees, the seniority system would presumably lack neutrality and gain no protection from section 703(h) on the new reading of that section.

It may be objected that while labor-management discretion in designing seniority systems is not at stake, collectively bargained settlements of grievances charging discrimination are and should have the protection of the new reading of section 703(h). In *Evans*, for example, the employer and union had tried to eradicate the lingering effects of the "no marriage" rule by providing seniority adjustments for any of the rule's victims who had filed grievances with the union or charges with the EEOC;[132] this effort would have proved superfluous if stragglers like Evans could have obtained relief by a subsequent Title VII suit. One laudable reason for a rule limiting the litigation of seniority system challenges is to give employers and unions an incentive for correcting discrimination and its effects. But as it is now interpreted, section 703(h) does not practically create that incentive. The NLRB and the courts have agreed that the Taft-Hartley Act imposes on unions a duty of fair representation towards their members,[133] under which a union must try to correct the kinds of discrimination that Title VII condemns. Agreements and even arbitration between unions and employers,

130. *See* United States v. Hayes Int'l Corp., 415 F.2d 1038 (5th Cir. 1969).
131. 424 U.S. at 758.
132. *See* text accompanying notes 76-77 *supra*.
133. Ford Motor Co. v. Huffman, 345 U.S. 330 (1953). *Huffman* followed the reasoning in Steele v. Louisville & N. R.R. Co., 323 U.S. 192 (1944), in which the Court found a union duty of fair representation under the Railway Labor Act, 45 U.S.C. §§ 151, 152 (1970). The breach of that duty in that case consisted of a failure to prevent racial discrimination in job assignments and compensation.

however, do not bar subsequent Title VII actions by discriminatees;[134] the machinery of the Taft-Hartley Act permits subsequent challenges by employees in certain circumstances.[135]

A more compelling argument in favor of an immunity for seniority systems based on labor-management relations is that if union members cannot rely on seniority rights, the position of the union may be weakened sufficiently to jeopardize the collective bargaining relationship. Commentators have debunked the union defense of seniority that stresses employees' seniority expectations.[136] Those expectations are of course only hopes that future business conditions may frustrate. Seniority status is not a vested property right;[137] unions can and sometimes do alter individual employees' seniority rankings by agreement with the employer—they may do so in order to remove traces of past discrimination.[138] But these arguments do not reach the issue whether a law that results in the general instability of seniority expectations would seriously compromise union strength. An argument that does reach this issue could be based on the recent experience of unions when numerous seniority challenges of the sort now being disqualified were succeeding in the lower federal courts. Empirical studies of the effect on unions' strength, however, are not available.

Even if Title VII seniority suits did undermine union credibility, this result would not necessarily outweigh the purpose of making discriminatees whole. The complete collapse of a union would make seniority adjustments worthless, but short of that outcome the harm to a union occasioned by its members' resentment over the loss of seniority status because the union or employer has discriminated against other employees may command little sympathy. A judgment that the value of fostering unions overrides the inequity of leaving discriminatees to their plight would need the support of a more comprehensive policy in favor of unions than that embodied in the Taft-Hartley Act.[139]

Nor does Title VII contain exemptions designed to protect unions or the collective bargaining relationship in other important respects. Hiring hall arrangements, for example, receive no protection.[140] Labor-management agreements affecting other hiring methods, promotion, transfer, and the prevention of unjustified discharge, even if these agreements are traditional

134. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

135. *See* § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185; Humphrey v. Moore, 375 U.S. 335 (1964).

136. Cooper & Sobol, *supra* note 23, at 1604-07.

137. Ford Motor Co. v. Huffman, 345 U.S. 330, 337-39 (1953).

138. *See* text accompanying note 130 *supra*.

139. One need only mention § 14(b) permitting state "right to work" laws. 29 U.S.C. § 164(b) (1970).

140. United States v. IBEW, Local 38, 428 F.2d 144 (6th Cir. 1970).

in the industry and pass muster under NLRB precedents, are subject to timely Title VII challenge when they involve discrimination on a prohibited basis.[141] Arbitration of labor disputes is not entitled to deference in this area.[142] Moreover, the higher priority of the antidiscrimination policy appears affirmatively from the face of Title VII, and the Court has shown no inclination to alter this priority.[143] The legislative history that *Teamsters* rehearsed did express concern for the possible harm Title VII could do to labor's interests, but it should be remembered that "big labor" sympathized with Title VII in its original form, and that legislators not known for their alignment with union causes were the only ones to express anxiety over its effect on seniority rights.[144]

B. Reverse Discrimination and Fairness to Discriminatees

The Court's ingenious view that sections 703(h) and 706(g) are wholly independent obscures, if it does not vitiate, the only remaining policy arguments that favor the new reading of section 703(h), arguments based on a concern for equitable treatment of all employees with a stake in a seniority system. A plaintiff's seniority relief translates directly into other employees' forfeiture. The rules of *Franks, Teamsters*, and *Evans* do not seem to respond to the question whether equity should always or sometimes preclude reallocation of benefits on the ground that it entails reverse discrimination. It is plausible, however, to regard *Teamsters* and *Evans* as deliberately qualifying *Franks'* generosity towards discriminatees, a result that might be desirable on equitable grounds. While under *Franks* any Title VII violation with seniority consequences will support a request for seniority relief, most violations are short-lived and the new reading of section 703(h) prevents the treatment of seniority systems as artificial life-supports. Thus, we must now consider whether the Court's roundabout method of minimizing the period during which seniority relief is obtainable coherently answers the demands of equity.

These equitable demands can be set out partly in terms of an answer to the issue of reverse discrimination. Proponents of the broadest view of seniority system violations argue that the seniority expectations of employees who would suffer if the seniority of discriminatees were increased are illegitimate.[145] Only rarely is a distinction drawn between employees whose

141. 42 U.S.C. § 2000e-2(a), (c) (1970).
142. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).
143. Franks v. Bowman Transp. Corp., 424 U.S. 747, 778 , 778 n.40 (1976); 118 CONG. REC. 7166, 7168 (1972).
144. Vaas, *supra* note 23, at 436.
145. Cooper & Sobol, *supra* note 23, at 1605-06; Note, *supra* note 8, at 401-02.

bargaining agent participated in the discrimination and employees who were not even remotely culpable.[146] In either case, the employees' seniority expectations are hopes of gain that rest ultimately on the discrimination. A traditional equitable approach would distinguish knowing accomplices from unwitting beneficiaries.[147] The *Teamsters* and *Evans* holdings draw at best a very rough version of that distinction. If we consider only seniority systems that result from collective bargaining, the requirement that a plaintiff show a discriminatory purpose behind the system's adoption restricts violations to instances in which the most senior employees will have had reason to know, when the system is adopted, that the union was treating minority or female employees unfairly. Yet deliberate discrimination in the design of a seniority system implicates unionized employees no more than do other forms of union discrimination—for example, the union's failure to prosecute grievances alleging discriminatory discharge—that have seniority consquences but will not support a seniority system challenge under *Teamsters* and *Evans*.

When the time period for asserting a claim is severely limited, another equitable concern is that the potential claimant should have a clear knowledge of his injury during the whole time period. A person whose place on a seniority roster is low because of past discrimination may be unable to determine at the time his or her name is added to the roster whether the consequences will be slight or severe.[148] Competitive seniority usually controls extremely different kinds of employment benefits, such as layoff and opportunity to select routes.[149] If layoff is highly unlikely, a discriminatee may reasonably not value other seniority benefits enough to seek a seniority adjustment. There is also a serious likelihood that many discriminatees would not immediately recognize a wrongful seniority assignment as a form of employment discrimination for which Title VII provides a cure.

While the new reading of section 703(h) does not attune seniority system challenges to the finer points of traditional equity just examined, it does provide major protection for the seniority rights threatened by Title VII. The measure of that protection is perhaps illogical, since the exceptional circumstances under which a seniority system will now be understood to lose section 703(h) immunity bear only a rough relation to the question

146. *Id.* at 1605.

147. In his separate opinion in *Franks*, Chief Justice Burger compares unwitting employee accomplices to holders in due course of negotiable instruments. 424 U.S. at 781.

148. This was the case in Cates v. Trans World Airlines, Inc., 561 F.2d 1064 (2d Cir. 1977). *See* text accompanying notes 124-25 *supra*.

149. Stacy, *supra* note 8, at 490.

whether those who gain by existing seniority rankings had a part in the discrimination against potential complainants.[150] The protection is more generous to the former than to the latter, however, which comports with the view that its purpose is the avoidance of what might be considered reverse discrimination. A consciousness of that purpose pervades the partly concurring, partly dissenting opinions of three justices in *Franks*.[151] It is relevant to note that in those opinions the phrase "reverse discrimination" does not occur; neither *Teamsters* nor *Evans* so much as hint at the problem of reverse discrimination, under any description. The explanation no doubt is that the Court would prefer to particularize rather than to call attention to this central and politically inflammatory aspect of antidiscrimination law. The Court's interpretation of section 703(h) will probably save the Court any future encounters with the issue of reverse discrimination under Title VII.

Stephen Utz

150. Justice Powell's proposal in *Franks* coupled with a more permissive reading of § 703(h) would be preferable. *See* text accompanying notes 46-49 *supra*.

151. *See* text accompanying notes 44-49 *supra*.