

# Title VII Works – That’s Why We Don’t Like It

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The Supreme Court held that the word “boy” used without modification was “not always benign” and could be evidence of racially discriminatory intent.

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After reviewing the record, we conclude once again that the use of “boy” by Hatley was not sufficient, either alone or with other evidence, to provide a basis for a jury reasonably to find that Tyson’s stated reasons for not promoting the plaintiffs was racial discrimination.<sup>1</sup>

### ABSTRACT

*In response to the universal belief that Title VII of the Civil Rights Act of 1964 is not fulfilling its purpose, this Article presents a different perspective on the reality of this federal employment discrimination law. Title VII is fulfilling the purpose of the Congress that created it. The purpose was not the eradication of all discrimination in employment. The purpose was to balance the prohibition of the most obvious forms of discrimination with the preservation of as much employer decision-making latitude as possible. Moreover, the seminal Supreme Court decision, McDonnell Douglas v. Green, accurately implemented this balance. This Article argues that State law provides the best opportunity to seek the eradication of employment discrimination.*

### INTRODUCTION

We have chosen to believe that Title VII of the Civil Rights Act of 1964 (“Title VII”) was meant to end employment discrimination and have not evaluated the validity of that cognition.<sup>2</sup> When I use “we” I

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1. *Ash v. Tyson Foods, Inc.*, 190 F. App’x. 924, 926 (11th Cir. 2006).

2. Cognitive dissonance theory was created by social psychologist Leon Festinger in the mid to late 1950s. *See, e.g.*, Leon Festinger, *A Theory of Social Comparison Processes*, 7 HUM. REL. 117 (1954); LEON FESTINGER ET AL., *WHEN PROPHECY FAILS* (1956); LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957). The basic premise of the theory is that people are driven to achieve consistency and are motivated to make changes in the wake of inconsistency. To describe this drive, Festinger defined pieces of knowledge as “cognitions.” “Cognitions” can be abstract or fact based, real or imagined. It can be a belief even if the belief is a complete illusion. In this article, “cognition” encompasses all of these meanings. “Dissonance” is the inconsistency between two or more given variables. “Cognitive dissonance” is the presence of inconsistent cognitions, which is experienced as uncomfortable tension. The tension has drive-like properties and must be reduced. The greater the magnitude of the

mean the scholars, jurists, lawyers, and people who have described or would describe Title VII’s purpose as the eradication of employment discrimination. Title VII’s purpose was not the eradication of employment discrimination. Title VII’s purpose was to preserve as much as possible of the extant management prerogatives and union freedoms circa 1964. In preserving the *status quo*, Title VII necessarily preserved the beliefs that accompanied those prerogatives. When I use the words “*status quo*” I refer to both the scope of decision making implied by prerogatives and the beliefs, including prejudices, consistent with the era and with the manner in which those attitudes informed personnel decisions. The only thing Congress designed this piece of legislation to do was eliminate the worst forms of overt racial discrimination.<sup>3</sup> Title VII has served that purpose. Title VII works. That’s why we don’t like it.

The persistence of the belief in Title VII’s broad purposes sets up an uncomfortable dissonance with knowledge of cases like *Ash*. Anthony Ash and his co-plaintiff John Hithon were black employees in the Tyson Foods chicken processing plant in Gadsden, Alabama.<sup>4</sup> Gadsden is about an hour from the city jail in Birmingham, Alabama, where, in 1963, Martin Luther King wrote in response to critics who wanted him to delay protest marches. He responded that the time for waiting was over and supported his response with a list of historical wrongs including: “. . . when your first name becomes ‘nigger,’ your middle name becomes ‘boy’ (however old you are) and your last name becomes ‘John’ . . . .”<sup>5</sup> Ash and Hithon were both up for promotion to a shift supervisor position which the white decision-maker, Thomas Hatley, gave to a white employee.<sup>6</sup> Ash and Hithon brought Title VII

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dissonance, the greater the drive to reduce the tension, by reducing the discrepancy between cognitions. A “discrepant cognition” is one that requires adjustment to reduce the tension to a tolerable level. Adjustment can be achieved by replacing a discrepant cognition, adding a new cognition that reduces the tension, and/or supplementing or changing the discrepant cognition to reduce the tension.

3. See H.R. REP. NO. 88-914, pt. 1, at 18 (1963) (“It is, however, possible and necessary for the Congress to enact legislation which prohibits and provides the means of terminating the most serious types of discrimination.”); H.R. REP. NO. 88-914, pt. 2, at 2 (1963) (“But this bill can and will commit our Nation to the elimination of many of the worst manifestations of racial prejudice.”).

4. See *Ash v. Tyson Foods, Inc.*, No. 96–RRA–3257–M, 2004 WL 5138005 (N.D. Ala. 2004).

5. MARTIN LUTHER KING JR., *WHY WE CAN’T WAIT* 84 (1964).

6. *Ash v. Tyson Foods, Inc.*, 129 F. App’x. 529, 531 (11th Cir. 2005).

claims alleging disparate treatment.<sup>7</sup> The evidence at the jury trial focused on their testimony that Hatley had called them both “boy.”<sup>8</sup> After the district court granted Tyson Foods’ post-trial motion for judgment as a matter of law Ash and Hithon appealed.<sup>9</sup> Among other things, the Eleventh Circuit held that “boy” alone evidenced no racial discrimination.<sup>10</sup> After remand from the Supreme Court with specific instructions to consider “boy” in light of its “context, inflection, tone of

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7. *Id.* Ash and Hithon also alleged analogous claims under 42 U.S.C. § 1981. *Id.* It was Hithon’s Section 1981 claim that survived, ultimately successfully. *See* Ash v. Tyson Foods, Inc., 664 F.3d 883 (11th Cir. 2011).

8. Ash and Hithon’s odyssey began in 1995 when they applied for the shift supervisor position at the Gadsden plant. *Ash*, 129 F. App’x. at 531. In the first trial, Ash and Hithon won a substantial jury verdict of \$250,000.00 in compensatory damages and \$1,500,000.00 in punitive damages each. *Ash*, 2004 WL 5138005 at \*1. Tyson Foods filed a post-trial motion under F.R.C.P. 50(b) challenging the verdict due to lack of evidence of pretext. *See id.* The trial court granted Tyson Food’s Rule 50 motion and dismissed Ash and Hithon’s claims. *See id.* at \*9-10. The Eleventh Circuit Court sustained the trial court’s decision as to Ash, but not Hithon. *See Ash*, 129 F. App’x. at 533-34. On the issue of the significance of the word “boy,” the three judge panel held: “the use of the word ‘boy’ alone is not evidence of discrimination.” *Id.* at 533. The Supreme Court responded that “boy” need not be modified by “black” or “white” to become evidence of racial discrimination. *See* Ash v. Tyson Foods, Inc., 546 U. S. 454, 456 (2006). “Boy” standing alone could demonstrate discriminatory animus. *See id.* The Court directed the Eleventh Circuit to reflect on the speaker’s “context, inflection, tone of voice, local custom, and historical usage.” *Id.* The Eleventh Circuit’s response is quoted above. *See Ash*, 190 F. App’x. at 926. The Eleventh Circuit confirmed the dismissal of Ash’s claims and remanded the case for a new trial as to Hithon. *Id.* at 927. Ash and Hithon again sought the Supreme Court’s intervention, but the Court denied a second writ of certiorari without comment. *See* Ash v. Tyson Foods, Inc. 549 U.S. 1181 (2007). After a second trial, the jury awarded Hithon \$35,000.00 in back-pay, \$300,000.00 for mental anguish damages, and \$1,000,000.00 in punitive damages. *See* Hithon v. Tyson Foods, No. 96-RRA-3297, 2008 WL 4921515 \*1 (N.D. Ala. 2008). Tyson Foods filed a Rule 50(b) based on insufficient evidence of discrimination, separately challenging the punitive damages award. *See id.* The district court granted Tyson Food’s motion as to punitive damages only. *Id.* at \*10. Both sides appealed. *See* Ash v. Tyson Foods, Inc., 392 F. App’x. 817 (11th Cir. 2010). The Eleventh Circuit, again, dismissed Hithon’s discrimination claim for failure to prove pretext. *See id.* at 833. There was a dissent this time. *See id.* The basis of Judge Dowd’s dissent was that two juries had found discrimination. *Id.* Because two juries of Hithon’s peers had found discrimination, Hithon’s verdict should stand as to liability. *Id.* Prior to December 2011, Ash and Hithon had nothing to show for their fifteen-year investment in this litigation. Hithon’s “successful” claim was finally affirmed, as to compensatory damages, on December 16, 2011. *See* Ash v. Tyson Foods, Inc., 664 F.3d 883 (11th Cir. 2011).

9. *See Ash*, 129 F. App’x. at 533-34.

10. *See id.* at 533.

voice, local custom, and historical usage”,<sup>11</sup> the Eleventh Circuit again concluded that “boy” had no legal significance to Ash and Hithon’s disparate treatment claims.<sup>12</sup>

Even if the Eleventh Circuit judges were ignorant of Dr. King’s letter, ignorance of the significance of a white man calling a black man “boy” in the middle of Alabama beggars belief. In the Eleventh Circuit, and probably elsewhere,<sup>13</sup> “boy,” without significant additional evidence, has no meaning under Title VII for purposes of proving discrimination, despite “local custom and historical usage.”<sup>14</sup> If “boy” now has no real meaning as a historical signifier of discriminatory animus under the law, how far are other socially significant words from losing their cultural and legal significance?

*Ash* could be described as a signpost pointing at the failure of Title VII of the Civil Rights Act of 1964. Over the course of the *Ash* litigation Tyson Foods avoided liability in a world where all believe that Title VII was intended to eradicate discrimination in employment. Our knowledge, of Title VII’s purpose, our understanding of the

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11. *Ash*, 546 U. S. at 456.

12. *See Ash*, 190 F. App’x. at 926. Two juries understood that “boy” had a special meaning according to local custom and historical usage. Those juries demonstrated this understanding by awarding Hithon more than \$1,000,000.00 twice. What makes the case worthy of attention is that the Eleventh Circuit needed significantly more than the obvious custom and usage of “boy” in the south to cause them to reconsider their conclusion that “boy” as used in the case had no legal significance. *See Ash*, 664 F.3d at 896-98. The issue remains unresolved how the Eleventh Circuit consciously or unconsciously determined to ignore local custom and historical usage after specific direction to do so by the Supreme Court.

13. *See* Michael Selmi, *Why are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 562 (2001) [hereinafter *Hard to Win*] (“Race discrimination claims are generally thought to be the most difficult employment claim to succeed on, and when it comes to race, the courts’ bias tends toward our common definition of bias.”).

14. *See Ash*, 546 U. S. at 456. “Boy” is the polite word for “nigger” in certain circles. In the middle of Alabama, the connection was so obvious and dangerous that the defense successfully blocked an attempt by Ash’s counsel to elicit the connection on the ground that the testimony would be unduly prejudicial. *Ash*, 664 F.3d at 896 n. 8. The *Ash* drama is particularly ironic given the reference to Alabama in Dr. King’s speech:

I have a dream that one day, down in Alabama, with its vicious racists, with its governor having his lips dripping with the words of interposition and nullification; one day right there in Alabama, little black boys and black girls will be able to join hands with little white boys and white girls as sisters and brothers..

MARTIN LUTHER KING, JR., I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD 105 (James Melvin Washington ed., 1992) [hereinafter I HAVE A DREAM]

history and context of the word “boy” and our cognition of the result in *Ash* create a cognitive dissonance. *Ash* should not be possible if our first two pieces of knowledge are accurate. To resolve the tension, however, we do not check the accuracy of the first cognition; we supplement our information with the cognition that Title VII is not working. Or, if we admit that Title VII itself is not broken, we justify our understanding that something is not working by blaming the Supreme Court for erroneous and illegitimate interpretation. If we are wrong to believe that Title VII was meant to eradicate employment discrimination, we are wrong when we say it doesn’t work. If we are wrong and a statutory basis exists for the Supreme Court’s interpretation of Title VII in disparate treatment cases, we are wrong to blame the Court for creating the tension we feel. I think we are wrong. That we consider cases like *Ash* as contrary to Title VII’s purpose is a manifestation of our cognitive dissonance.<sup>15</sup> The discrepant cognition is the belief that Title VII was intended to do more, in its structure or by interpretation, than prevent gross acts of employment discrimination.<sup>16</sup>

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15. It is the behavior, demonstrated by the use of “boy,” and the belief system, also demonstrated by the use of “boy,” and the Eleventh Circuit’s approval of that behavior and belief system that causes the tension when we believe that the point of Title VII is to prohibit the behavior and, perhaps more importantly, to cause society to jettison the supporting belief system. What we want is for people, like Thomas Hatley, and employers, like Tyson Foods, to experience unwanted or negative consequences for their behavior where they would have no latitude in rejecting the consequences, but must relieve the tension by changing their attitudes and behavior, including the acceptance of the responsibility for the impact of their earlier conduct and prejudice. See JOEL COOPER, *COGNITIVE DISSONANCE: FIFTY YEARS OF A CLASSIC THEORY* 74-80 (2007).

16. Much scholarship reflects the underlying premise that Title VII should be able to attack less than obvious discrimination because Title VII was intended to end discrimination in employment. See, e.g., Natasha Martin, *Pretext in Peril*, 75 MO L. REV. 313, 315 (2010) (“Plaintiffs have a hard row to hoe in proving unlawful discriminatory bias. Without the smoking gun document, the blatant biased statement, or other direct evidence, plaintiffs must rely on a variety of factual circumstances to weave a story that convinces the fact-finder that an employer’s actions constitute unlawful discrimination.”); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 210 (1993) (“In passing Title VII of the Civil Rights Act, Congress stressed that equal employment opportunity is a basic right in this country. The legislature noted that the other civil rights the Act guaranteed would be meaningless without the right to ‘gain the economic wherewithal to enjoy or properly utilize them.’”); Robert Brookins, *Hicks, Lies, and Ideology: The Wages of Sin is Now Exculpation*, 28 CREIGHTON L. REV. 939, 940 (1995) (“Title VII molded the basic moral principle of equal treatment into a national policy to eliminate employment discrimination.”); Judith Olans Brown et al., *Some Thoughts About Social Perception*

This Article presents a new cognition of Title VII. Title VII was never meant to perform the role of eradicating employment discrimination in disparate treatment cases. For disparate treatment, Title VII set a low standard of proscribed behavior that has since been recognized by the Supreme Court and approved by Congress. The limited scope of the proscribed behavior sustains an environment where a court does not recognize a white man calling a black man “boy” in the middle of Alabama as evidence of discriminatory animus. Part I of this article describes the illusion we have been socialized to believe about Title VII’s purposes with the Court playing a significant leadership role in creating and sustaining the illusion. Part II reveals the illusion by focusing on Title VII’s original political, legal and social context and relies on the legislative history to show how Congress intentionally limited Title VII’s scope. In Part III, the discussion turns to *McDonnell Douglas v. Green*,<sup>17</sup> because of its perennial relevance as the Supreme Court’s first and most enduring interpretation of Title VII in the context of disparate treatment.<sup>18</sup> I argue that a firm statutory basis exists for *McDonnell Douglas* as an accurate and legitimate interpretation of Title VII.<sup>19</sup> Finally, Part IV proposes that the alternative to the existing Title VII is not in an appeal to Congress or the Court.<sup>20</sup> The better opportunity for advancing

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*and Employment Discrimination Law: A Modest Proposal for Reopening the Judicial Dialogue*, 46 EMORY L.J. 1487, 1487-88 (1997) [hereinafter *Some Thoughts*] (“Most recently, in 1992, we demonstrated how the federal courts, and particularly the Supreme Court, had significantly weakened Title VII of the Civil Rights Act of 1964 by construing procedural rules in a consistently pro-defendant manner.”).

17. 411 U.S. 792 (1973).

18. *McDonnell Douglas* remains viable even after *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), which was hailed as the death knell of the burden shifting analysis scholars have found so troubling. See generally Jeffrey A. Van Detta, “*Le Roi Est Mort; Vive Le Roi!*”: An Essay on the Quiet Demise of *McDonnell Douglas* and the Transformation of Every Title VII Case After *Desert Palace, Inc. v. Costa* into a “Mixed-Motives” Case, 52 DRAKE L. REV. 71 (2003).

19. But see, Sandra F. Sperino, *Flying Without A Statutory Basis: Why McDonnell Douglas is not Justified by Any Statutory Construction Methodology*, 43 HOUS. L. REV. 743 (2006) (arguing that there is no statutory basis for the Supreme Court’s *McDonnell Douglas* interpretation of Title VII).

20. I am not the first to suggest that the Supreme Court and Congress should not be the sole objects of efforts to actually achieve the elimination of employment discrimination. In 1997 Professors Brown, Subrin and Baumann decided not to make “suggestions for further tinkering with the language of Title VII,” but suggested that judges confront the likelihood of their implicit bias and that juries be instructed on the pervasiveness of implicit bias. See *Some Thoughts*, *supra* note 16, at 1489-91.

employment discrimination laws which prevent cases like *Ash* lies in state law. Individual states offer much better resources for moving away from a Title VII that works in such unsatisfying ways.

### I. MISUNDERSTANDING TITLE VII'S PURPOSE

Describing our knowledge of Title VII's purposes as a misunderstanding does not mean that our belief is entirely without basis<sup>21</sup>; a rational basis exists for the belief that Title VII's purpose is the eradication of discrimination in employment. For example, in *McDonnell Douglas* the Supreme Court told us that "Title VII tolerates no racial discrimination, subtle or otherwise."<sup>22</sup> The strength of the misunderstanding, like a discrepant cognition, lies in the choice to accept that statement, and others like it,<sup>23</sup> as true, accurate and correct.<sup>24</sup> Ironically, the main source of conflicting information is

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21. The argument I am making is that Title VII was meant only to limit the very worst kinds of discrimination. Therefore, a conception of Title VII as a vehicle for the eradication of all discrimination or even subtle forms of discrimination is the discrepant cognition in need of replacement. *See id.* at 1491 (recognizing the futility of redrafting Title VII).

22. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973).

23. *See, e.g., Alexander v. Gardener-Denver Co.*, 415 U.S. 36, 44 (1974) ("Congress enacted Title VII . . . to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin."); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) ("[T]he primary objective [of Title VII] was a prophylactic one."); *Johnson v. Ry. Express Agency*, 421 U.S. 454, 457-58 (1975) ("It creates statutory rights against invidious discrimination in employment and establishes a comprehensive scheme for the vindication of those rights."); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283 (1976) ("The Act prohibits *all* racial discrimination in employment, with exception for any group of particular employees . . ."); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 71(1977) ("The emphasis both in the language and the legislative history of the statute is on eliminating discrimination in employment . . ."); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 348 (1977) ("The primary purpose of Title VII was 'to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.'"); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979) (Title VII's purpose is "the elimination of discrimination in the workplace"); *United Steelworkers v. Weber*, 443 U.S. 193, 202 (1979) ("Congress' primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with 'the plight of the Negro in our economy.'"); *Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982) ("The 'primary objective' of Title VII is to bring employment discrimination to an end . . ."); *EEOC v. Shell Oil Co.*, 466 U.S. 54, 77 (1984) ("The dominant purpose of the title, of course, is to root out discrimination in employment.").

24. The force of this statement and others like it has cemented this cognition of



*McDonnell Douglas*<sup>25</sup> and its progeny which make proving disparate treatment almost impossible.<sup>26</sup> *McDonnell Douglas* is internally dissonant in setting up the cognition of Title VII’s purpose as broadly remedial and denying that purpose in practice.<sup>27</sup> The difficulty in proving disparate treatment is seen, however, as a problem of interpretation rather than a fundamental problem with Title VII’s structure.<sup>28</sup> The disparate cognition of Title VII’s purposes is so strong

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Title VII to such a degree that it looks more like a behavior than an attitude. In the drive to relieve the tension caused by cognitive dissonance, attitudes usually change before behaviors because behaviors are harder to change. *See* COOPER, *supra* note 15, at 2. In dispelling the tension of the dissonance between this cognition, which relates strongly to the belief about Title VII’s structure and its history as part of the Civil Rights Act of 1964, and the actual outcomes in cases like *Ash*, which are based on the Supreme Court’s interpretation of Title VII, we are driven to resolve the tension by focusing on the Court’s errors in limiting the ability of Title VII to eradicate discrimination in employment. In short, the belief in Title VII’s purposes is stronger than the belief in the Court’s ability to properly interpret it. So, the latter belief changes to accommodate a consistent view of Title VII’s ability to eradicate employment discrimination, subtle or otherwise.

25. 411 U.S. at 801 (“Title VII tolerates no racial discrimination, subtle or otherwise.”).

26. *McDonnell Douglas* established the basic framework of the three-part burden shifting analysis in cases alleging disparate treatment based on circumstantial evidence. *See id.* at 802-03. (First, the plaintiff establishes a presumption of discrimination by showing that he was a qualified, racial minority, who was not hired, and the job remained unfilled or was filled by someone with the same qualifications, who was not a racial minority. Second, the employer has to provide a legitimate, non-discriminatory reason for the adverse employment decision. Third, the presumption of discrimination disappears and the employee has to prove discrimination by showing that employer’s reason was just a pretext for discrimination.). An employer need not assert a legitimate nondiscriminatory reason at all. However, then, it faces the possibility that a plaintiff will establish a prima facie case of discrimination. *See* St. Mary’s Honor Ctr. v. Hicks, 509 U. S. 502, 510 (1993). If that risk is unacceptable, an employer need only assert a reason for the challenged decision, other than the plaintiff’s prescribed characteristic. *Id.* At that point, the presumption of discrimination disappears. *Id.* This evolution of *McDonnell Douglas* has been sharply criticized. *See* The Honorable Timothy M. Tymkovich, *The Problem with Pretext*, 85 DENV. U. L. REV. 503, 519-24 (2008). Aside from the criticism, disparate treatment cases (particularly those claiming racial discrimination) have been ably demonstrated. *See generally* *Hard to Win*, *supra* note 13, at 562 (“Race and discrimination claims are generally thought to be the most difficult employment claim to succeed on, and when it comes to race, the courts’ bias tends toward our common definition of bias.”).

27. *See* Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 324-28 (1997) [hereinafter *Supreme Court Rhetoric*].

28. *See generally* Van Detta, *supra* note 18; Martin J. Katz, *Reclaiming McDonnell Douglas*, 83 NOTRE DAME L. REV. 109 (2007); William R. Corbett, *Fixing Employment*

that we do not effectively question the foundation for the knowledge.<sup>29</sup>

The illusion that Title VII was meant to eradicate employment discrimination also stems from our attachment to the Civil Rights Era.<sup>30</sup> The Civil Rights Era provides the reference point for the beginning of life in a meritocracy<sup>31</sup> focused on the country's fundamental promise to give faithful meaning to these words: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life,

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*Discrimination Law*, 62 SMU L. REV. 81 (2009).

29. See note 23, *supra*, discussing the reasons for the strength of the belief that Title VII is meant to eradicate discrimination in employment.

30. Daniel B. Rodriguez & Barry Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act And Its Interpretation*, 151 U. PA. L. REV. 1417, 1537 (2003) ("The trouble with [the] heroic picture is that we may well come away with a distorted view of what actually happened within Congress between the summers of 1963 and 1964.").

The strength of the belief in Title VII's purpose has deep roots in the meaning of the Civil Rights Era. As a culture, the Civil Rights Era allowed America to be reborn with the blood of hundreds of years of oppression washed away. It seemed that the Central American promise of equality became real overnight. President Kennedy addressed the nation on June 1, 1963, echoing Lincoln's opening lines to the Gettysburg Address: that the country was "founded on the principle that all men are created equal . . ." See *infra* note 33. Two months later, Martin Luther King, standing literally at Lincoln's feet, invoked the foundation principle of the nation. See *infra* note 31. By passing the Civil Rights Act of 1964 into law Congress fulfilled the core American promise. Yet, this epochal event could not have happened without Lincoln, Kennedy and King to remind the Nation to keep its faith. They are heroes. Their deaths by assassination made them also martyrs. Culturally, we, the heirs of heroes, have the Civil Right Act of 1964. The purpose of Title VII is informed by our kinship with our heroes and their gift of civil rights. If we are to retain a cultural sense of American exceptionalism stemming from our heroic heritage in the civil rights struggle, our inheritance, in this case Title VII, must also reflect exceptionalism. Charles P. Henry, *Long Overdue*, 28 (2007). Therefore, Title VII's purpose could not be anything less than a zero-tolerance policy for employment discrimination. If, on the other hand, Title VII's purpose is limited to preventing or suppressing the worst forms of overt discrimination while allowing for subtle forms of discrimination based in subjective considerations like personal animosity, the result is not particularly exceptional and neither are the achievements of the Civil Rights Era.

31. See I HAVE A DREAM, *supra* note 14 ("content of their character"); President John F. Kennedy, Inaugural Address 1961 (Jan. 20, 1961), <http://www.jfklibrary.org/Asset-Viewer/BqXIEM9F4024ntF17SVAjA.aspx?gclid=CMi1pLeqxa8CFecSNAod-E7fYg> ("ask what you can do for your country"). This meritocracy consisted of two interlocking parts: a stress on individual success based on talent and ability, and colorblindness – color cannot be allowed to make any difference if "all men are created equal."

liberty and the pursuit of happiness.”<sup>32</sup> On June 1, 1963, John F. Kennedy not only reminded Americans that the country was “founded on the principle that all men are created equal,”<sup>33</sup> he told Americans that he was going to see that the nation fulfilled its promise.<sup>34</sup> Dr. Martin Luther King Jr.’s “I Have a Dream” speech echoed the key theme of meritocracy.<sup>35</sup> By passing the Civil Rights Act of 1964 (the “Act”) into law Congress finally fulfilled the core American promise to make meritocracy the American reality.<sup>36</sup> For some, President Barack Hussein Obama’s election in 2008 proves the successful attainment of meritocracy.<sup>37</sup>

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32. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). The reality of slavery and the fact that slaves weren’t “men” in a constitutional sense, made it impossible for America to live up to this promise. *See* *Dred Scott v. Sandford*, 60 U.S. 393 (1856); U.S. CONST. art. I, § 2, cl. 3 (counting slaves at 3/5ths of a person); COOPER, *supra* note 15, at 150. (“The historical inconsistency between the famous phrase in the Declaration of Independence that ‘All men are created equal’ and the reality of the Black experience in antebellum America has been replaced by the inconsistency between the philosophy of equal opportunity and the reality of poverty, underemployment, and discrimination. In short, to live in twenty-first century America as a member of a minority group is to experience the double consciousness that frequently treats one as equal in philosophy and less than equal in practice.”).

33. *See* President John F. Kennedy, Radio and Television Report to the American People on Civil Rights, (June 11, 1963), <http://www.jfklibrary.org/Research/Ready-Reference/JFK-Speeches/Radio-and-Television-Report-to-the-American-People-on-Civil-Rights-June-11-1963.aspx> [hereinafter Report on Civil Rights].

34. *See id.* (“Now the time has come for the Nation to fulfill its promise. \* \* \* Next week I shall ask the Congress of the United States to act, to make a commitment it has not fully made in this century to the proposition that race has no place in American life or law. \* \* \* I am, therefore, asking the Congress to enact legislation giving all Americans the right to be served in facilities which are open to the public. . . . I am also asking Congress to authorize the Federal Government to participate more fully in lawsuits designed to end segregation in public education. \* \* \* Other features will also be requested, including greater protection for the right to vote.”).

35. On August 28, 1963, standing literally at Lincoln’s feet, King told his listeners, including Kennedy,

In a sense we have come to our nation’s capital to cash a check. When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was a promise that all men, yes, black men as well as white men, would be guaranteed the unalienable rights of life, liberty, and the pursuit of happiness. I HAVE A DREAM, *supra* note 14, at 102.

36. *See* Brookins, *supra* note 16, at 940.

37. *See, e.g.,* WILLIAM JELANI COBB, *THE SUBSTANCE OF HOPE: BARACK OBAMA AND THE PARADOX OF PROGRESS* (2010); JABARI ASIM, *WHAT OBAMA MEANS...FOR OUR CULTURE, OUR POLITICS, OUR FUTURE* 218 (2009) (“The remnants of old-school racism that reared up in certain quarters prior to election day were not revealed as

The Supreme Court has been instrumental in confirming the disparate cognition of Title VII's purpose.<sup>38</sup> The Court has found "that Congress' primary purpose was the prophylactic one of achieving equality of employment 'opportunities' and removing 'barriers' to such equality."<sup>39</sup> A more emotionally satisfying version of the same idea is the pronouncement that Title VII is part of "a complex legislative design directed at a historic evil of national proportions."<sup>40</sup> These statements have no textual foundation in Title VII. Earlier versions of what became Title VII possessed a congressional declaration of purpose: "that it is the national policy to protect the right of the individual to be free from [employment] discrimination."<sup>41</sup> This specific declaration of purpose did not survive as part of Title VII.<sup>42</sup> A more detailed look at Title VII's legislative history provides significant information for assessing a change in our beliefs regarding its purpose.

## II. TITLE VII'S REAL PURPOSE

The words "Title VII's purpose is to eradicate employment

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omens of a November surprise but exposed as the last gasps of a dying pathology."). At least in his speeches, particularly his inaugural address, the President also gives the impression that his election was a culmination. Theme of the inauguration, "A new birth of freedom," from Lincoln's Gettysburg Address links President Obama to the foundation promise of the nation, the breach of which Lincoln lamented and the fulfillment of which President Obama celebrated. The President specifically remarks on the completion of the Civil Rights effort:

What is required of us now is a new era of responsibility . . . This is the meaning of our liberty and our creed – why men and women and children of every race and every faith can join in celebration across this magnificent Mall, and why a man whose father less than sixty years ago might not have been served at a local restaurant can stand before you and take a most sacred oath.

President Barack Obama, Inaugural Address 13 (Jan. 20, 2009),

<http://www.whitehouse.gov/blog/inaugural-address/>.

38. See note 23 *supra* and cases cited therein.

39. *Connecticut v. Teal*, 457 U. S. 440, 449 (1982).

40. *Albemarle Paper Co. v. Moody*, 422 U. S. 405, 416 (1975).

41. See H.R. REP. NO. 88-914, pt. 1, at 18 (1963).

42. This declaration of policy was Section 701(a) of what would become Title VII until the omnibus civil rights bill left the House for the Senate in late 1963. Senator Dirksen's amendments deleted this statement of purpose. See Rodriguez & Weingast, *supra* note 30, at 1493 ("To the extent that Dirksen rationally feared that the broad phrasing of Section 701(a) would authorize courts to expand the scope of the Act, his intent in deleting it seems rather prescient."). See also Part II.B. *infra*, describing Title VII's legislative history.

discrimination” do not appear in its text.<sup>43</sup> Nor does the statement: “In the implementation of [personnel decisions], it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise.”<sup>44</sup> It is wrong to expect to see those words in Title VII. Title VII was, after all, a *quid pro quo* for the passage of the Civil Rights Act of 1964;<sup>45</sup> the compromise was to limit Title VII’s reach and preserve the *status quo*.<sup>46</sup> This included: entirely prospective legislation; the commitment to retain as much of existing management prerogatives in personnel decisions as possible; and a focus only on overt gross acts of discrimination. Proponents of the *status quo* co-opted meritocracy to move this agenda into Title VII.

### A. Background

An accurate understanding of Title VII’s real purposes must focus on its legal, social and political contexts. This combination of contexts chiefly describes the thinking of the politicians in intentionally limiting

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43. The Civil Rights Act of 1964 has no preamble stating its purpose, nor do any of its component Titles. A statement of the purpose and content of the legislation that would become the Act comes from House Report 88-914, November 20, 1963 on House Resolution 7152. According to the report, “The bill, as amended, is designed primarily to protect and provide more effective means to enforce the civil rights of persons within the jurisdiction of the United States.” H.R. REP. NO. 88-914, pt. 1, at 16 (1963). The General Statement to the report describes that H.R. 7152

[i]s designed as a step toward eradicating significant areas of discrimination on a nationwide basis. It is general in application and national in scope. No bill can or should lay claim to eliminating all of the causes and consequences of racial or other types of discrimination against minorities. There is reason to believe, however, that national leadership provided by the enactment of Federal legislation dealing with the most troublesome problems will create an atmosphere conducive to voluntary or local resolution of other forms of discrimination. It is, however, possible and necessary for the Congress to enact legislation which provides the means of terminating the most serious types of discrimination. This H.R. 7152, as amended, would achieve in a number of related areas. \* \* \* It would eliminate discrimination in employment.

...

*Id.* at 18. The report’s section-by-section analysis of Title VII states: “The purpose of this title is to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion or national origin.” *Id.* at 26.

44. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973).

45. CHARLES & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 37 (1985) [hereinafter *WHALENS*].

46. *See infra* note 153 and accompanying text.

Title VII to the immediate issues at hand and simultaneously preventing Title VII, with the Court's assistance, from eradicating all but the most overt forms of employment discrimination.

In 1963 and 1964, Civil Rights legislation and the idea of a federal fair employment practices law was not new.<sup>47</sup> There was a critical mass of state laws seemingly aimed at employment discrimination.<sup>48</sup> A related and very powerful body of federal law also existed in the field of labor relations.<sup>49</sup> The nation also recently adopted meritocracy as its goal.<sup>50</sup> Moreover, a tension existed between federal labor law and the employment at will doctrine developed under the state law. That tension must be given credit for the role it played in guiding Congressional intentions in drafting Title VII's text.<sup>51</sup> Finally, if we look at the kind of discrimination it took to fully animate the national debate over civil rights,<sup>52</sup> we should better understand the nature of the discrimination Congress ultimately prohibited under Title VII.

### 1. Influences of Existing Jurisprudence

A serious question for the legislators working for and against civil rights was the nature of the change in scope of existing management prerogatives in the private sector.<sup>53</sup> Historically,

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47. See generally Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (1957); Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (1960). As to employment discrimination, the bills that fathered Title VII were H.R. 10144 "Federal Equal Employment Opportunity Act" in 1963 and H.R. 405 "Equal Employment Opportunity Act of 1963." See also Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. L. REV. 431 (1966) ("In the legislative branch of the federal government, this history of FEP legislation prior to 1964 was characterized by repeated failures for civil rights advocates.") (giving a brief chronicle of these failures starting in 1941).

48. H.R. REP. NO. 88-570, at 2302 (1963) ("Testimony before the committee has indicated that Federal legislation is necessary despite the existence of fair employment practice laws in almost half the States.").

49. See National Labor Relations Act, 61 Stat. 136 (1947) (current version at 29 U.S.C. §§ 151-168).

50. See *supra* Part I.

51. See *infra* Part II.A.1.

52. See *infra* Part II.A.2. Professor Selmi has observed that the Supreme Court cannot see anything, but the kind of discrimination that brought on the Civil Rights Act of 1964. See *Supreme Court Rhetoric*, *supra* note 27, at 284, 335 ("Once the signs denominating 'colored' and 'white' facilities were taken down, it has been difficult for the Court to understand what legal problem remained.").

53. See Richard A. Bales, *Explaining the Spread of At-Will Employment as an Interjurisdictional Race to the Bottom of Employment Standards*, 75 TENN. L. REV.

management prerogatives found expression in the at will employment doctrine.<sup>54</sup> Under that doctrine an employer could take any personnel action for any or no reason.<sup>55</sup> Clearly, refusing jobs or promotions to blacks fell squarely within management prerogatives.<sup>56</sup> Such decisions also found ample support in the reigning social mores.<sup>57</sup>

It was not until the New Deal Era that federal law made any significant inroads into at-will employment. One of the favored children of the New Deal, the National Labor Relations Act, curbed management prerogatives, but only in a very limited way.<sup>58</sup> It became a national policy, enforced directly by a federal agency, the National Labor Relations Board, to prevent the exercise of the full scope of management prerogatives, but only to the degree that the right to deny or terminate employment no longer included union activity as a reason.<sup>59</sup>

The existence of a federal mandate for a federal agency to prosecute unlawful discrimination gave the right being protected enhanced status. Once an employee filed an unfair labor practice charge with the NLRB, the NLRA transfigured that individual’s private right to a public right.<sup>60</sup> The actions of the NLRB after receipt of the

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453, 458 (2008); Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 126 (1976).

54. See Deborah L. Markowitz, *The Demise of At-Will Employment and the Public Employee Conundrum*, 27 URB. LAW. 305, 308 (1995).

55. See Bales, *supra* note 53, at 461 (describing at-will employment as a “doctrine whereby an employer has nearly absolute control over employment terms.”).

56. See *id.* Since race would fall under the heading of “any” reason and there was no protection for racial discrimination under the NLRA until 1964, and no effective protection under state fair employment practices laws, any employer could use race as a reason for an adverse employment decision.

57. See C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW*, 149-88 (3d ed. 1974); Ralph K. Winter, Jr., *Improving the Economic Status of Negroes Through Laws Against Discrimination: A Reply to Professor Sovorn*, 34 U. CHI. L. REV. 817, 818 (1967) (“Questions of style and beauty as well as other even less easily identified considerations constantly shape business (and employment) decisions. Matters of individual taste are involved and cannot be eliminated without gross impingement on individual freedom and quite intolerable substantive results.”).

58. See Markowitz, *supra* note 54, at 309-10; Robert J. Affeldt, *Title VII in the Federal Courts – Private or Public Law: Part I*, 14 VILL. L. REV. 664, 666-67 (1969) [hereinafter *Affeldt Part I*].

59. See National Labor Relations Act, 61 Stat. 136 (1947) (current version at 29 U.S.C. §§ 151-168).

60. At least that was the perspective of commentators in the aftermath of the passage of the Civil Right Act of 1964, who compared the Title VII with the NLRA and concluded that the rights under Title VII compared to those under the NLRA were

charge vindicated the public policy of the NLRA: empowering individuals to engage in collective action to balance the power of management at the bargaining table as the best way to achieve lasting industrial harmony.<sup>61</sup>

If Title VII were to mirror the NLRA, the right to be free from discrimination in employment because of race, color, religion, national origin or sex would identify discrimination under Title VII as harm to the individual and society as a whole.<sup>62</sup> The less Title VII resembles the NLRA, particularly as to the existence of a federal agency tasked with enforcement, the less employment discrimination resembles a public wrong.<sup>63</sup> Wrongs under Title VII would then be private rather than public, and “not so injurious to the community to justify the intervention of the public law enforcement authorities.”<sup>64</sup>

Employment discrimination, as something not cognizable as a national public wrong necessarily implicates federalism.<sup>65</sup> Indeed, a

not public. See Affeldt *Part I*, *supra* note 58, at 672-78 (arguing why discrimination is a “public wrong”); Stuart A. Morse, Comment, *The Scope of Judicial Relief Under Title VII of the Civil Rights Act of 1964*, 46 TEX. L. REV. 516, 520 (1968) [hereinafter Morse] (had it retained its NLRB-like powers, the EEOC “would not have adjudicated private rights, but would have acted in the public interest to obtain broad compliance . . . .”); Comment, *Enforcement of Fair Employment Under the Civil Rights Act of 1964*, 32 U. CHI. L. REV. 430, 432 (1965) [hereinafter *Enforcement of Fair Employment*] (“As originally conceived, Title VII would primarily have established a ‘public’ right and only incidentally created a private one. Like the NLRA, Title VII was to have been enforced by a federal agency empowered to eliminate discriminatory practices by issuing cease-and-desist orders.”).

61. National Labor Relations Act, 61 Stat. 136 (1947) (current version at 29 U.S.C. §§ 151-168).

62. See Richard K. Berg, *Equal Employment Opportunity Under The Civil Rights Act of 1964*, 31 BROOK. L. REV. 62, 67 (1964).

63. See Morse, *supra* note 60, at 520.

64. Berg, *supra* note 62, at 67. See also, Article, *Title VII, Civil Rights Act of 1964: Present Operation and Proposals for Improvement*, 5 COLUM. J.L. & SOC. PROBS. 1, 7 (1969) [hereinafter *Present Operation*] (Title VII, by making enforcement a private action with private remedies, “[creates] a private right.”); Affeldt *Part I*, *supra* note 58, at 672 (“if the courts view the charging party’s suit as a private suit, with no public interest, the Title is again doomed.”); *Enforcement of Fair Employment*, *supra* note 60, at 432.

65. The NLRA, as an expression of national policy preempts state law under Section 301; WILLIAM H. RIKER, *FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE* 155 (1964) (“If in the United States one disapproves of racism, one should disapprove of federalism.”). Professor Riker concluded that the main, although not sole, beneficiaries of American Federalism were Southern Whites. The normative question on the value of American federalism for Professor Riker was “a judgment on the values of segregation and racial oppression.” *Id.* at 153. I am indebted to Professor Charlton C.



critical mass of states had employment discrimination laws in the period immediately preceding the passage of the Civil Rights Act.<sup>66</sup> The issue of employment discrimination remained a problem in almost all of these states.<sup>67</sup> If federalism suborns racism,<sup>68</sup> then one would have to conclude that any federal employment discrimination law would be doomed to failure if it relied on the states for investigation and enforcement.<sup>69</sup> From that perspective, the nature of any balance struck that limited central authority in favor of local autonomy would speak volumes about the value of the rights protected under Title VII vis-a-vis existing management prerogatives under the at-will employment doctrine.

## 2. Civil Rights Era Discrimination<sup>70</sup>

The meaning of “discrimination” in the Civil Rights Era is obviously not susceptible of definition with one hundred percent accuracy. Never-the-less, one thing Congress’ failure to define “discrimination” suggests is that there was a common understanding of the word, which taken together with the practices that Congress determined would and would not be unlawful under Title VII, gives a

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Copeland of the University of Miami School of Law for causing me to consider the impact of federalism on segregation in American society, generally, and how America handles discrimination in employment specifically. Issues of federalism arose during the debate over Title VII in Congress and ultimately caused the EEOC to have to take a back seat to state fair employment practices entities. H.R. Rep. No. 87-1370, at 5, 8; H.R. Rep. No. 88-570, at 16, 19; 110 Cong. Rec. 12721, 12723, 14327, 14329, 14331.

66. Berg, *supra* note 62, at 67 n. 10.

67. In those states with fair employment practice laws, the House Committee on Education and Labor considered these problems twofold: “Second, State [sic] laws very [sic] in coverage and effectiveness. Third, State [sic] commissions have encountered difficulty in dealing with large, multiphased operations of business in interstate commerce.” H.R. REP. NO. 88-570, at 2302-03 (1963); *see also Present Operation, supra* note 64, at 12-13 (“State fair employment practices laws have been largely ineffective due to lax enforcement and the paucity of complaints. The low level of complaints has been attributed to apathy, fear and distrust of state fair employment practices commissions.”).

68. *See* RIKER, *supra* note 65, at 155.

69. *See supra* note 64.

70. I am purposefully excluding from this discussion “discrimination” as used and understood under the federal labor law. Discrimination under that law was linked to the exercise of a legal right granted by the federal government. It has a distinctly different flavor from decisions based solely on readily identifiable characteristics, like race or skin color, which requires the holder of that characteristic to do nothing more than exist.

very good picture of the nature of the discrimination in employment that Congress proscribed.<sup>71</sup> The common understanding of actions that amounted to “discrimination” and Title VII’s text supply a definition that does not encompass much more than a personnel decision that obtained almost solely because an individual was black.

A common understanding of “discrimination” in the Civil Rights Era should capture both the most dramatic influences on the changes in the American conscience that made meritocracy/colorblindness a key feature of the Era and the more nuanced behaviors of the people involved in the passage of the Act.<sup>72</sup> There are many events of the Civil Rights era that riveted the public’s attention on the “Negro Problem.”<sup>73</sup> A non-exhaustive list of the highlights includes the trial for the murder of Emmett Till in Money, Mississippi, the integration of Central High School in Little Rock, Arkansas, the Montgomery, Alabama bus boycott, and the events in Birmingham, Alabama that catalyzed the Kennedy administration to submit omnibus civil rights legislation to Congress.<sup>74</sup> These events served to publicize the level of violence and

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71. See William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 341 (1990) (discussing alternative meanings for “discrimination” in Title VII in their critique of textualism as a valid foundation principle for statutory interpretation). As discussed in Part II.B.2. however, Congress was aware of definitions of discrimination put forth by witnesses testifying on behalf of H.R. 405, the sire of Title VII. These proposed definitions linked discrimination to any reliance on subjective criteria for personnel decisions. The fact that these definitions did not appear in Title VII suggests an intention to allow subjectivity to continue to play the role it had always played, so long as race was not the only reason for an adverse employment decision.

72. C. Vann Woodward’s insights on segregation give an idea of the nuances when he describes segregation as a physical distance, rather than a social distance: “physical separation of people for reasons of race. Its opposite is not necessarily ‘integration’ . . . nor ‘equality.’” WOODWARD, *supra* note 57, at xi-xii.

73. These events have been chronicled in such works as TAYLOR BRANCH, *PARTING THE WATERS: AMERICA AND THE KING YEARS 1954-1963* (1988); DAVID J. GARROW, *BEARING THE CROSS: MARTIN LUTHER KING, JR. AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE*, (First Vintage Books ed. 1988); HARVARD SITKOFF, *THE STRUGGLE FOR BLACK EQUALITY 1964-1992* (rev. ed. 1993).

74. See Eskridge & Frickey, *supra* note at 71, at 342-43 (discussing the influence of context on meaning). Although I agree with Professors Eskridge and Frickey that these kinds of images should inform our understanding of discrimination circa 1964, I think they inform only a general understanding and not one that translates, without more, to Title VII. Kennedy’s address to the Nation and his civil rights legislation said nothing about equal employment opportunities for blacks in the public sector. Even after the famous March on Washington For Jobs and Freedom, where Dr. King delivered the “I Have a Dream” speech, Kennedy dismissed the notion of a strong equal employment opportunity law as antithetical to the purpose of passing omnibus civil rights

animosity directed at blacks solely because they were black. This elevated the issue of making decisions or taking actions based on race or color to a national moral question.<sup>75</sup>

On a less graphic level, the problem of discrimination was also largely understood as a physical reaction to skin color alone. This was true in organized labor.<sup>76</sup> In other parts of society the issue was described as having to associate with blacks,<sup>77</sup> work alongside blacks,<sup>78</sup> live in the same neighborhood as blacks<sup>79</sup> or serve blacks<sup>80</sup> because they were black. “Discrimination” can, therefore, be understood as equal to segregation. This meaning of “discrimination” has two overlapping aspects. First, it captures the enforced *de facto* or *de jure*

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legislation. WHALENS, *supra* note 45, at 26-27.

75. See I HAVE A DREAM, *supra* note 14, at 102 (“In a sense we have come to our nation’s capital to cash a check. When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was a promise that all men, yes, black men as well as white men, would be guaranteed the unalienable rights of life, liberty, and the pursuit of happiness.”); Report on Civil Rights, *supra* note 33 (“This Nation was founded by men of many nations and backgrounds. It was founded on the principle that all men are created equal, and that the rights of every man are diminished when the rights of one man are threatened. \* \* \* We are confronted primarily with a moral issue. It is as old as the scriptures and is as clear as the American Constitution.”). The immediate forefather of Title VII, H.R. 405, would have contained a finding that “discrimination in employment . . . is contrary to American principles of liberty and equality of opportunity, is incompatible with the Constitution . . .” See H.R. REP. NO. 88-570, at 2305-06 (1963).

76. See, e.g., *Tunstall v. Bhd. of Locomotive Firemen & Enginemen*, 323 U.S. 210 (1944); *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944); Michael A. Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563, 565 (1962) (“Indeed in some sectors of the economy unions have more to say about who gets jobs than employers do. And those exercising this power have not always been color-blind. It is not merely that some unions have refused, either explicitly or tacitly, to admit Negroes to membership and that others have relegated them to segregated locals. These are not insignificant handicaps and affronts, but they are obviously secondary in importance to the use of union power to confine Negroes to the lowest job classifications of some enterprises and to exclude them from others all together.”) (citations omitted); H.R. REP. NO. 88-570, at 2301 (1963) (Discrimination by labor organizations, particularly certain construction unions, with respect to membership and training is widespread.”).

77. See *McLaughlin v. Florida*, 379 U.S. 184 (1964); Harvey M. Applebaum, *Miscegenation Statutes: A Constitutional and Social Problem*, 53 GEO. L.J. 49 (1964).

78. See H.R. REP. NO. 88-570, at 2301 (1963) (“Segregated locals still exist despite continuous statements of opposition by national labor leaders.”).

79. See *Hurd v. Hodge*, 334 U.S. 24 (1948).

80. See *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

physical separation of people.<sup>81</sup> Picture two drinking fountains one for “white” one for “colored.” Second, it captures the contemporary action of relegating people to positions commensurate with preconceived and constantly reinforced beliefs as to limitations on their abilities based on skin color alone.<sup>82</sup> In the end, despite the fact that there was no means to start a discussion of what it meant to use words like “nigger” or “boy,” there was a common understanding that discrimination was at least an intentional adverse response to race alone.<sup>83</sup>

Turning to Title VII, the language suggests that Congress was addressing by permission or prohibition personnel decisions related to skin color alone rather than some more subtle form of discrimination.<sup>84</sup>

81. See WOODWARD, *supra* note 57, at xi.

82. Reporting on Title VII’s forerunner, H.R. 405, the Committee on Education and Labor seemed to view even “subtle” forms of discrimination as segregating behavior; a physical action. See H.R. REP. NO. 88-570, at 2301 (1963) (“Job discrimination most is extant in almost every area of employment and in every area of the country. It ranges patent absolute rejection to more subtle forms of invidious distinctions. Most frequently, it manifests itself through relegation to ‘traditional’ positions and through discriminatory promotional practices.”). The recognition of “discrimination” as a function of skin color did not include what we now call expressions of bias. Nigger, for example, was not a strange word to Supreme Court Justice James Clark McReynolds, or Presidents Truman, Eisenhower, or Johnson. See, e.g., RANDALL KENNEDY, NIGGER: THE STRANGE CAREER OF A TROUBLESOME WORD 9-10 (Vintage Books ed. 2003). Truman desegregated the American military; establishing the President’s Committee on Equality of Treatment and Opportunity in the Armed Services. See Exec. Order No. 9,981, 13 Fed. Reg. 4313 (July 28, 1948). Eisenhower deployed the 101<sup>st</sup> Airborne Division to make sure that the Little Rock Nine got to Central High School, Providing Assistance for the Removal of an Obstruction of Justice within the State of Arkansas, Proclamation No. 3204, 22 Fed. Reg. 7628 (Sept. 25, 1957). And Johnson actually made the Civil Rights Act of 1964 happen. One might conclude that, at least from their perspectives, using a word like “nigger” did not make them racists or their actions discriminatory.

83. See Berg, *supra* note 62, at 71. Mr. Berg’s often-referenced description of Title VII’s legislative history provides significant insight to the contemporary and well-disposed legal mind. Mr. Berg saw discrimination as, pardon the pun, a black and white issue. He apparently understood what “discrimination” meant so well that the word in isolation did not merit discussion. Where he discusses discrimination is in conjunction with the word “intentionally” to explain why “intentionally” was a superfluous addition to Title VII. “Discrimination is by its nature intentional. It involves both an action and a reason for the action. To discriminate ‘unintentionally’ on grounds of race, color, religion, sex, or national origin appears a contradiction in terms.” *Id.* In contrast, Mr. Berg dismisses as too remote the possibility that a subconscious intent to discriminate, that is submerged in the use of pejorative language, could fall within Title VII’s protections. *Id.* at n. 14.

84. The legislative history strongly supports a limited definition for “discrimination.” See H.R. REP. NO. 88-914, pt. 1, at 18 (1963) (H. R. 7152 “prohibits

Section 703(a) captures the responses to race Congress considered by making the anticipated reactions of the time unlawful. The anticipated reactions included rejecting an applicant because he or she was black,<sup>85</sup> or segregating a black person with other black people because of the belief that blacks could only be allowed to work certain kinds of jobs and/or the belief that white employees would not work in an integrated environment.<sup>86</sup>

Another good example of the congressionally intended meaning of “discrimination” is the protection of seniority rights in Section 703(h). The problem with seniority rights was their well-known relationship to the exclusion of black people from receiving all or some of their benefits on the sole basis of skin color.<sup>87</sup> Title VII allowed these predations to go unpunished by being forward looking.<sup>88</sup> Time began for “bona fide” seniority systems with Title VII’s enactment.<sup>89</sup> By virtue of the definition within Section 703(h), a seniority system was “bona fide” and could continue functioning where there was no “intention to discriminate.”<sup>90</sup> “Discrimination,” therefore, meant no longer using race to exclude blacks from the benefits of seniority and no longer dispensing the benefits of seniority on the basis of race.

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and provides the means of terminating the most serious types of discrimination.”); H.R. REP. NO. 88-914, pt. 2, at 2 (1963) (“But this bill can and will commit our Nation to the elimination of many of the worst manifestations of racial prejudice.”). See also Frank Cloud Cooksey, *The Role of Law in Equal Employment Opportunity*, 7 B.C. L. REV. 417, 419-20 (1966) (arguing that Title VII will only address some of what Mr. Cooksey describes as “unreasonable discrimination” and concluding that “[t]he role of law in the area of equal employment opportunity is a limited one.”).

85. See Civil Rights Act of 1964, §703(a)(1), Pub. L. No. 88-352, 78 Stat. 241 (1964).

86. See Civil Rights Act of 1964, §703(a)(2), Pub. L. No. 88-352, 78 Stat. 241 (1964). Segregation was, of course, on the minds of the Nation and had been since *Brown v. Board of Education* in 1954. In the employment context, a similar form of segregation permeated labor unions. Section 703(c)(1) and (2) are a direct response to this well-known phenomenon.

87. Professor Sovern’s 1962 article, *supra* note 76, is entirely dedicated to the resolution of race discrimination in unions. See also Herbert Hill, *The New Judicial Perception of Employment Discrimination – Litigation Under Title VII of the Civil Rights Act of 1964*, 43 U. COLO. L. REV. 243, 250-54 (1972) (describing the extent of racial discrimination by and in unions).

88. See *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

89. See Civil Rights Act of 1964, §703(h), Pub. L. No. 88-352, 78 Stat. 241 (1964).

90. *Id.*

## B. Legislative History

A comprehensive legislative history of Title VII is not necessary to a view of what I have called the conflicting evidence.<sup>91</sup> Legislative history is only part of the story and need only describe the key events that led to the gestation and birth of Title VII. These key events are related to and work in concert with the background issues I described *supra* in Parts I and II.A. Together they reveal the Title VII that not only allows for *Ash* but promotes more decisions like *Ash*.

### 1. Kennedy's Title VII

“The one thing Kennedy did not want was civil rights legislation.”<sup>92</sup> As events at home and abroad began to force his hand, he began to turn himself to the issue. “Civil rights” for the Kennedy administration, however, did not include a federal law prohibiting private sector employment discrimination. The administration focused on public rights, like to right to vote, rather than private rights like the right to be free from discrimination in private employment.<sup>93</sup>

On February 28, 1963, Kennedy's first message to Congress on civil rights effectively established meritocracy as his guiding principle on voting rights and school desegregation legislation.<sup>94</sup> Kennedy's message included a section on employment, largely devoted to detailing the executive branch's efforts in federal employment and

91. The best early efforts at a comprehensive catalogue specific to Title VII's difficult legislative history are those of Mr. Vaas and Mr. Berg. *See* notes 47 and 62, respectively. *See also* WHALENS, *supra* note 45; Note, *Employment Discrimination: State FEP Laws and the Impact of the Civil Rights Act of 1964*, 16 CASE W. RES. L. REV. 608 (1965); *Enforcement of Fair Employment*, *supra* note 60; Note, *Discrimination in Employment and in Housing: Private Enforcement Provisions of the Civil Rights Acts of 1964 and 1968*, 82 HARV. L. REV. 834 (1969); and the volume long Developments in the Law publication of the Harvard Law Review, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 109 (1971).

92. WHALENS, *supra* note 45, at 15.

93. For example, Kennedy's framing of civil rights as a moral issue in response to events in Birmingham, Alabama in the summer of 1963 related only to education, public accommodation, and voting. Kennedy's vision of civil rights really never included protections from discrimination in private employment. *See* Report on Civil Rights, *supra* note 33. Although I agree with those, like Professor Trina Jones, who sees that anti-discrimination law is in peril generally, *see* Trina Jones, *Anti-Discrimination Law in Peril?*, 75 MO. L. REV. 423, 425-26 (2010), any reliance on the Kennedy legacy as a source for strong employment discrimination prohibitions is misplaced.

94. *See* 109 CONG. REC. 3,245-49 (1963).

contracting.<sup>95</sup> Outside of the public sector, Kennedy’s vision of

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95. *Id.* at 3,248. Kennedy was in the process of a two-pronged attack on the employment issue. *See id.* at 3,245-49. The first prong, via executive orders culminating in Executive Order 11246, meant to prevent the government from funding discriminatory employment practices. The second prong was to use the quasi-judicial powers of the NLRB to see that discrimination became an unfair labor practice. The scope of the Kennedy Administration’s activity on the second prong is not clear. He may have had the *Hughes Tool* case, 147 N.L.R.B. 166 (1964), in mind. That case established racial discrimination in union membership as an unfair labor practice for the first time. *See id.*

Kennedy’s strategy might have achieved the most important employment discrimination goals of getting blacks in jobs. Freedom from employment discrimination as an unfair labor practice would have all of the benefits of a public right, including a federal agency to enforce the law. Practical economic benefits attended this philosophical benefit. Banking on the desirability of lucrative government contracts, compliance with executive orders would have put significant pressure on industry to cease discriminatory employment practices and perhaps to engage in what would have been, at the time, legal preferences in favor of blacks. To the degree the contractors were also unionized, a steady stream of successful unfair labor practice charges would put blacks in jobs and in line for better, more skilled, higher paying jobs.

Kennedy’s strategy might have achieved all of this without serious risk to an omnibus civil rights law. He must have been aware of the rancor in the House over the recent attempts in 1962 and 1963 on H.R. 10144 and H.R. 405, respectively, to get a free standing federal fair employment practices bill out of committee. This knowledge could explain the absence of a strong federal fair employment practices title in his original proposal for omnibus civil rights legislation, which became H.R. 7152. It also explains his statements to the civil rights leadership after the March on Washington on August 28, 1963. Kennedy explained to the black leadership that Representative McCulloch told Kennedy that if he, McCulloch, wanted to defeat omnibus legislation, he would put in a fair employment practices title, vote for it, and watch it die in the house. *See* WHALENS, *supra* note 45, at 26-27. McCulloch was a core member of the center position that ultimately allowed the Civil Rights Act to become law. *See id.* at 29-71.

Additionally, the history of H.R. 10144 and H.R. 405 may have taught him that federal employment discrimination legislation was toxic to omnibus civil rights legislation. One of the problems was whether employment discrimination was a proper field for federal intervention. Opponents of federal action asserted federalism and “the force of public opinion” as solutions. *See* H.R. Rep. No. 88-570, at 2318 (1963). They claimed that federal legislation on the issue was, if not immoral, a counterproductive idea that would “tend[] to breed contempt for the law and a public apathy about moral values.” *Id.* Moreover, neither H.R. 10144 nor H.R. 405 provided for a court trial of discrimination claims. Opponents claimed that these bills endangered the fundamental right to a court trial. *Id.* The bills also put enforcement in the hands of a federal agency that mirrored the NLRB. Opponents did not want another quasi-judicial agency on a crusade and feared that “the accused . . . as a practical matter . . . must bear the burden of proving his freedom from guilt.” *Id.* at 2314. Had Kennedy’s employment discrimination strategy remained in place, rather than being supplanted by a strong

employment discrimination as a national problem focused on unions.<sup>96</sup> He envisioned using the NLRB as the way to reach private employment discrimination once the NLRB decided, under the prodding of the Department of Justice, that racial discrimination was an unfair labor practice.<sup>97</sup> Kennedy “hope[d] that administrative action and litigation [would] make unnecessary the enactment of legislation with respect to union discrimination.”<sup>98</sup>

Kennedy’s second address to Congress on civil rights on June 19, 1963, fulfilled the nationally televised promise he made on June 11, 1963, to send Congress omnibus civil rights legislation.<sup>99</sup> Between the 11th and the 19th the administration’s early drafts of the Civil Rights Act of 1963 did not include any federal fair employment practices titles.<sup>100</sup> The version of the administration’s bill that was submitted in the House as H.R. 7152 on June 20, 1963 was the first version that mentioned an Equal Employment Opportunity Commission in its seventh title.<sup>101</sup> The sole aim of that version of Title VII was the prevention of discrimination by government contractors and subcontractors.<sup>102</sup> Kennedy believed that a strong fair employment practices component jeopardized the entire civil rights effort.<sup>103</sup>

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federal fair employment practices title in the omnibus legislation, there would have been little to attack and dismember under the guise of a bi-partisan compromise.

96. See 109 CONG. REC. 3,245-49 (1963).

97. *Id.* at 3,245.

98. *Id.*

99. See Report on Civil Rights, *supra* note 33.

100. See Civil Rights Act of 1963 (June 13, 1963), <http://www.jfklibrary.org/Asset-Viewer/Archives/JFKPOF-053-004.aspx>. (last visited May 8, 2012). This draft included only five titles, none of which addressed employment discrimination. See *id.* Another version of the proposed legislation, with a penciled date of June 17, 1963, had six titles and no employment discrimination title. See *id.*

101. See H.R. REP. NO. 88-914, pt. 1 (1963).

102. *Id.* at 35 (“It shall be the function of the Commission to prevent discrimination against employees or applicants for employment because of race, color, religion, or national origin by Government contractors and subcontractors, and by contractors and subcontractors participating in programs or activities in which direct or indirect financial assistance by the United States Government is provided . . .”).

103. See WHALENS, *supra* note 45, at 27. Attorney General Robert Kennedy’s testimony before the House Judiciary Committee on October 15-16, 1963 is hard to square with the administration’s steady and deliberate avoidance of federal legislation on discrimination in private employment. By the time of those hearings, Subcommittee No. 5 had substituted Kennedy’s Title VII with a formidable title aimed exactly at discrimination in private employment. Attorney General Kennedy testified that “the President strongly endorsed Federal fair employment practices legislation applicable to both employers and unions.” *Civil Rights Act of 1963: Hearing on H.R. 7152 Before*



## 2. Replacing Kennedy’s Title VII

Before October 1963, the House subcommittee responsible for H.R. 7152 discarded the Kennedy administration’s proposed Title VII and replaced it with what had been H.R. 405.<sup>104</sup> In 1963 H.R. 405 was the latest of a succession of failed attempts at federal fair employment practices legislation.<sup>105</sup> Its predecessor from 1962 was H. R. 10144.<sup>106</sup> The story of the development of this fair employment practices legislation, outside of the context of omnibus civil rights legislation, foreshadows much of the debate that occurred over H.R. 7152 in the House and the Senate.<sup>107</sup> And, if one can safely assume that the Kennedy administration was aware of this story, the discussion of these bills in the House Committee on Education and Labor explains Kennedy’s prescience of the potentially catastrophic impact potent federal fair employment practices legislation would have on passing an omnibus civil rights bill.<sup>108</sup>

The Committee Report on H.R. 405, nevertheless, gives significant insight into what the legislators most likely thought of as “discrimination” in employment.<sup>109</sup> One of the themes of the Committee Report matches Kennedy’s focus on unions as a source of the discrimination. Another theme, which went largely without comment elsewhere, was the psychology of separation. These themes explain that the “discrimination” addressed in H.R. 405 was of two kinds. One form of discrimination was based on decisional reactions to readily identifiable immutable characteristics. H.R. 405 addressed this form of discrimination by making it unlawful to make adverse employment decisions based on observable immutable

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*the H. Comm. on the Judiciary*, 88th Cong. 2660 (1963). Attorney General Kennedy also made clear, however, that the administration was well aware that the potent Title VII contained in H.R. 7152 at that time could endanger the passage of the entire civil rights act. *Id.* at 2661.

104. See H.R. REP. NO. 88-570 (1963) (“A Bill to Prohibit Discrimination in Employment in Certain Cases Because of Race, Religion, Color, National Origin, Ancestry or Age.” The short title was to have been the “Federal Equal Employment Opportunity Act.” See also Vaas, *supra* note 47, at 433 (“H.R. 405 is the nominal ancestor of Title VII.”); WHALENS, *supra* note 45, at 35.

105. Failed in the sense of dying in the House after having been successfully reported out of committee. See Vaas, *supra* note 62, at 433 n. 10, 434.

106. See *id.* at 433 n. 10; H.R. REP. NO. 88-570 (1963).

107. See *infra* notes 109-48 and accompanying text.

108. WHALENS, *supra* note 45, at 26-27.

109. See *infra* note 105.

characteristics.<sup>110</sup> The other form of discrimination the legislators had in mind occurred only after employment and it was based on the physical actions and mental attitude that accompanied segregation. H.R. 405 dealt with this form of discrimination by prohibiting the habit or practice of assuming that race or color was limiting; from continuing the segregation of blacks into menial, low paying work and/or actually physically segregating employees. The first version of H.R. 405 is otherwise noteworthy for its inclusion of age as a protected class and the only class subject to what became a powerful protection of union seniority against all classes protected by Title VII: “but no discrimination arising by reason of the operation of a bona fide seniority system shall be deemed an unlawful employment practice” based on age.<sup>111</sup>

H.R. 405’s explosiveness came from its close resemblance to the NLRA in its key enforcement provision.<sup>112</sup> Like the National Labor Relations Board, H.R. 405 created an Equal Employment Opportunity Commission with quasi-judicial powers.<sup>113</sup> The Commission was “empowered . . . to prevent any person from engaging in any unlawful employment practice.”<sup>114</sup> These powers included, after a Commission hearing and a finding by a preponderance of the evidence that a respondent had engaged in any unlawful employment practice, the ability to issue cease and desist orders “and to take such affirmative action, including reinstatement or hiring of employees, with or without back pay . . . .”<sup>115</sup> In this version of H.R. 405, however, there was no effort to separate the EEOC’s investigative and prosecutorial functions from its judicial functions.<sup>116</sup> Once an unlawful employment practice charge was filed, the EEOC took ownership of the charge.<sup>117</sup> There was no provision for a claimant under H.R. 405 to seek direct judicial intervention.<sup>118</sup> Any dispute over a Commission decision could be

110. See H.R. REP. NO. 88-570, at 2300 (1963).

111. See *id.* at § 6(a) (“Discrimination Because of Age.”).

112. See *id.* at 2314 (1963) (“We must vigorously object to the administrative procedure which has been incorporated in this bill by the majority members of the committee.”); Berg, *supra* note 62, at 65; Vaas, *supra* note 47, at 436-37.

113. H.R. REP. NO. 88-570, §§ 8 and 9 (1963).

114. *Id.* at § 9(a).

115. *Id.* at § 9(j).

116. *Id.* at §§ 9(a) – (j).

117. *Id.* at § 9(b).

118. Only the Commission could petition a United States Court of Appeals for enforcement of any Commission-issued cease and desist order. *Id.* at § 10(a). “Any

reviewed in a United States Circuit Court of Appeals – where the factual findings of the Commission, if supported by substantial evidence, would have conclusive effect.<sup>119</sup> In the context of the debate over public and private rights, the initial version of H.R. 405 was as close to elevating employment discrimination to the rank of public rights as any legislation in the Civil Rights Era.<sup>120</sup>

On July 22, 1963, the House Committee on Education and Labor reported out the “Equal Employment Opportunity Act of 1963.”<sup>121</sup> This version of H. R. 405, with minor modifications, replaced Kennedy’s proposed Title VII in H. R. 7152.<sup>122</sup> By July 1963, the committee deleted age as a protected class<sup>123</sup> and added bona fide occupational qualifications (“BFOQs”) as a narrow exception for occupational qualifications based on religion and national origin.<sup>124</sup> The only other major changes related to the structure of the EEOC as the enforcer of equal employment opportunity and the ability of an employer to avoid liability.

In response to criticism about making the EEOC the investigator, prosecutor and judge, H. R. 405 now described the Commission as a “vessel” for a Board and an Office of the Administrator.<sup>125</sup> The Board housed the judicial functions.<sup>126</sup> The Administrator housed the investigative and prosecutorial functions.<sup>127</sup> In a related addition, where the Administrator failed to prosecute a charge, a charging party could apply to a federal court to compel the Administrator to issue and

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person aggrieved by a final order of the Commission” could use the same avenue for relief from a Commission determination. *Id.* at § 10(h).

119. *Id.* at § 10(d). This was the same procedure used in cases under the NLRA. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

120. *See* discussion *supra* Part II.A.1.

121. *See* H.R. REP. NO. 88-570, at 2300 (1963).

122. *See id.*

123. *See id.* Age as a basis for employment discrimination legislation was consigned to the Secretary of Labor for study. Congress retained this provision in Title VII and ultimately handled age discrimination in the Age Discrimination in Employment Act of 1967.

124. *Id.* at 2307.

125. “The major purpose of this functional division within the Commission is to separate to the greatest degree feasible the functions of ‘prosecutor’ and ‘judge’.” *Id.* at 2304.

126. “The Board is primarily a quasi-judicial body with power to hear and determine complaints and issue lawful and appropriate orders.” *Id.* at 2303.

127. “The Office of the Administrator, headed by the Administrator, is the body responsible for the continuing implementation of the act in its entirety.” *Id.* at 2303-04.

prosecute a charge.<sup>128</sup> There was still no mechanism allowing or requiring an individual charging party to seek judicial relief on his own. The Committee explained the need to house the enforcement of federal employment discrimination law in a federal agency as consistent with existing federal and state fair employment practices agencies.<sup>129</sup> Moreover, a “one-stop shop” for employment discrimination held the most important merit of speed.

Justice delayed, is justice denied,” applies especially with great force in this area. Undue delay in achieving a final decision could make the ultimate result a pyrrhic victory. In addition to speed, this procedure would reduce costs for parties, allow for greater informality and flexibility, provide greater uniformity of result within a shorter period, and tend toward the development and contribution of expertise in the area, be conducive to continuing supervision of compliance, create greater motivation to reach informal agreements, and establish unified implementation of a truly national policy.<sup>130</sup>

In keeping with the limited definition of “discrimination” and meritocracy as the *leitmotif* of the Era, the Committee also explained that H.R. 405’s operative provisions protect individuals rather than groups, “and [are] not intended to discriminate in favor of or against individual members of any group.”<sup>131</sup> The distinctions Congressmen made here are noteworthy. The focus on the individual comports with meritocracy; “encourag[ing] the consideration of individuals for employment based upon merit, capability, competence, effort, and other factors not related to an individual’s race”.<sup>132</sup> The expression of meritocracy in H.R. 405 therefore abandoned groups as a suspect class. These Congressmen also rejected the notion of disparate impact. The Committee affirmed that disproportional representation<sup>133</sup> of any kind

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128. “Where the Administrator fails or refuses to issue a complaint within a reasonable time, the person filing the charge may petition a Federal court to require the Administrator to issue such a complaint. This is intended to inhibit unjustifiable delay or rejection of remedial action.” *Id.* at 2304.

129. “This is the procedural pattern followed by the vast majority of State [sic] fair employment practice laws, as well as a traditional practice among many independent federal agencies.” *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. “Nothing in the act is intended to allow charges to be brought based upon a

could not support a charge of discrimination under H.R. 405.<sup>134</sup> Moreover, the Committee’s discussion of “[g]eneral rules as to percentages and quotas” to establish proportional representation demonstrates consideration and rejection of affirmative action of any kind.<sup>135</sup> The Commission could, however consider disproportionate representation as background evidence in any proceeding.<sup>136</sup>

Also consistent with the idea of a narrow definition of “discrimination” and the kind of behavior that could result in liability; H.R. 405 addressed the issue of defenses against charges of employment discrimination. Initially, H.R. 405 only described the result of a finding that discrimination occurred without consideration of the impact on an award of relief if any adverse employment action was explained by any reason other than a proscribed characteristic.<sup>137</sup> This could have become an any taint standard which acknowledged the reality that multiple factors can influence any decision, but cause the decision to be irretrievably tainted by the presence of a proscribed characteristic.<sup>138</sup>

This version of H.R. 405 is the law the majority of the Committee favored, but it would be error to call it the pivot<sup>139</sup> position from which

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disproportionate representation of members of any race, religion, color, national origin, or ancestry within any business enterprise or labor organization.” *Id.*

134. “General rules as to percentages, quotas, or other proportional representation shall not be the basis of charges brought under this act.” *Id.*

135. *Id.* I must acknowledge that the Committee’s language is somewhat ambiguous. By stating that “General rules as to percentages, quotas, or other proportional representation shall not be the basis of charges brought under this act[.]” the Committee may have suggested that such rules might be established and would not violate the law. In that case, the Committee intended to permit affirmative action under H.R. 405. This conclusion is probably not what the Committee intended. It is completely inconsistent with the meritocracy discussion surrounding it. None of the additional, supporting, minority, or supplemental view in H.R. Rep. 570 mentions affirmative action, which they surely would have done in the face of a proposal that jobs could legally be set aside for blacks because of disproportionate employment. Finally, such an idea is inconsistent with the fact that the remedies of H.R. 405 were meant to be entirely prospective.

136. *Id.* at 2305.

137. *See id.* at § 9(j).

138. *See* Mark S. Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292, 296 (1982) (any “‘taint’ standard of causation . . . would make unlawful a decision based even in part on a racial motive.”).

139. I have adopted the terms “pivot” and “pivot legislators” from Professors Rodriguez and Weingast who use it to describe the legislators without whom the Civil Rights Act of 1964 could not have passed. Rodriguez & Weingast, *supra* note 30, at

H.R. 405 would survive intact as the law of the land. Instead, it represents one extremity of the debate<sup>140</sup> which, as I argue in the following sections, represented an untenable perspective. The other equally untenable perspective condemned federal employment discrimination law outright.<sup>141</sup> Although untenable, the anti-employment discrimination argument resonated in certain respects. It captured parts of the Civil Rights Era meritocracy, in pointing out the financial and social hardships on employers and workers. Those against a powerful federal law hinted at issues of wealth redistribution and federalism in the right to make employment decisions on any basis without cost.<sup>142</sup> It also more directly faced the specter of which existing rights would have to be limited in favor of eradicating employment discrimination.<sup>143</sup> These arguments resonated strongly with the pivot legislators which an omnibus civil rights package would require for passage. For that reason, the EEOC envisioned in H.R. 405 merits additional discussion.

An EEOC that functioned like the NLRB was rejected in the 1962 iteration of an equal employment opportunity law in H.R. 10144 for

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1436. The term also distinguishes “pivot legislators” from legislators Professors Rodriguez and Weingast describe as “ardent supporters” in their meticulous discussion of where courts should focus in legislative history to find the best source of the actual intent of the legislators. Professors Rodriguez and Weingast argue that for purposes of consistent statutory interpretation courts should give the statements of the pivot legislators the most weight because “. . . they have the strongest incentives to communicate reliably the act’s meaning . . .” *Id.* at 1448.

140. This extremity of the debate is defined by giving primacy to equal employment opportunity. “There is no more crucial right than the right of equal opportunity to work for a living and to acquire the material blessings of life for self and family.” H.R. REP. NO. 88-570, at 2317 (1963).

141. *See id.* In Commenting on H. R. 405 in its form as Title VII to H. R. 7152, Representative Meader thought Title VII an “ill-devised limitation upon the area of discretion and decision-making of both American business and American workers[.]” and for that reason among others opined that Title VII be deleted from the Civil Rights Act. H.R. REP. NO. 88-914, pt. 1, at 57 (1963). Extreme conservatives paraded hot button issues like having to choose a “Negro” despite personal preferences against “Negros,” and hiring by quota to achieve numerical racial balance. They went on to predict a virtual social Armageddon: “If this title of this legislation becomes a statute, we predict that it will be as bitterly resented and equally as abortive as was the 18th Amendment [prohibition], and what it will do to the political equilibrium, the social tranquility, and the economic stability of the American society, no one can predict.” *Id.* at 111.

142. *See id.* at 57-58.

143. *See* H.R. REP. NO. 88-570, at 2302 (1963).

two reasons.<sup>144</sup> First, it was claimed that an agency with quasi-judicial power violated the American principal that a “fair trial” could only be achieved in a court of law.<sup>145</sup> Second, it was observed that the state fair employment practices agencies, many of which resembled the NLRB in their enforcement powers, achieved more success in conciliation efforts than through hearings and cease and desist orders.<sup>146</sup> These pivot legislators, supporters of H. R. 405 in the Committee on Education and Labor, believed:

Discrimination in employment on the basis of race, religion, color, national origin or ancestry is contrary to our national ideals and our national interest. But we do not act very wisely if we destroy one fundamental right in our zeal to protect another. \* \* \* We believe it would be a serious mistake if this legislation were to deny the right of trial in a court of law, and we believe that such a denial could only serve to undermine and weaken the moral force of this legislation and public acceptance of it.<sup>147</sup>

Given the source of these sentiments and their underlying criticism of the way the NLRB functioned, in addition to the fact that H.R. 405’s predecessor, H.R. 10144, purposefully abandoned the NLRB model, one can comfortably conclude that H.R. 405 appeared as Title VIII in H.R. 7152 in anticipation of being traded away to secure the Act’s passage.<sup>148</sup>

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144. *Id.* at 16.

145. “The historic safeguard of trial before an impartial judiciary would be abandoned in this bill by the majority in favor of hearings before a newly created NLRB-type administrative tribunal, with only a limited right of review in a court of appeals. It is unfortunate that the committee in its zeal to protect one civil right has seen fit, unnecessarily, to cast aside other fundamental and well-established rights which are at least of equal importance.” *Id.* at 15. “We regard the modern development of trial by administrative tribunal as a threat to the liberties of every citizen. It is a reactionary device in the truest sense of that word.” *Id.* at 20.

146. *Id.* at 16.

147. *Id.* at 17.

148. See WHALENS, *supra* note 45, at 37. The legislative history of the Civil Rights Act of 1964 in its entirety is often told as a tale of great success because of the overall minimal impact of the Senate compromise on voting rights, public accommodations, and school desegregation relative to what happened to Title VII. See WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY*, 20 (3d ed. 2001) (“Although the Democrats had allowed Dirksen to make changes to the bill’s language, so that he could claim to have significantly rewritten the bill, virtually all of the changes were cosmetic . . . not weakening the substantive protections.”). Title VII viewed individually felt the brunt of

### 3. Compromising Title VII

As H.R. 7152 worked its way through the House Judiciary Committee, to the full House, then to the Senate—where it faced the longest filibuster in history—and then through the “leadership compromise,” Title VII became fully compromised. Compromised in the sense of its components being traded away in favor of fulfilling the Nation’s foundation promise of equality; a promise which found substance in voting rights, public accommodations, and school desegregation. The right to be free from discrimination in employment was not comparable to these important problems. Despite the fact that the famous “March on Washington” in August 1963 was actually organized as a “March for Jobs and Freedom,”<sup>149</sup> employment discrimination never became a first class problem in the legislature.

Title VII was also compromised in the sense that it would ultimately preserve rather than eradicate the *status quo*. Within the universe, as they perceived it, the Members of the House Committee on Labor and Employment structured H.R. 405 to take on the harsh reality of black joblessness and imprisonment in low paying menial work.<sup>150</sup> When these Congressmen spoke about the symbiotic relationship between earning a living, having a reason to vote, having the ability to enjoy public accommodations and being motivated to succeed in school, they had H. R. 405 as a pledge of sincerity.<sup>151</sup> Once the deal-making began, and others spoke these words, the obfuscation is chilling.

In the House Judiciary Committee, the same people who said:  
The right to vote . . . does not have much meaning on an  
empty stomach. The impetus to achieve excellence in  
education is lacking if gainful employment is closed to the

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the compromise. Attorney General Kennedy acknowledged as much: “I recognize that there are some experienced Members of Congress who feel that the inclusion of this provision in the omnibus bill could make it difficult to secure a rule from the Rules Committee and could even jeopardize ultimate passage of the omnibus bill.” *Civil Rights Hearings Before the Comm. on the Judiciary on H.R. 7152*, 88th Cong. 2660 (1963). At the same time, the Attorney General hinted that the administration was not behind fair employment practices legislation that endangered an omnibus civil rights bill. *Id.* More openly he hinted that fair employment practices be severed from H. R. 7152 as an entirely separate goal. *Id.*

149. Garrow, *supra* note 73, at 284.

150. H.R. REP. NO. 88-570, at 2301 (1963).

151. *Id.*



graduate. The opportunity to enter a restaurant or hotel is a shallow victory where one’s pockets are empty.<sup>152</sup>

also said:

It must also be stressed that the Commission must confine its activities to correcting abuse, not promoting equality with mathematical certainty. In this regard, nothing in this title permits a person to demand employment. Of greater importance, the Commission will only jeopardize its continued existence if it seeks to impose forced racial balance upon employers and labor unions. *Similarly, management prerogatives, and union freedoms are to be left undisturbed to the greatest extent possible.* Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices<sup>153</sup>

This statement represented the pivot position on employment discrimination; the “consensus of the civil rights proponents” in the House.<sup>154</sup> Events in the Senate merely advanced the effort to leave “management prerogatives and union freedoms . . . undisturbed to the greatest extent possible.”<sup>155</sup>

#### *a. Elimination of an NLRB-style EEOC*

The House Judiciary Committee did most of the work of eliminating an NLRB-style EEOC from Title VII. By the time H.R. 7152 was reported out of that committee, the EEOC had ceased to be a quasi-judicial entity with broad enforcement powers.<sup>156</sup> The pivotal legislators did not want a crusading quasi-judicial agency to eradicate employment discrimination.<sup>157</sup> The Judiciary Committee stripped out

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152. H.R. REP. NO. 88-914, pt. 2, at 26 (1963).

153. *Id.* at 29 (emphasis added).

154. Vaas, *supra* note 47, at 437.

155. H.R. REP. NO. 88-914, pt. 2, at 29 (1963).

156. Had Kennedy’s proposed Title VII remained in place in H. R. 7152, there would have been little to attack and dismember under the guise of a bi-partisan compromise. The opportunity presented itself when H. R. 405 took the place of Title VII. Kennedy’s Title VII looked weak on employment discrimination. *See* WHALENS, *supra* note 45, at 26. Those, who were strong on employment discrimination, the leadership of the civil rights movement, had allies with sufficient conviction and ability to put H.R. 405 into H. R. 7152. *Id.* at 36-7.

157. Vaas, *supra* note 47, at 450.

the judicial function entirely.<sup>158</sup> All that remained was the Commission's ability to seek judicial relief for discrimination when conciliation failed.<sup>159</sup> During the "leadership compromise" phase of H.R. 7152's legislative history, the Senate completed the EEOC's emasculation.<sup>160</sup> The Commission had no right to seek judicial relief for claims of disparate treatment.<sup>161</sup> These changes represented the successful resonance of the "right to a fair trial" argument. As a policy choice, the "right to a fair trial," a phrase pregnant with reactionary potential, was more important than the right to be free from employment discrimination.<sup>162</sup> So, in Title VII's text and in effect, the EEOC's primary function would be conciliation not vindication.<sup>163</sup>

*b. Protecting the Labor-Management Complex*

Seniority rights represented another area where Congress could secure the *status quo* contrary to Kennedy's envisioned fair employment practices plan.<sup>164</sup> The Senate inserted protections for bona

158. WHALENS, *supra* note 45, at 58.

159. Vaas, *supra* note 47, at 436.

160. Berg, *supra* note 62, at 66-7.

161. *Id.*

162. "A substantial number of the committee members . . . preferred that the ultimate determination of discrimination rest with the Federal Judiciary. Through this requirement, we believe that the employer or labor union will have a fairer forum to establish innocence since a trial de novo is required in district court proceedings . . . ." H.R. REP. NO. 88-914, pt. 2, at 29 (1963).

163.

It must also be stressed that the Commission must confine its activities to correcting abuse, not promoting equality with mathematical certainty. In this regard, nothing in this title permits a person to demand employment. Of greater importance, the Commission will only jeopardize its continued existence if it seeks to impose forced racial balance upon employers and labor unions.

1964 U. S. C. C. A. N. at 2516. *See also* Franklin D. Roosevelt, Jr., INTRODUCTION, 7 B. C. Indus. & Com. L. Rev. 413 (1966). Roosevelt, the first chairman of the EEOC, saw that Title VII on its face was lacking when he described the EEOC's initial focus as encouraging "business [to] go beyond the letter of the law in order to carry out the spirit of the law." *Id.* at 413-14. Chairman Roosevelt hoped that "persuasive and aggressive promotion of affirmative action . . ." would fill the gaps in the letter of the law. *Id.* Ironically, the Court would close this "affirmative action" gap in *United Steel Workers of America v. Weber*, 443 U.S. 193, 208 (1979), by finding that voluntary affirmative action (under certain circumstances) did not violate Title VII.

164. The plan President Kennedy outlined in his first message to Congress isolated labor for special treatment. The President wanted to attack discrimination in the labor-management complex. For a view of the scope and variety of the discrimination, *see*

fide seniority systems in H.R. 7152.<sup>165</sup> This language helped advance that goal of preserving the *status quo* by protecting employers and unions from the financial repercussions of the very specific harm historical discrimination wrought on blacks in crafts and trades.<sup>166</sup>

The protections contained in this section of Title VII raise three essential points. First, the act of insulating the known historical harms from claims of discrimination gave substance to the pivot position on the purpose of Title VII. What better place to begin giving meaning to the directive that “management prerogatives, and union freedoms are to be left undisturbed to the greatest extent possible”<sup>167</sup> than to gift the history of those prerogatives and freedoms with a blanket pardon? The second point consist of eliminating any risk of a “windfall” wealth redistribution had Title VII allowed blacks to attack the obvious and

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*generally* Govern, *supra* note 76, at 1.

(Negro workers are still disproportionately concentrated in the ranks of the unskilled and semiskilled in both private and public employment. They are also disproportionately represented among the unemployed because their concentration in unskilled and semiskilled jobs . . . and because Negro workers often have relatively low seniority.) (quotations and citations omitted).

165. Vaas, *supra* note 47, at 449. Professors Rodriguez and Weingast concluded that the primary work of the pivotal legislators in the Senate was to blunt the impact of Title VII on the north where their constituencies dominated job opportunity, both as management and labor, and discrimination was *de facto* rather than *de jure*. Rodriguez & Weingast, *supra* note 30, at 1471-72; 1487 (“Taken as a whole these amendments were designed to blunt the impact of the bill on the North and lower the perceived cost of the Act to Republican constituents.”).

166. The connection between creating a safe harbor for “bona fide seniority systems” and perpetuating an employment ghetto for blacks in unionized settings before Title VII became operational in 1965 escaped the notice of the early legislative historians, *see* Berg, *supra* note 62, at 73-74, and the voice of Title VII in the Senate, Hubert Humphrey. To both of them the first part of 703(h) only meant that disparities in pay and/or other terms and conditions of employment can be, and are, acceptable under bona fide seniority or merit systems, so long as they aren’t used as an indirect means of discrimination. Humphrey’s example was that an employer with two plants, one predominately black and one predominately white, could have better pay and conditions at one of the plants, so long as the employer did not intend to discriminate. 110 CONG. REC. 12,297 (1964). This ignores the fact that the difference was based on intentional discrimination in the first place, that an employer and a union would escape all liability for the impact of that intentional discrimination, and that an employer could only be liable after 1965 if the employer actively continued to discriminate. Given the truly imbedded nature of the harm that had already been done, there really was no motivation for an employer or union to take an active role – the impact of the harm was self-perpetuating.

167. H.R. REP. NO. 88-914, pt. 2, at 29 (1963).

rich target presented by the historical depredations practiced between union and management.<sup>168</sup> Such a scenario could take on nightmarish qualities where courts branded the “haves” as personally responsible for administering a system where they were unjustly enriched by the purposeful exclusion of the “have nots” and the courts compelled the “haves” to divest themselves of finite, albeit ill-gotten, resources.<sup>169</sup> The third point is that the central theme of the Civil Rights Era effectively supplied Congress with the rationale for avoiding the nightmare scenario. “Unearned” “windfalls” are by definition outside

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168. What I call depredations were so notorious that they were President Kennedy’s starting points in attacking employment discrimination, figured prominently in Committee discussions of the need for federal fair employment practices legislation, see H.R. REP. NO. 88-570 at 2(1963), and caught scholarly attention, see *Sovern*, *supra* note 76.

169. Note, Title VII, Seniority Discrimination And The Incumbent Negro, 80 HARV. L. REV. 1260 (1967). This Note, like all the scholarship analyzing Title VII in the years immediately after its passage, struggles with the fact of Title VII’s limited protections and its entirely prospective view. *Id.* at 1262. This Note is unique in specifically addressing the problems arising from Title VII’s specific protections of *bona fide* seniority systems which on their face insulate historical discrimination from Title VII’s reach. *Id.* at 1263-1266. Arguing that in order to achieve Title VII’s purpose (“a desire to eliminate the economic losses to the Negro and to the nation caused by racial discrimination in employment”), the Note’s author urges courts to adopt a “rightful place” approach to the issue of seniority discrimination under Title VII. *Id.* at 1273-1274. The “ ‘rightful place’ approach holds that the continued maintenance of the relative competitive disadvantage imposed on Negroes by the past operation of a discriminatory system violates Title VII . . .” *Id.* at 1268. Because Title VII outlaws the segregation of jobs by race, “the ‘rightful place’ approach would allow an incumbent Negro to bid for openings in ‘white’ jobs of comparable to those held by whites of equal tenure, on the basis of his full length of service with the employer.” *Id.* The “rightful place” approach was not vulnerable to a challenge of being retroactive or requiring employers to take the impermissible step of discriminating in favor of blacks. Moreover, “the ‘rightful place’ remedy *does not deprive white workers of the benefits of discrimination which have accrued to them in the past . . .*” *Id.* at 1274 (italics added).

The significance of this Note is that the “rightful place” approach became the answer to the question posed in the seminal decision *Quarles v. Philip Morris Inc.*, 279 F.Supp. 505 (E.D. Va 1968): “Are present consequences of past discrimination covered by [Title VII]?” *Id.* at 510 (“A perceptive analysis of the problem and its solution, upon which the court has freely drawn, may be found in Note, Title VII, Seniority Discrimination And The Incumbent Negro, 80 Harv. L. Rev. 1260 (1967).”) The *Quarles* decision is cited with approval in *Griggs*, and has been credited with being the source of the Court’s creation of the disparate impact theory of recovery. Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death and Resurrection of the Disparate Impact Theory of Discrimination*, 22 HOFSTRA LAB. & EMP. L. J. 431, 444-446 (2005).

of the parameters of meritocracy. To take from whites and give to blacks because of historical racial discrimination was incomprehensible in a new society suddenly struck “colorblind.”

*c. Protecting an Employer’s Right to Test*

Intelligence testing of job candidates did not arise as an issue until H. R. 7152 arrived in the Senate.<sup>170</sup> The trigger for Congress to protect testing in Title VII came from an Illinois state fair employment practices decision.<sup>171</sup> In *Myart v. Motorola, Inc.*,<sup>172</sup> Myart alleged that Motorola did not hire him because he was black.<sup>173</sup> One of Motorola’s defenses was it did not hire Myart because he failed Motorola’s Test No. 10, a general intelligence test.<sup>174</sup> Motorola did not produce Myart’s actual test or the Motorola employee who administered Myart’s test.<sup>175</sup> Myart testified that he had passed Test No. 10. Motorola produced the test’s author,<sup>176</sup> who testified that it was the shortest test he knew of to test verbal comprehension and ability to understand instructions.<sup>177</sup>

The hearing officer, finding for Myart, enjoined Motorola from using Test No. 10. According to the hearing officer, Test No. 10 was obsolete and had the effect of disadvantaging minority applicants regardless of intent.<sup>178</sup> Test No. 10’s “norm was derived from standardization on advantaged groups. Studies in inequalities and environmental factors since the publication of test No. 10 [in 1949] have been made with careful equating of such background factors. . . . [T]his test does not lend itself to equal opportunity to qualify for the hitherto culturally deprived and the disadvantaged groups.”<sup>179</sup> In addition to ordering Motorola to cease and desist from using Test No. 10, the hearing officer ordered that, should the company replace the test, any replacement “shall reflect and equate inequalities and environmental factors among the disadvantaged and culturally

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170. See Vaas, *supra* note 47, at 449.

171. See Berg, *supra* note 62, at 74.

172. 110 CONG. REC. 5,662-64 (1964).

173. *Id.* at 5,662.

174. *Id.* at 5,663.

175. *Id.*

176. “Dr. Shurrager developed a series of test for [Motorola, including Test No. 10,] including tests of four different kinds of special relations and ability; and he regularly supplies these tests to [Motorola] for a fee . . . .” *Id.*

177. *Id.* at 5,664.

178. *Id.*

179. *Id.*

deprived groups.”<sup>180</sup> The hearing officer also ordered Motorola to employ Myart.<sup>181</sup>

Seen as a declaration that facially neutral tests cannot be used to reject “disadvantaged and culturally deprived groups” unless the tests account for “inequalities and environmental factors,” the hearing officer’s decision in *Myart* and the Court’s decision in *Griggs v. Duke Power Company* are effectively identical.<sup>182</sup> Imbedded in the hearing officer’s pronouncements of cultural deprivation and inequalities lay the *Griggs* Court’s reasoning that the educational, and therefore occupational, disparities caused by segregation could not be allowed to be frozen in time by a facially neutral test that did not really test a person’s ability to do a job, but instead tested the person himself.<sup>183</sup> Fully aware of, *Myart*, Congress could have signaled its intent to allow for the *Griggs* result by either remaining silent or by enacting a section that prohibited testing on any other basis than an applicant or employee’s ability to perform a specific job.<sup>184</sup>

Congress neither remained silent on testing nor prohibited the kind of general intelligence testing for the group-wide discriminatory

180. *Id.*

181. *Id.* Myart’s compensatory demand was for employment, with back-pay, and seniority from the date of his application. *Id.* at 5,662.

182. *See Griggs v. Duke Power Co.*, 401 U. S. 424 (1971). In 1971, the *Griggs* Court created the disparate impact theory of recovery. *See* Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death and Resurrection of the Disparate Impact Theory of Discrimination*, 22 HOFSTRA LAB. & EMP. L.J. 431, 434 (2005). *Griggs* is also significant for addressing the issue of the need for job tests and employment criteria to be related to the actual job in question. “The touchstone is business necessity. If an employment practice, which operates to exclude Negroes, cannot be shown to be related to job performance, the practice is prohibited.” *Griggs*, 401 U. S. at 431. This holding responded to Duke Power Company’s argument that Title VII specifically authorized the use of professionally developed ability tests in Section 703(h). For this holding, the Court relied on a combination of legislative history and the EEOC’s interpretive guidelines to demonstrate the need for the test to relate to ability to perform a specific job. To hold otherwise would allow a professionally developed test to mask discrimination. “What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance.” *Id.* at 433–36.

183. *Id.*

184. *See* Rodriguez & Weingast *supra* note 30, at 1504-08 (discussing the congressional response to *Myart* and the Court’s decision in *Griggs*). Note that Congress was also fully aware of the purposeful discrimination of similar “literacy tests” in the voting rights context and significantly circumscribed the use of such tests in Title I of the Civil Rights Act of 1964 with an eye to their eventual eradication.

impact identified in *Myart*.<sup>185</sup> Congress specifically acted to make sure that the *Myart* result could not happen under Title VII.<sup>186</sup> The Senate leadership accepted the Tower Amendment to Title VII and the following language ultimately appeared in Section 703(h): “nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test is not designed, intended or used to discriminate . . . .”<sup>187</sup> In 1964 Congress could not have known that in 1971 the Court would, despite this language, reach the *Myart* result; a result that Congress clearly and specifically intended to bar. Congress wanted management prerogatives, including the giving of employment tests, to remain in place. The clarity of the legislative intent on the issue made the Court’s *Griggs* decision a usurpation of fundamental democratic principles and therefore fundamentally illegitimate.<sup>188</sup>

Under the reasoning of *Myart*, almost all contemporary employment testing would allow for a finding of an unlawful employment practice because of the obviously ubiquitous design defect of failing to account for the nationwide impacts of segregation on education. Given the extreme likelihood of the design defect, discrimination was built into the result of any employment aptitude test. An employer taking action on the test result would necessarily be

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185. See 110 CONG. REC. 5,664 (1964).

186. See Berg, *supra* note 62, at 74.

187. Civil Rights Act of 1964, § 703(h), Pub. L. No. 88-352, 78 Stat. 241 (1964).

188. The fact that Congress later legitimized *Griggs* in the Civil Rights Act of 1991 does not alleviate the concerns about the Court’s political behavior. The Court was wrong to create disparate impact because the entire tenor of the legislative history shows that Congress considered that segregation had seriously impaired blacks as a group and decided to leave them impaired. “Nothing in the act is intended to allow charges to be brought based upon a disproportionate representation . . . .”. H.R. REP. NO. 88-570, at 2304 (1963). The demonstration of intent on testing is even stronger. Not only was the legislature aware of the issue, it specifically responded to that awareness by adding Section 703(h) to Title VII to keep general intelligence testing in place without regard to whether the test accounted for historical “disadvantage” and without regard to the relationship between the test and any specific job function. By overriding Congress’ will on these issues, the Court created a false impression of Title VII that we have yet to shed. Moreover, the Court creates a false impression of reliability when it acts politically and claims the touchstones of democratic process as justification. See *Supreme Court Rhetoric*, *supra* note 27, at 348 (“A review of the Court’s discrimination doctrine indicates that the Court acted like a political branch . . . . Those who have analyzed the political branches’ civil rights enforcement efforts have generally concluded that the federal government lacked any solid commitment to racial equality . . . .”).

taking action to discriminate. Such a dramatic expansion of the compass of “discrimination” logically added the real and undesirable consequence of companies like Motorola being ordered to give jobs to people like Myart along with back-pay and/or back-dated seniority.

The Tower amendment going largely unremarked<sup>189</sup> can be explained by the notion that if Title VII guaranteed anything, it only guaranteed the equal opportunity to compete, regardless of history, from a starting line drawn in 1963.<sup>190</sup> Thus, this exchange between Senator Dirksen, who had filed objections, and Senator Clark, one of the leading Democrats tasked with the passage of the omnibus civil rights legislation:

Objection: Under the bill, employers will no longer be able to hire or promote on the basis of merit and performance.

Answer: Nothing in the bill will interfere with merit hiring or merit promotion. The bill simply eliminates consideration of color from the decision to hire or promote.<sup>191</sup>

From this perspective, testing embodies the spirit of equality and individual merit that animated the Civil Rights Movement.<sup>192</sup> From a different perspective, testing, like a flat tax, is at best regressive in an economy where segregation prevented “have nots” from accumulating the educational and experiential capital to survive the imposition of the tax.<sup>193</sup> From either perspective the employer’s ability to test was an

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189. Compare Berg, *supra* note 62, at 74, who apparently saw the Tower amendment as largely irrelevant (“Since the amendment did not effect a change in the previous meaning of the title, no negative implication may be drawn from the reference to a ‘professionally developed ability test.’”), with Vaas, *supra* note 47, at 449, who perceived what the logic of *Myart* portended (“The amendment is limited to an employer’s use of such tests. Does this leave the door open for the EEOC or a court to hold that use of such a test by an employment agency . . . is an unfair employment practice if it results in “*de facto* discrimination,” and the user knows or should have known that this would be the result?”).

190. See *supra* note 33 (President Kennedy’s announcement that America would become a colorblind society).

191. 110 CONG. REC. 7,218 (1964).

192. See *supra* note 31.

193. This is the position the Court established in *Griggs* and Congress confirmed by formally putting disparate impact into Title VII with the 1991 civil rights act amendments in response to the *Wards Cove* Court’s attempt to turn back the clock on *Griggs*. Morally, the *Griggs* court was right and Congress was equally right to formally install disparate impact in Title VII. Nevertheless, I argue that the position staked out by the centrists on Title VII intended testing, in partnership with the other factors I describe, to help maintain the status quo. If, as the *Griggs* Court opined, Congress did



unobjectionable part of existing management prerogatives,<sup>194</sup> which “expressly protects the employer’s right to insist that any prospective applicant, Negro or white, must meet the applicable job qualifications.”<sup>195</sup>

*d. No Quotas*

As part of Title VII’s compromise, the fact the federal law rejected any requirement to adjust for racial imbalance, to hire by quota or to specifically set aside opportunities for training and employment comes as no surprise. The absence of such provisions in Title VII is consistent with meritocracy. At bottom, however, this theme harmonizes well with the goals of those desirous of protecting the rights and interests of the majority. Nothing could or would result in more discord for civil rights proponents or opponents than to take limited resources from one group and give those resources to another group because of race. Section 703(j) embodies these concepts.<sup>196</sup>

Section 703(j) also embodies the Nation’s rejection of atonement for slavery and segregation. Slavery and segregation, their practical impacts, ingrained behaviors and, perceptions were the reason for racial imbalance in employment.<sup>197</sup> This very imbalance caused the legislators to comment on the need for Title VII.<sup>198</sup> Yet, there was no legislative movement for a direct correction of these imbalances in the private sector.<sup>199</sup> Moreover, there was a worrisome persistent call for reassurance that Title VII could not be a remedy for the observed imbalances, or by logical extension, an apology for the causes of the imbalances.<sup>200</sup>

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not intend to “freeze” black in place, they intended no more than a glacial pace for progress in employment discrimination consistent with the imperative to preserve existing management prerogatives and union freedoms.

194. Berg, *supra* note 62, at 74-75 (“Since the amendment did not effect a change in the previous meaning of the title, no negative implication may be drawn from the reference to a ‘professionally developed ability test.’ The issue in any case where the use of any ability test is questioned is not whether the test is professionally developed . . . but whether it is used in good faith or with intent to discriminate.”).

195. Berg, *supra* note 62, at 74, quoting 110 CONG. REC. 7,026 (1964).

196. See Civil Rights Act of 1964, § 703(j), Pub. L. No. 88-352, 78 Stat. 241 (1964).

197. Roosevelt, at, *supra* note 163, at 414 (“There will be no social peace unless we right ancient wrongs. That requires us to undo the damage done by 250 years of slavery and 100 years of segregation.”).

198. See *supra* note 152.

199. No iteration of Title VII provided for quotas or hiring to racial balance.

200. See H.R. REP. NO. 88-914 (1963); *Civil Rights Act of 1963: Hearing on H.R. 7152 Before the H. Comm. on the Judiciary*, 88th Cong. 2660 (1963).

Whether one chooses to view Section 703(j) as imbedding meritocracy in Title VII, its practical effect reinforced the *status quo* of racial imbalance.<sup>201</sup> Even if the idea of “racial balance” only occurred to employers and labor organizations because of Section 703(j), that section assured them that they could continue with their existing intentionally racially imbalanced work force. *Status quo*, however, to have its complete meaning must describe the behavior, mind-set and beliefs that cause the imbalance as well as the resulting imbalance. Just as 703(j) protects the result, so also it creates a safe haven for the truth that segregation was and continues to be a social norm and that people take as much “freedom” as they can to make sure they are not associating with people they do not like even if the reasons for the dislike become politically incorrect to articulate.

In a way, Section 703(j) also helps inform a contemporaneous definition of “discrimination” by telling us what could not be required and accordingly what would be allowed. Correcting for the effects of slavery and segregation could not be required under Title VII.<sup>202</sup> That being the case, there was also no requirement to correct the belief systems consistent with slavery and segregation that caused the imbalance. Arguably, Section 703(j) approves of that belief system in preserving its effects and not requiring adjustment. Therefore, arguably, Title VII intentionally allows wide latitude for beliefs consistent with slavery and segregation to be influential in such a way that actions against individuals consistent with “discrimination” are not legally discriminatory because the motivations for the actions are consistent with Congress’s view of the very limited kind of discrimination Title VII was designed to end.<sup>203</sup>

*e. Placing the Enforcement Burden on the Individual*

When the Senate placed the entirety of the enforcement burden on

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201. The legislative history repeatedly refers to the significant disparity in unemployment figures and the fact that the figures appeared to remain constant over time. *See* H.R. REP. NO. 88-570 (1963); H.R. REP. NO. 88-914 (1963).

202. *See* Civil Rights Act of 1964, § 703(j), Pub. L. No. 88-352, 78 Stat. 241 (1964).

203. Keeping in mind that I am discussing what appears to have been the intent of a Congress, whose members were all products of a segregated society, if United States Presidents can call black people “niggers” without suffering public ignominy, *see* KENNEDY, *supra* note 82 employers and labor organizations might also verbalize their beliefs without running afoul of Title VII. Even if expressed, bias or animus could be and were disconnected from the kind of intentional action Congress censured in Title VII.

the individual claimants in disparate treatment cases,<sup>204</sup> Title VII made its final shift from a public to a private right.<sup>205</sup> This shift stands out as a commentary on how very difficult Congress intended it to be for a claimant to prove intentional disparate treatment. In the first instance, placing the enforcement burden on the individual makes the Title VII rights less desirable because they are more burdensome.<sup>206</sup> Congress did not make this decision in the abstract. The legislators put the enforcement burden on the party least able to successfully carry the burden, and they knew it.<sup>207</sup> To make that option even less attractive, Congress made the less public and less financially rewarding avenue of conciliation the least costly and least burdensome. The discriminator would not be subject to public exposure<sup>208</sup> and the discriminatee could get something for free now, or pay for the risk of getting nothing later.

Congress took additional steps to assure that the burden of enforcement included more than investments of time and money. If Title VII were to have any value for disparate treatment claimants beyond the suppression of gross acts of discrimination, that value would only come from proving discrimination and receiving an affirmative award of employment, or reinstatement with back pay. Proving “discrimination” begs the question of the meaning of “discrimination” under Title VII. Congress, however, failed to answer the question by failing to define “discrimination.”<sup>209</sup> Given the acknowledged costs, Congress also made a successful disparate treatment claim almost impossible by establishing that a protected characteristic had to be the only reason for the discrimination in order for a court to grant affirmative relief.<sup>210</sup>

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204. 110 CONG. REC. 12,722, 12723 (1964).

205. See Berg, *supra* note 62, at 85; *Enforcement of Fair Employment*, *supra* note 60, at 432.

206. See Berg, *supra* note 62, at 96-97. That is also why the proponents of H.R. 405 wanted the EEOC to mirror the NLRB. See H.R. REP. NO. 88-570 (1963).

207. See 110 CONG. REC. 12,724 (1964).

208. Congress found it extremely important that the EEOC’s conciliation efforts be private to protect allegations of discrimination from harming alleged discriminators in the public eye. “This latter point is important, to prevent some irresponsible employee or other person from, in effect, conspiring to blackmail an employer with the publication of charges that may later prove to be false.” 110 CONG. REC. 14331 (June 18, 1964).

209. See *infra* note 211.

210. Mr. Berg concluded that: “The enforcement procedures of the title, however, bear only too visibly the marks of compromise, and seem to me to contain serious deficiencies. It seems questionable that much can be accomplished through suits in

i. The Failure to Define “Discriminate”

The reason or reasons why Congress did not define “discrimination” in Title VII remains obscure.<sup>211</sup> It may be that Congress was sensitive to “the evolutionary change that constitutional law in the area racial discrimination was undergoing in 1964.”<sup>212</sup> It may also be that “discrimination” was left undefined in the Civil Rights Act so that it might evolve.<sup>213</sup> Within the context of the Congressional action on Title VII, it may also be that “discrimination” was understood well enough to be left undefined<sup>214</sup> and that purposeful act had the intended consequence of leaving a claimant hamstrung as they attempted to prove discrimination in the form of disparate treatment.

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federal court by persons aggrieved by acts of discrimination. The practical advantages will lie heavily with the defendants, and even where the evidence of discrimination is overwhelming, it cannot be expected that many complainants will undertake the burden of an individual suit.” Berg, *supra* note 62, at 96-97. See also Charles T. Schmidt, Jr., *Title VII: Coverage and Comments*, 7 B.C. L. REV. 459, 462-63 (1965) (“And compliance with the letter [of Title VII] – both in terms of coverage and substance – may very well impose inconveniences and require more imagination to enable the continuation of practices, which exclude Negroes from employment, but the legislation, as presently conceived, can do little to effectively prohibit these practices.”).

211. See generally *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 133 (1976) (“While there is no necessary inference that Congress, in choosing this language, intended to incorporate into Title VII the concepts of discrimination, which have evolved from court decisions construing the Equal Protection Clause of the Fourteenth Amendment, the similarities between the congressional language and some of those decisions surely indicate that the latter are a useful starting point in interpreting the former. Particularly in the case of defining the term “discrimination,” which Congress has nowhere in Title VII defined, those cases afford an existing body of law analyzing and discussing that term in a legal context not wholly dissimilar to the concerns, which Congress manifested in enacting Title VII.”); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 337-38 (1978) (Brennan, J., White, J., Marshall, J., and Blackmun, J., concurring in the judgment in part and dissenting in part) (“[T]he legislative history [of Title VI and, more generally, the Civil Rights Act of 1964] shows that Congress specifically eschewed any static definition of discrimination in favor of broad language that could be shaped by experience, administrative necessity, and evolving judicial doctrine. Although it is clear from the debates that the supporters of Title VI intended to ban uses of race prohibited by the Constitution and, more specifically, the maintenance of segregated facilities, they never precisely defined the term “discrimination,” or what constituted an exclusion from participation or a denial of benefits on the ground of race.”).

212. *Bakke*, at 339-40.

213. *Id.* at 337-39.

214. See discussion *supra* Part I.A.2.

What can be known is that the absence of a definition of “discrimination” in H. R. 7152 was a topic of discussion in the legislature specifically regarding Title VI.<sup>215</sup> The discussions specific to H.R. 405, which became Title VII, are more substantive and satisfying for having provided definitions of “discrimination.” In hearings on H. R. 405 before the General Subcommittee on Labor of the Committee on Education and Labor, Congressmen heard a number of definitions for “discrimination”:

[E]mployment discrimination against Negroes is defined as any behavior on the part of an employer toward a Negro employee or potential employee, which reflects a negative evaluation of that person’s race to the extent that the employer either refuses to utilize that person or underutilizes him, and/or underpays him.<sup>216</sup>

A simple definition is sufficient. Let us refer to

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215. See 110 CONG. REC. 1,619 (1964) (“It [Title VI] is aimed toward eliminating discrimination in federally assisted programs. It contains no guideposts and no yardsticks as to what might constitute discrimination in carrying out federally aided programs and projects.”) (statement of Rep. Abernethy); 110 CONG. REC. 1,632 (1964) (“Nowhere in the bill [H.R. 7152] is the word ‘discrimination’ defined, so each department and each agency [of the executive branch] could prescribe its own definition, and the President could prescribe a definition for his actions.”) (statement of Rep. Dowdy); 110 CONG. REC. 5,251 (1964) (“Title VI makes the cutoff [of Federal aid programs] mandatory. All that is required is ‘an express finding’ of a failure to comply with an undefined prohibition against discrimination in the administration of any program or activity receiving Federal financial assistance, and the President’s approval.”) (statement of Sen. Talmadge); 110 CONG. REC. 5,611-12 (1964) (“I have mentioned the fact that the word ‘discrimination’ is used in section 601 of Title VI. The word ‘discrimination,’ without any context, means merely the act of treating one differently from another. \* \* \* The word ‘discrimination,’ as used in this reference, has no contextual explanation whatever, other than the provision that the discrimination ‘is to be against’ individuals participating in or benefiting from federally assisted programs and activities on the ground specified. With this context, the discrimination condemned by this reference occurs only when an individual is treated unequally or unfairly because of his race, color, religion, or national origin. What constitutes unequal or unfair treatment?”) (statement of Sen. Ervin); 110 CONG. REC. 6,052 (1964) (“Such action [cutting federal funding] can also be taken when the agency finds that a person has been subjected to discrimination under such programs. It may be clear enough what the first two clauses mean, but if it means more than the first two, what does the clause ‘subjected to discrimination’ mean? To what does that phrase apply?”) (statement of Sen. Johnson).

216. *Equal Employment Opportunity Hearings Before the General Subcomm. of Labor of the Comm. On Education and Labor*, 88th Cong., at 198 (1963) (testimony of Walter B. Lewis, Director, Job Development, Washington Urban League).

employment discrimination as any nonobjective behavior on the part of an employer toward an employee or potential employee, which reflects some intuitive negative evaluation (prejudice) of the employee's race to the extent that the employer, when confronted with a manpower need, will either not use the employee, underutilize him and/or undercompensate him.<sup>217</sup>

Now, discrimination is practiced particularly when there is a scarcity of employment opportunities. You get an intensification of attitude by whites seeking to discriminate against the Negroes because there are too few jobs to go around. Of course, some will create artificial differences of race or religion to allege to try to allege a superior claim to employment.<sup>218</sup>

It is argued, we know, that discrimination springs from prejudice, from bigotry, and that legislation cannot cure it. We will agree that legislation cannot cure prejudice. But legislation can prevent at least a part of the fruits of prejudice from coming into harvest. Legislation is the way, the only sure way we know, to limit the degree to which people can act on their prejudices. It can eliminate discrimination.<sup>219</sup>

All of these definitions reflect an understanding that employment "discrimination" had two components: the denial of opportunity based on a readily knowable, objective characteristic, and a subjective motivation—prejudice—to take adverse action based on the objective characteristic. These components suggest that the goal of preventing discrimination is to limit the degree to which some intuitive negative evaluation is able to be used to justify adverse employment action. So by definition, intent to discriminate becomes irrelevant, if employment "discrimination" is "any behavior on the part of an employer toward [an] employee or potential employee, which reflects a negative evaluation of that person's race [color, religion, national origin or

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217. *Id.* at 203-04 (testimony of Walter B. Lewis).

218. *Id.* at 70 (testimony of James Carey, President, International Union of Electrical, Radio Machine Workers, AFL-CIO; Secretary-Treasurer, Industrial Union Department, AFL-CIO).

219. *Id.* at 20 (testimony of James Carey).

gender] to the extent that the employer either refuses to utilize that person or underutilizes him/her, and/or underpays him/her.”<sup>220</sup>

Although it is encouraging that the hearings on H. R. 405 revealed these definitions, they are not so materially different from the possible definition of discrimination reconstructed from Title VII’s temporal context, and Congress did not adopt this or any definition of “discrimination” in Title VII. One may therefore argue that Congress understood that discrimination occurred because of prejudice against an objective characteristic and that prejudice could be defined as any behavior reflecting a non-objective negative evaluation. Refusing to put this understanding in writing means that, regardless of what Congress intended, it was not going to penalize just “any behavior . . . which reflects a negative evaluation.”<sup>221</sup>

An “any behavior” definition of discrimination could also include behaviors that were not socially objectionable at the time.<sup>222</sup> To keep “discrimination” from taking on such breadth, the behavior would have to reflect prejudice and be an intentional act based on that prejudice to the exclusion of other possible causes for an adverse personnel decision. In that way, employment discrimination would at least have to describe an extremely close relationship, if not an identity, between belief and result. The additional burden on the individual disparate treatment plaintiff was that in failing to provide a definition, Congress gave no direction on how to successfully prove “discrimination” outside of the most obvious cases where a statement of belief—nigger, etc.—occurred contemporaneously with an adverse employment decision.

## ii. Enforcement of Title VII Rights

One could conclude, based on the current knowledge that proving disparate treatment is extremely difficult,<sup>223</sup> that Congress intended to

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220. *Id.* at 203-04 (testimony of Walter B. Lewis).

221. *Id.* at 198 (testimony of Walter B. Lewis).

222. *See supra* note 203.

223. *See Hard to Win, supra* note 13. In addition to Professor Selmi’s observations about why race discrimination cases *seem* hard to win, significant empirical work supports the conclusion that they *are* hard to win Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs In Federal Court: From Bad To Worse?*, 3 HARV. LAW & POL’Y REV. 103 (2009). Professor Wendy Parker describes the fact that race discrimination cases have the least chance of success. *See* Wendy Parker, *Lessons In Losing: Race Discrimination In Employment*, 81 NOTRE DAME L. REV. 889 (2006). Professor Parker concluded that plaintiffs are treated worse than

make this burden extremely difficult to prove. Without speculating, it is clear that the method of proving discrimination concerned the House and Senate. One of the exchanges on this issue provides a fair example of the nature of that concern:

Objection: If the employer discharges a Negro, he must prove that the dismissal had nothing to do with race. When an employer promotes or increases the pay of a white employee, he must show that he was not biased against the Negro worker who was not promoted.

Answer: The Commission must prove by a preponderance of the evidence that the discharge or other personnel action was because of race.<sup>224</sup>

The answer to this objection encapsulated the pivot position. First, it needed to be clear that an employer did not need to prove anything.<sup>225</sup> Second, it needed to be clear that liability under Title VII required intent: “because of race.”<sup>226</sup>

The relentless concern in the Senate about proving discrimination is somewhat curious given the changes to the enforcement provision of H.R. 405 before and after it became Title VII. Initially, H. R. 405 did not address causation.<sup>227</sup> It allowed the Commission, after finding an unlawful employment practice by preponderance of the evidence, to issue cease and desist orders, negative relief, and to “take such affirmative action, including reinstatement or hiring of employees, with or without back pay . . . as will effectuate the policies of the Act . . .”<sup>228</sup> If the Commission found no unlawful employment practice, it was to issue an appropriate order dismissing the complaint.<sup>229</sup> This was the most liberal iteration of the causation issue; it made no statement about

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defendants “for reasons that don’t appear to be race neutral.” *Id.* at 893 n. 15. Professor Parker argues that there is judicial agreement *ab initio* with the employer defendants’ position that plaintiffs’ cases are meritless. Courts “proceed from a perception that discredits the likelihood of plaintiffs’ claims and validates the defendants’ story.” *Id.* at 934.

224. 110 CONG. REC. 7,218 (1964).

225. The fear of an employer having the burden of proving the absence of discrimination had been expressed in the committee report on H.R. 405. *See* H.R. REP. NO. 88-570 (1963).

226. *Id.*

227. By “causation” I mean the necessary proof of harm to entitle a claimant to affirmative, as opposed to negative, relief.

228. H.R. REP. NO. 88-570, § 9(j) (1963).

229. *Id.*



intent and was likely to be enforced in the manner the NLRB enforced the NLRA’s provisions on unfair labor practices in the discharge context. As the NLRB was notorious at the time for readily finding unfair labor practices,<sup>230</sup> the EEOC was on a path toward establishing a standard where a charging party could prevail by demonstrating that race, color, religion or national origin (sex had not yet been added) was merely a factor in an adverse decision.

The next iteration of H. R. 405 replaced Kennedy’s Title VII. H. R. 405’s enforcement provision had changed to restrict the ease with which causation could be found. The initial Title VII allowed the Board<sup>231</sup> after finding an unlawful employment practice by preponderance of the evidence, to issue cease and desist orders and to “take such affirmative action, including reinstatement or hiring of employees, with or without back pay . . . as will effectuate the policies of the title . . .”<sup>232</sup> Now, however, instead of leaving the Board to its own devices, Title VII commanded:

No order of the Board shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged *for any reason other than* race, religion, color, national origin, or ancestry.<sup>233</sup>

One logical way of reading this change is that the Board can only award meaningful relief if race, religion, color, national origin or ancestry was the only reason for the unlawful employment practice.<sup>234</sup> “*Any reason other than*”<sup>235</sup> those protected categories would be a

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230. *Id.*

231. By this time, H. R. 405/Title VII reflected the split in the EEOC’s duties between the Administrator as investigator and prosecutor and the Board as adjudicator.

232. H.R. REP. NO. 88-914 (1963).

233. *Id.* at 85-86 (emphasis added).

234. Professor Brodin presciently suggested that the distinction between negative and affirmative relief would still allow the Board to grant negative relief if there was disparate treatment for any reason in addition to the proscribed reasons. *See* Brodin, *supra* note 138, at 298. *See also* St. Mary’s Honor Ctr. v. Hicks, 509 U. S. 502, 523-24 (1993) (“Title VII does not award damages against employers who cannot prove a nondiscriminatory reason for adverse employment action, *but only against employers who are proven to have taken adverse employment action by reason of (in the context of the present case) race.*”) (emphasis added).

235. H.R. REP. NO. 88-914, at 85-86 (1963) (emphasis added).

complete bar to the only meaningful relief a disparate treatment claimant would want: a job, a promotion, retroactive seniority and/or back-pay. Although neither the text nor this reading address which party would have to prove or disprove “*any reason other than*,”<sup>236</sup> available evidence strongly suggests that “the [claimant] must prove by a preponderance of the evidence that the discharge or other personnel action was because of race.”<sup>237</sup> This is a very satisfying standard of causation if the desire is to limit the ability of a claimant to successfully prove discrimination in all but the worst cases. It partially serves the meritocracy theme when any other reason relates to objective qualifications, skills or ability. It also serves the dominant theme peculiar to Title VII, the preservation of the maximum extent of management prerogatives and union freedoms which went well beyond objective job performance criteria.

The next version of the enforcement provision changed “discharged for any reason other than race, religion, color, national origin, or ancestry”<sup>238</sup> to “discharged for cause.”<sup>239</sup> This language represents a dramatic reversal of direction. “For cause” was a term of art under federal labor law. It came into play when an employee claimed an adverse employment decision, for example, occurred because he or she had exercised his or her protected rights under the NLRA. An employer responded to the employee’s allegation by asserting that the adverse employment action was “for cause.” The employer, however, had to show that the “cause” was the reason for the adverse employment action untainted by an employee’s exercise of his or her rights under the NLRA.<sup>240</sup> “Cause” excluded most subjective

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236. *Id.*

237. 110 CONG. REC. 7,218 (1964). *See also* H.R. REP. NO. 88-570 (1963). Congressmen expressed their fear of employers having the *de facto* burden of proving that they did not discriminate.

238. H.R. REP. NO. 88-914, at 86 (1963).

239. *See* Comment, *Strike Misconduct: An Illusory Bar To Reinstatement*, 72 YALE L.J. 182, 194-197 (1962).

240. *Bon-R Reproductions, Inc. v. N.L.R.B.*, 309 F.2d 898, 906 (2nd Cir. 1962) (“It is, of course, true, that §8(a)(3) is violated even if there is a legitimate motive for discharging an employee if one of the motives is antagonism to unions.”), citing *N.L.R.B. v. Jamestown Sterling Corp.*, 211 F.2d 725, 726 (2nd Cir. 1954); *Sunshine Biscuits, Inc. v. N.L.R.B.*, 274 F.2d 738, 742-43 (7th Cir. 1960); *N.L.R.B. v. Lewis*, 246 F.2d 886, 890 (9th Cir. 1957) (“There is no shortage of cases holding if one discharges an employee, assigning or holding inwardly the wrong reason, it benefits not the employer to have had a justifiable reason which he did not assert or which did not motivate him.”).

factors because subjectivity could easily be seen as an improper anti-union motive in the labor context.<sup>241</sup> Therefore, had it been retained in Title VII, a “for cause” standard reflected a definition of discrimination that limited the degree to which subjective considerations could justify adverse employment action. Moreover, if courts had held “for cause” had the same meaning under Title VII as it had in federal labor law, an employer would have had the burden to prove that the adverse decision was untainted by considerations of race. The issues raised by the “for cause” standard, however, never made it to the courts.

The final amendment to Title VII’s enforcement provision in the House replaced “cause” with a formula almost identical to the language that “cause” had replaced.<sup>242</sup> The amendment was made “to specify cause.”<sup>243</sup> Representative Celler, the House sponsor of H.R. 7152, explained that his amendment was to assure that a court “cannot find any violation of the act which is based on facts other—and I emphasize ‘other’—than discrimination on the grounds of race . . . .”<sup>244</sup> When Title VII went to the Senate, it read:

No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged *for any reason other than discrimination on account of race, color, religion, sex or national origin.*<sup>245</sup>

Celler’s amendment returned causation to a standard that allowed “any other reason” to trump a claim for affirmative relief for disparate treatment.

The harum-scarum method Congress used to create the Civil Rights Act of 1964 provides an explanation for continued calls for

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241. See *Int’l Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers of America v. N.L.R.B.*, 298 F.2d 297, 301 (D.C. Cir. 1961)(majority concluded that employer’s “for cause” justification was “insincerely raised and was utilized as a pure pretext to mask [employer’s] discriminatory purpose.”) In this way “cause” is similar to the definition of “discrimination” witnesses offered to the committee responsible for H.R. 405.

242. 110 CONG. REC. 2,567 (1964).

243. *Id.*

244. *Id.*

245. *Id.* (emphasis added).

clarifying that Title VII only covered intentional discrimination based only on a proscribed characteristic.<sup>246</sup> Apparently, no one in the Senate considered that Congressman Celler's amendment effectively defined discrimination as proof of an adverse personnel action based solely on a proscribed characteristic by only permitting affirmative relief in the complete absence of any reason other than a proscribed characteristic. Likewise, no one recognized that the same amendment acknowledged the existence of mixed motivations for an adverse personnel action by allowing other contemporaneous reasons to defeat a claim for affirmative relief. The failure to recognize the Celler amendment's force can be attributed to the haphazard manner in which Title VII was cobbled together or, a failure to debate the impact of replacing "for cause" with Celler's language, or, perhaps, a conscious desire to avoid an explicit statement that there could be no affirmative relief for a successful claim of disparate treatment if race was not the sole factor for the adverse employment decision. Whatever the reason, the failure to recognize the implication of the Celler amendment seems related to an effort to add "solely" to the operative language of Section 703 so that Title VII only prohibited discrimination "solely because of . . ." a proscribed characteristic.

The effort to add "solely" failed.<sup>247</sup> Senator McClellan of Arkansas proposed adding the language "solely" so that section 703 would not "be a dragnet, a catchall, to leave something uncertain for a court to interpret."<sup>248</sup> In support, Senator Long of Louisiana explained: "I cannot for the life of me understand why someone would want to insist on leaving out the word 'solely,' because my impression was that if it were desired to hire someone because he was a brother-in-law or a first cousin, a person could not complain that he failed to get the job because of his race."<sup>249</sup> Senator Lausche from Ohio agreed that the addition of "solely" was a mere clarification that "because of" really meant "only because of."<sup>250</sup> Senators Case and Magnuson responded that "solely" would negate Title VII.<sup>251</sup> Senator Case also observed that: "If anyone ever had an action that was motivated by a single

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246. *See* 110 CONG. REC. 12,702-11 (1964) (Senators discuss the number of amendments and the problem of duplication in an attempt to describe the current status of the Civil Rights Act).

247. 110 CONG. REC. at 13,837-38 (1964).

248. *Id.* at 13,837.

249. *Id.*

250. *Id.*

251. *Id.*

cause, he is a different kind of animal from any I know of.”<sup>252</sup>

There were causation concerns, but the attempted addition of “solely” in Section 703 is better described as part of the confusion about the number and duplication of amendments, and the geographic distance between the descriptions of unlawful employment practices in Section 703 and the descriptions of the liability for those practices in Section 706, coupled with Senator McClellan’s desire express what everyone apparently understood: Title VII granted affirmative relief where an adverse employment decision happened only because of one or more proscribed criteria. The issue of mixed motives Senator Case raised was already imbedded in Section 706(g). Therefore, Senator Case partially erred in concluding that “solely” would negate Title VII.<sup>253</sup> “Solely” would have required a claimant to prove that race was the only reason for an adverse employment decision to receive any relief. The Celler amendment had already negated Title VII’s force by compelling disparate treatment claimants to prove sole causation as the predicate to the affirmative relief that gave Title VII rights any value. One could prove discrimination but receive no affirmative relief where other reasons, subjective or objective, existed.

Although the Senate resisted the urge to clarify Section 703 by adding “solely,” they succumbed to the desire to clarify or amplify the

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252. *Id.* Interestingly, no Senator disabused Senator Long of his understanding of Title VII.

253. On this point, I must respectfully disagree with Professor Brodin’s assessment of the rejection of McClellan’s amendment as evidence of the rejection of a “sole factor” test under Title VII. *See* Brodin, *supra* note 138, at 287. Congressman Celler’s amendment had already been made to Title VII and replaced “for cause” with “any reason” and in doing so confirmed that affirmative relief would be denied where a claimant failed to prove that there were no reasons other than proscribed reasons for an adverse employment decision. To that end, there was no mixed-motives mystery in the 88th Congress. Moreover, an attempt to describe the operation of Sections 703 and 706(g) as one where a claimant can prove liability under Section 703, but receive no affirmative relief only makes sense if Section 703 is viewed as something more than a description of unlawful employment practices and Section 706(g) as something less than a complete description of the standard of causation. Courts have come to alternative conclusions, like Professor Brodin’s, but they have done so without giving due consideration to the evolution of Title VII from H. R. 403, the evolution of what became Section 706(g), and most specifically Congressman Celler’s tying relief to the absence of any other reason including wanting to hire a brother-in-law or first cousin. I agree with Professor Brodin that since Celler’s amendment only addressed conditions on which a court could grant affirmative relief, it is possible that a court could grant some other kind of relief. *See id.* at 298. Balanced against a job, a promotion, back-dated seniority, or back-pay, what would be the value of any other kind of relief to a disparate treatment plaintiff complaining about a refusal to hire or promote?

necessity for intent by adding “intentionally” to the enforcement provisions of Section 706(g).<sup>254</sup> Before the amendment, the first sentence of Section 706(g) allowed a court to award relief if it found that “the respondent has engaged in or is engaging in an unlawful employment practice.”<sup>255</sup> As amended and in its current form, Section 706(g) authorizes relief where a claimant proves that “the respondent has *intentionally* engaged in or is *intentionally* engaging in an unlawful employment practice.”<sup>256</sup>

At the time of the amendment, “intentionally,” was seen as essentially superfluous “[s]ince the title bars only discrimination because of race, color, religion, sex, or national origin it would seem to already require intent.”<sup>257</sup> It was not “a substantive change in the title.”<sup>258</sup> The addition simply clarified that there was no liability for “inadvertent or accidental discriminations.”<sup>259</sup> In the temporal context, this description provides a snapshot of how Congress thought about discrimination; it obviously had to be something that was done on purpose. There was no reason in the segregated America of the early-60’s to pretend otherwise.

On the other hand, actually adding “intentionally” to the statute invited courts to give the language some meaning as the descriptor of how a respondent was engaging in an unlawful employment practice.<sup>260</sup>

254. See 110 CONG. REC. 14,331 (1964) (“The Senate amendments require that no employer can be held responsible for any violation, unless it can be proved that such a violation was intentional.”); 110 CONG. REC. 14,331-32 (1964) (“A further safeguard that was provided by the Senate amendment deals with proceedings against employers in Federal court. It provides that the unlawful employment practice complained of must be an intentional one: The employer must have intended to discriminate before a court could grant any relief.”).

255. H.R. REP. NO. 88-914, at 12 (1963).

256. Civil Rights Act of 1964 §706(g), Pub. L. No. 88-352, 78 Stat. 241 (1964).

257. 110 CONG. REC. 12,723 (1964) (remarks of Senator Humphrey, one of H. R. 7152’s key proponents).

258. *Id.*

259. *Id.* at 12,724.

260. See Berg, *supra* note 62, at 71. Mr. Berg predicted this outcome, but struggled to comprehend its complete significance for two reasons. First, he appears to be completely focused on what were literally issues of “black and white” at the time. So, “unintentional discrimination” did not register in relation to proscribed criterion, that were not self-declaratory. Second, because discrimination was something done on purpose in his time, “unintentional discrimination” seemed far-fetched; an expression of the subconscious impossible to prove. Accordingly, if it existed, such “unintentional discrimination” was not a significant loss if exempted from coverage by Section 706(g). *Id.* at n. 14.

If “intentionally” means that “the asserted act of discrimination must have been knowingly and deliberately”<sup>261</sup> based on a proscribed characteristic, then its addition was more likely meant to address discrimination claims where the proscribed characteristic was not open and notorious, like religion or natural origin.<sup>262</sup> In such cases, absence of knowledge makes sense as a defense to liability. This reading also makes sense of the legislative history. “Intentionally” did not materially alter the understanding of Title VII, it merely clarified that it was possible for an employer (claim) to lack sufficient knowledge of the proscribed characteristic to discriminate and to place the burden of establishing that knowledge on the claimant.<sup>263</sup>

Under this reading, in the ordinary course, intent would not be a difficult proposition if it were restrained to assuring that the decision-maker knew that the identity of the target of discrimination fell within a proscribed category. Intent then describes a reason for an action. A claimant would then be responsible for proving that his or her identity was the only reason for the action in question: an adverse employment decision. Given the language in Section 706(g)’s final sentence, the burden of proof also required the exclusion of any reason other than the claimant’s protected status.<sup>264</sup>

That this conclusion has been maddeningly perplexing is a

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261. *Id.*

262. Not to exclude the possibility that race and color might be mistaken by, or hidden from, a decision maker. America had been an involuntary genetic melting pot for about 400 years. As a result, people, who would be legally defined as black under the “one drop rule,” could be mistaken as white or could take advantage of being that light-skinned, light-eyed, and fine-haired to escape the cruelty of segregation. *See* LANGSTON HUGHES, *THE WAYS OF WHITE FOLKS* (1934).

263. This explanation also stands up to the fact that there was a proposal that “willfully” be used to describe the manner of the unlawful employment practice so that “[g]ood faith should be made a defense for all persons accused of discrimination.” 110 CONG. REC. 12,641 (1964). The proposal came from the Chamber of Commerce of the United States, which was pressing for the complete elimination of Title VII from H. R. 7152. *Id.* Given the Chamber’s avowed animosity toward Title VII, it seems more likely that adding “willfully” was an effort to make the burden of proof something greater than simple intent for the kind of discrimination Congress tried to address. This kind of discrimination included nothing more than the disparate treatment of individuals and excluded the deliberate exclusion of blacks as a group in the sense of requiring or promoting the correction of racial imbalances in hiring. The claim that such discrimination could happen in “good faith,” in some general way so that all persons accused of discrimination could claim “good faith” as a defense, is difficult to square with the Chamber’s agenda at the time.

264. *See* Civil Rights Act of 1964 §706(g), Pub. L. No. 88-352, 78 Stat. 241 (1964).

combination of the expectations of the Civil Rights Era,<sup>265</sup> the Court's excursions into lawmaking based on a manipulation of those expectations as its statement of the "purpose" or "intent" of Title VII changed,<sup>266</sup> and an overreaction to the word "intentionally" in terms of what it required in terms of the level of proof and what it could capture as a descriptor of "discrimination."<sup>267</sup>

### III. WHY TITLE VII WORKS – UNDERSTANDING *McDONNELL DOUGLAS*

Disparate treatment cases like *Ash* demonstrate that Title VII is serving the purposes of the Congress that created it: to assure that Title VII minimally impacted existing management prerogatives and union freedoms.<sup>268</sup> This was immediately apparent to the early Title VII scholars.<sup>269</sup> They concluded that disparate treatment plaintiffs had little chance of vindicating their rights under Title VII.<sup>270</sup> In that sense, results like *Ash* were predicted.<sup>271</sup> Proponents of the view that Title VII should eradicate all employment discrimination appealed to the courts for enforcement the spirit rather than the letter of the law; further evidencing the obvious and almost insurmountable difficulties in Title VII's text if its purpose went beyond eliminating only the most overt kinds of discrimination.<sup>272</sup> These difficulties were called problems or failures and are still seen in those terms because of the strength of the cognition that Title VII is meant to eradicate employment discrimination. Giving the actual intent and purpose of Title VII its due

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265. *See supra* Part I.

266. *See* Eskridge & Frickey, *supra* note 71, at 378-83 (observing that the Court's efforts to come to majoritarian, therefore "legitimate," legal conclusions causes a certain "anxiety over its creative law making role" and a form of obfuscation that drives the Court to search for "objective" reasons to support a wholly "subjective" outcome and an irrational reverence for such "objective" indicia.).

267. *See Supreme Court Rhetoric*, *supra* note 27.

268. *See supra* Part II.B.

269. *See* Berg, *supra* note 62, at 96-97; Affeldt, *Part I*, *supra* note 58, at 669; Cooksey, *supra* note 84, at 419-420, 430; Schmidt, *supra* note 209, at 462-3 ("And compliance with the letter [of Title VII] – both in terms of coverage and substance – may very well impose inconveniences and require more imagination to enable the continuation of practices which exclude Negroes from employment, but the legislation, as presently conceived, can do little to effectively prohibit these practices.").

270. *Id.*

271. *Id.*

272. Robert J. Affeldt, *Title VII In The Federal Courts – Private Or Public Law* PART II, 15 VILL. L. REV. 1 (1971); Hill, *supra* note 87.



weight dispels the cognitive dissonance.

The fact that Congress created Title VII, as to disparate treatment, with a view to preserving the maxim extent possible of management prerogatives circa 1964 invites an analysis of the Court’s implementation of Congress’ mandate. Given the Court’s decisions in *Griggs*, for example, where the Court demonstrated an allegiance to purposes that Congress rejected,<sup>273</sup> what explains the Court’s cleaving so closely to the limits of Title VII in *McDonnell Douglas* and its progeny? The answer does not reside in the *McDonnell Douglas* decision itself. The opinion references the broad social policy that animated *Griggs* and specifically declares that “Title VII tolerates no racial discrimination, subtle or otherwise.”<sup>274</sup> The Court then proceeds to manufacture the infamous burden shifting analysis that married Title VII to the identity Congress gave it in 1963 and 1964. The Court’s sphinx-like decision explains little. One of the ways to understand it is as a response to a dialogue commenced by the Eighth Circuit.

In the Eighth Circuit and below, *McDonnell Douglas* never disputed Green’s qualifications to do the job.<sup>275</sup> Instead, *McDonnell Douglas* relied on Green’s involvement in illegal protest activity against the company to deny him employment.<sup>276</sup> In the Eighth Circuit the divided panel relied heavily on *Griggs* to reject *McDonnell Douglas*’s argument. The Eighth Circuit responded that hiring decisions based on subjective criteria carried little weight.<sup>277</sup> The Eighth Circuit based this conclusion squarely on the *Griggs* holding: “If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.”<sup>278</sup> Following this reasoning, in words that completely mirror *Griggs*, the 8th Circuit explained:

In enacting Title VII, Congress has mandated the removal of racial barriers to employment. Judicial acceptance of subjectively based hiring decisions must be limited if Title VII is to be more than an illusory commitment to that end, for subjective criteria may mask aspects of prohibited prejudice. Employers seldom admit racial discrimination.

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273. See discussion *supra* Part II.B.3c.

274. *McDonnell Douglas Corp. v. Green*, 411 U. S. 792, 801 (1973).

275. *Green v. McDonnell Douglas Corp.*, 463 F.2d 337, 339 (8th Cir. 1972).

276. *Id.* at. 343.

277. *Id.*

278. *Id.* (quoting *Griggs v. Duke Power Co.*, 401 U. S. 424, 431 (1971)).

Its presence is often cloaked in generalities or vague criteria which do not measure an applicant's qualifications in terms of job requirements.<sup>279</sup>

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Blind acceptance of any non-discriminatory reason offered by an employer in a fair employment case would always preclude correction of any discriminatory practices otherwise existing. It has generally been said that an employer may refuse to hire or decide to fire any employee for any reason he chooses. Civil rights legislation and case law dealing with discriminatory employment practices have added modification to these principles. Discriminatory motives even though they constitute only a partial basis for an employer's refusal to hire are not sanctioned.<sup>280</sup>

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The hard nut of it all is that the public interest to be carried out in the legislative requirement of fair and equal employment practices possesses a higher value than the likes or dislikes of a particular employer.<sup>281</sup>

If the Supreme Court adopted the Eighth Circuit's reasoning, it would effectively define the language "discrimination" in Section 703 as a personnel decision: 1) based on non-job-related criteria; 2) regardless of the facially non-discriminatory nature of the criteria; 3) so long as the claimant was qualified to do the job. It would create an environment where employers had to demonstrate an objective job-related cause for any adverse personnel decision. Given the close philosophical ties to *Griggs*, adopting the Eighth Circuit's conclusions also opened doors to a version of Title VII in disparate treatment cases that fully acknowledged the continuing negative impacts of historical harm and made correcting for those impacts Title VII's core purpose. The Court, as we know, did not adopt this reasoning. In rejecting the

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279. *Id.* at 343 (citations omitted). Since Green had the objective job qualifications, McDonnell Douglas was unlikely to be able to avoid hiring him. "[i]f McDonnell's refusal to hire Green rests upon management's personal dislike for Green or personal distaste for his conduct in the civil rights field, Green is entitled to some relief." *Id.* at 344. Twenty years later, in *St. Mary's Honor Ctr. v. Hicks*, 509 U. S. 502 (1993), the Court approved personal animosity as a legal justification for an adverse employment decision.

280. *Id.* at 345-6.

281. *Id.* at 346.

Eighth Circuit’s attempt to apply and extend the *Griggs* interpretation of Title VII, the Supreme Court’s *McDonnell Douglas* opinion gives priority to the preservation of existing employer prerogatives to rely on subjective criteria by limiting *Griggs* to its context. In doing so, the Court adopted the company’s argument that Title VII protects subjective decision-making.<sup>282</sup>

Without specifically addressing the individual elements of the 8th Circuit’s description of how Title VII should work, the Court discretely rejected them all. The Eighth Circuit found that subjective criteria limited an employer’s ability to justify a decision.<sup>283</sup> The Court responded that “the [Eighth Circuit] seriously underestimated the rebuttal weight to which [McDonnell Douglas’] reasons were entitled.”<sup>284</sup> It pronounced that an employment decision based on unlawful conduct standing alone fell outside of Congress’ intentions to remove arbitrary and unreasonable barriers to employment.<sup>285</sup> The Court’s statement about the weight to give employer justifications coupled with its tacit approval of the use of decisional criteria not related to ability to perform a particular job made employers’ evidence of non-discriminatory reasons practically unassailable.<sup>286</sup> Finally, by resurrecting the legitimacy of McDonnell Douglas’ reason for refusing Green, the Court also rejected the Eighth Circuit’s proposition that any legal motivation for a personnel action would be irreparably tainted by a coexisting discriminatory motive.<sup>287</sup>

The *McDonnell Douglas* decision, like *Griggs*, picks up on the meritocracy theme. Unlike *Griggs*, however, *McDonnell Douglas*

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282. The *McDonnell Douglas* Court specifically distinguished *Griggs* because *Griggs* dealt with the disparate impacts of standardized testing and the impermissibility of “freezing” blacks out of employment opportunities because of the continuing impacts of segregation. *McDonnell Douglas*, 411 U.S. at 805-06. Moreover, the victims in *Griggs* had done nothing to deserve being excluded from employment opportunities. *Id. Green* presented a different picture because Green engaged in illegal protest activity. *Id.* at 806. McDonnell Douglas rejected him for that reason. *Id.*

283. *Green*, 463 F.3d at 343.

284. *McDonnell Douglas*, 411 U.S. at 803.

285. *Id.* at 806.

286. *Id.* at 803.

287. *Green*, 463 F.3d at 346 (Judge Lay’s concurrence:

The evidence must show that the employee’s lawful activities . . . were in no part a motivating factor in the employer’s decision and the reason for the rejections is objectively related to job performance. Without this showing any reason could otherwise be used to mask the denial of protected rights.).

conforms completely to the Civil Rights Era meritocracy as entirely prospective in disparate treatment cases. In *McDonnell Douglas*, the Court's view of meritocracy is best seen from the vantage point of its rejection of the 8th Circuit's position on the issue. The Eighth Circuit saw personnel decisions as merit determinations where the only relevant merit was a candidate's ability to perform the specific functions of a given job. Subjective criteria, as the likely reservoir of discriminatory thought and action, could not be suborned by Title VII. The Court maintained the following view:

There are societal as well as personal interests on both sides of this equation. The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions.<sup>288</sup>

The Court's description of an overarching interest in "efficient and trustworthy workmanship" stands in place of the words "individual merit and achievement" and "colorblindness." In the Court's eyes, meritocracy is the shared, therefore, dispositive principle.<sup>289</sup> The Court, however, did not explain the relationship between this conclusion and Title VII and is criticized for creating "just one example of the many statutory constructions enacted by the courts without due consideration for statutory heritage."<sup>290</sup> That conclusion is based on the cognition that Title VII tolerates no racial discrimination, "subtle or otherwise."<sup>291</sup> The conflicts within *McDonnell Douglas* call that belief into question. An exploration of why the *McDonnell Douglas* Court did not explain its reasoning helps to resolve the conflict.

Professors Eskridge and Frickey have observed that the Court's failure to candidly explain its answers to ambiguous questions is a result of anxiety about how to give a legitimate explanation of its

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288. *McDonnell Douglas*, 411 U.S. at 801.

289. The import of this statement, however, is not limited to the Court's views on meritocracy. It is also a description of the tension between visions of Title VII as a public (societal) law and as a private (personal) law. That said, the Court's decision in *McDonnell Douglas* to retain the scope and power of employer prerogatives had ample support in the legislative history, despite the Court's failure to rely on that history. See Part II, *supra* for a discussion of the relevant legislative history and Part III, *supra* for a discussion of how that legislative history supports the Court's *McDonnell Douglas* decision.

290. Sperino, *supra* note 19, at 805.

291. *McDonnell Douglas*, 411 U.S. at 801.

reasoning process.<sup>292</sup> The anxiety drives the Court into the arms of foundationalism where it usually finds something in the text, the purpose or intent to link the decision to the statute. The statute is legitimate because the elected representatives of the people created and executed it. Any link to the source of legitimacy will do. In *McDonnell Douglas*, however, this kind of anxiety does not account for the complete absence of an explanation for the outcome. An explanation was handy in the text and in the purpose or intent as described in the legislative history. The Court could have explained that:

Under Section 706(g) as supported by the intent of the Congressmen and Senators most responsible for crafting and enacting Title VII, Mr. Green will have to prove that his race was the only reason he was not hired. It was obviously the legislature’s intent to preserve, to the maximum extent possible existing management prerogatives. These prerogatives include reasons such as the desire to hire a brother-in-law or first cousin. They include personal animosity. They also include the claimant’s acts of disloyalty and illegal protests of an employer’s hiring practices.

The Court did not do this.

The availability of the usual elements of foundationalism and the Court’s avoidance of them, leads to the conclusion that the Court’s lack of candor in *McDonnell Douglas* and its progeny had a source other than anxiety. A likely source of the Court’s reticence was its awareness of Title VII’s significant limitations for disparate treatment plaintiffs and its unwillingness to describe that knowledge because of the impact the description would have had on themselves and the Country. In light of the knowledge that we can safely insist the Court had or should have had, not explaining the unanimous ruling of *McDonnell Douglas* preserved the Court and the Country from the exposure of the dissonance between what the Court achieved in *Griggs*<sup>293</sup> and Congress’ elevation of the protection of existing management prerogatives above racial discrimination in employment.<sup>294</sup>

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292. Eskridge & Frickey, *supra* note 71, at 379.

293. *Id.* at 380 (“And whatever the problems of relativism in science or philosophy, they are even more troubling in legal theory, where, because of the clear link between law and political power, arbitrariness is most to be feared.”).

294. SITKOFF, *supra* note 73, at 210 (“The movement had secured basic civil rights for African-Americans. . .”); WOODWARD, *supra* note 57, at v (“Thus within one

Another answer to the question why the Court failed to explain itself in *McDonnell Douglas* is simple: It did not have to. The urge to explain is the child of the desire to establish legitimacy.<sup>295</sup> In this case, I think of legitimacy in terms of having reached the correct result from both a foundational<sup>296</sup> and an “evolutive” perspective.<sup>297</sup> The more

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week a historic movement reached its peak of achievement and optimism and immediately confronted the beginning of a period of challenge and reaction called in question some of its greatest hopes and aspirations.”).

In fact, by 1973, the backlash against civil rights was already in full swing. SITKOFF, *supra* note 73, at 210 (“As the sixties ended, however, white backlash ruled the roost.”) C. Vann Woodward seems to place the beginning of the backlash and the questioning of what the Civil Rights movement achieved at the start of the Watts riots in August 1965. WOODWARD, *supra* note 57, at v. This suggests an early withdrawal from the Civil Rights Era meritocracy. The rioting in the summers succeeding 1965 caused President Johnson to establish a Commission on Civil Disorders by Executive Order in 1967. Exec. Order No.11,365, 32 Fed. Reg. 10907 (July 29, 1967). The Commission issued its report in 1968 including the conclusion: “Our nation is moving toward two societies, one black, one white - separate and unequal.” REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, 1 (1968). This conclusion is troubling for two reasons. First it suggests that there ever was one society; calling for a suspension of disbelief that the Commission was either that naive or this it was so steeped in meritocracy that the “playing field” actually became level for them in 1964. Second, the conclusion suggests that outside of the Committee and the 88th Congress meritocracy had never taken root, particularly among ghettoized blacks in northern cities for whom the remedy of sudden color-blindness meant nothing in terms of joblessness and its effects. With a certain amount of surprise the Committee reported: “What white Americans have never fully understood but what the Negro can never forget - is that white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it.” *Id.* For whites, the backlash ascribed to black overreaching found political expression in Nixon’s 1968 victory over McGovern and the eclipse of desire to continue to unravel the tangled skein of slavery and more than 100 years of segregation. WOODWARD, *supra* note 57, at 190-214. In fact, there may have been few who actually continued to believe in Civil Rights Era meritocracy by 1973. *Id.* Nevertheless, the fiction of meritocracy prevails. Professor Selmi, for example, argues that the difficulty of employment discrimination cases based on race is based on a bias in the courts and that bias is a result of a belief by judges in the success of meritocracy expressed as skepticism of the “persistence of discrimination”. Selmi, *Hard to Win*, *supra* note 13, at 562-563. *See also* Freeman v. Pitts, 503 U.S. 467, 506 (1993) (Scalia, J., concurring) (“At some time, we must acknowledge that it has become absurd to assume, without any further proof, that violations of the Constitution dating from the days when Lyndon Johnson was President . . . continue to have an appreciable effect upon current operations of schools.”).

295. *See* Eskridge & Frickey, *supra* note 71, at 378-79.

296. At this point the, discussion requires the tools of statutory interpretation. I am not entering the debate about the merits of any particular interpretive method. I have chosen to rely on the ground breaking work of Professors Eskridge and Frickey in their

legitimate a decision, the less reason the Court has to explain it. All of the members of the Court believed the *McDonnell Douglas* result legitimate. It has (albeit unexplained) strong foundational links.<sup>298</sup> It is

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article *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990), for the necessary resources. For the purposes of this Article I rely on their descriptions of the various traditional schools of statutory interpretation. “The three main theories today emphasize (1) the actual or presumed intent of the legislature enacting the statute (“intentionalism”); (2) the actual or presumed purpose of the statute (“purposivism” or “modified intentionalism”) and (3) the literal commands of the statutory text (“textualism”).” Eskridge & Frickey, *supra* note 71, at 324 (citation omitted). Collectively referred to as “foundationalism” or “foundationalist” approaches to statutory interpretation. *Id.* at 324-325.

297. See Eskridge & Frickey, *supra* note 71. According to Professors Eskridge and Frickey, evolutive concerns cause contemporary policy concerns or values to impact the Court’s statutory interpretation. They point to the Court’s decision in *U. S. Steel Workers v. Weber*, 443 U.S. 193 (1979), for example, as showing evolutive concerns at work. Their premise for the Weber example is that “when it enacted Title VII, Congress assumed that outlawing color-conscious employment decisions would actually produce equal employment opportunity for blacks.” *Id.* at 359. Because blacks were not enjoying equal employment opportunity, “at least partly because of covert discrimination . . . the Court concluded in Weber that if the nation were to realize Title VII’s goal of providing jobs for blacks, it would have to relax the requirement of color-blindness.” *Id.* Professors Eskridge and Frickey concluded that Weber is a “clear example” of the Court accounting for evolutive considerations: “social and legal circumstances not anticipated when the statute was enacted.” *Id.* In other words, the Congress not anticipating that Title VII would fail in its purpose in effecting the social change of equal job opportunity, the Court stepped in and made a correction, *See Id.* at 342-343 (additional argument about how the 88th Congress in 1964 could not have understood the need for, and therefore did not provide for, the remedy the Court created in Weber fifteen years later.).

298. On this point I must differ with Professor Sperino, *supra* note 19. I completely agree with her that we should demand more from federal employment discrimination law than we receive. I also agree that *McDonnell Douglas* establishes a false dichotomy between direct and circumstantial evidence in disparate treatment cases, to the disadvantage of claims based on circumstantial evidence. *See* Sperino, *supra* note 19, at 773. I argue that is exactly why the false dichotomy exists. Direct evidence in discrimination cases is understood as a blatant reference to a proscribed characteristic at the time of an adverse employment decision. For example, an employer states to an applicant that he or she is being rejected because he or she is black. All other disparate treatment, or the behaviors that might reflect disparate treatment based on a proscribed characteristic, is based on circumstantial evidence. But the very point of the dichotomy, is that it prevents circumstantial evidence-based disparate treatment claims from being successful because Title VII was only intended to prevent the worst kinds of discrimination and to preserve as much of an employer’s decision-making latitude as possible. *See* discussion *supra* in Parts II.

I also disagree that the *McDonnell Douglas* version of Title VII for individual victims of disparate treatment is not justified by any statutory construction methodology. Professor Sperino attacks *McDonnell Douglas* with the tools of statutory construction

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and concludes that the Court's result has no textualist, intentionalist, or purposivist grounding. *See* Sperino, *supra* note 19, at 764-74. The argument that *McDonnell Douglas* is not grounded in Title VII's text relies solely on the operative language in Section 703(a). My view is that Section 703(a) cannot be read in isolation to discover *McDonnell Douglas*' link to Title VII's text. Section 703(a) must be read *in pari materia* with Section 706(g). Section 706(g) discusses the availability of affirmative relief, only where an unlawful employment practice is proved in the absence of "any reason other than discrimination on account of race, color, religion, sex, or national origin." § 706(g)(2)(A). The burden shifting gives life to this language by allowing the employer to assert "any other reason" as a legitimate, non-discriminatory reason without the burden of having to prove that reason as an affirmative defense. Moreover, rather than compelling an employer to assert a reason, in contrast to an employer's right to make decisions for any or no reason under the at-will employment doctrine, *McDonnell Douglas*' invitation to offer a legitimate, non-discriminatory reason is one that an employer may reject with little concern for the ultimate result. *See* Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to "No Cause" Employment*, 81 TEX. L. REV. 1177, 1179 (2003) ("While it was long presumed that, in the absence of an employers unrebutted, nondiscriminatory reason, discrimination was the likely motivation for the defendant's challenged action, courts have begun to presume that personal animosity most likely motivated the employer.").

As to Professor Sperino's argument that the legislative history does not support the Court's work in *McDonnell Douglas* from an intentionalist or purposivist perspective, *see* Sperino, *supra* note 19, at 776, 779-80, it appears that Professor Sperino does not give the legislative history the weight to which, I argue, it is entitled. It is true that the legislative history does not explicitly authorize the Court to interpret Title VII. *See id.* at 776. Title VII's legislative history may also be "judicially incomprehensible," *id.* (citation omitted), but it is not nonexistent. As to the development of Title VII, in general, and its enforcement provisions in particular, Professor Sperino does not acknowledge Title VII's role as a straw man for the overriding goal of omnibus civil rights legislation in 1964. Or that its power was sacrificed as part of the deal because the key players for the passage of the Civil Rights Act of 1964 wanted Title VII to do very little to impact existing management prerogatives and union freedoms. *See* discussion *supra* Section II.B.3. Moreover, much of what appears to be the trouble with Title VII is its insistence on qualifications. But qualification or individual merit was a core theme of the Civil Rights Era, which resounds in Title VII and in the version of Title VII described by *McDonnell Douglas* in making qualification part of the *prima facie* case that establishes a presumption of discrimination. Furthermore, the development of Section 706(g) gives significant information about the 88th Congress' intent to make it difficult for disparate treatment plaintiffs to get, or want to get, a financial recovery. For example, where Section 706(g) could have limited employer, non-discriminatory reasons to "cause" they specifically resorted to "any other reason" language. *See* discussion *supra* Section II.B.3.e.ii. If *McDonnell Douglas*' version of Title VII does anything, it carries out this legislative mandate by making Title VII cases extremely hard to win, if winning includes affirmative relief.

Professor Sperino's argument that *McDonnell Douglas* does not reflect Title VII's purpose relies on Section 703 to supply the statement of purpose. *See* Sperino, *supra* note 19, at 781-82. I suggest that Section 703 in isolation cannot inform a complete or accurate understanding of purpose. At a minimum, Section 703 must be read in



also rationally distinguishable from *Griggs* on its facts. *Griggs*, therefore, had no hold on the Court to keep it from blazing an entirely new trail to disparate treatment. Being the first case in its line, there was no need to rationalize a change in direction and explain why it was legitimate. Having reached a legitimate result, the extreme gravitational pull of *stare decisis* worked on the Court to keep the result in place and expand on it consistent with the latitude self-citation provides with the unacknowledged assistance of foundational links.<sup>299</sup> The consequence has not only been achieving the 88<sup>th</sup> Congress intentions from foundational point of view, but also affirming and nurturing a variety of behaviors that those against civil rights worked very hard to protect.<sup>300</sup> Far from the “day of reckoning” predicted by

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conjunction with 706(g) if the text of Title VII is to be the source of a description of its purpose. When these sections are understood together, *McDonnell Douglas* has a purposivist basis that is identical to its textual basis: to limit the chances of success for disparate treatment cases based on circumstantial evidence. Another construction of “purpose” for *McDonnell Douglas* exists. Professors Eskridge and Frickey candidly describe “purpose” as “incoherent, unless one means the deal between rent-seeking groups and reelection minded legislators.” Eskridge & Frickey, *supra* note 71, at 334. That blunt description of purpose accurately describes Title VII’s purpose on several levels. Title VII was set up to be sacrificed as part of the deal to get an omnibus civil rights bill passed into law. See WHALENS, *supra* note 45, at 37. Title VII’s purpose, therefore, was the purpose ascribed to it by the republican legislators, whose votes were required to get the Civil Rights Act of 1964 out of Congress and onto President Johnson’s desk for signature. In order to achieve that end, Title VII’s purpose is summarized in the following statement: “management prerogatives and union freedoms are to be left undisturbed to the greatest extent possible.” H.R. REP NO. 88-914, pt. 2, at 29 (1963). *McDonnell Douglas*’ version of Title VII admirably serves that purpose.

299. See *Patterson v. McLean Credit Union*, 491 U. S. 164, 172-73 (1989) (“Considerations of *stare decisis* have special force in the area of statutory interpretation, for here unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.”).

300. Republican Representative Meader thought Title VII an “ill-devised limitation upon the area of discretion and decision-making of both American business and American workers[.]” and for that reason among others opined that Title VII be deleted from the Civil Rights Act. See H.R. REP. NO. 88-914, pt. 1, at 57-58 (1963). The extreme conservatives paraded hot button issues like having to choose a “Negro” despite personal preferences against “Negros,” and hiring by quota to achieve numerical racial balance. They went on to predict a virtual social Armageddon: “If this title of this legislation becomes a statute, we predict that it will be as bitterly resented and equally as abortive as was the 18th Amendment [prohibition], and what it will do to the political equilibrium, the social tranquility, and the economic stability of the American society, no one can predict.” *Id.* at 111. “Now, I know that this so-called civil rights legislation has a lot of political mileage in it. It is more or less the brain

one Congressman, *McDonnell Douglas* assured that Title VII would never be a teaching tool for equality where potentially serious and frequent financial liability drove the lesson that disparate treatment had consequences.

In a society where disparate treatment has never had consistent and heavy repercussions for decision-makers,<sup>301</sup> *McDonnell Douglas*' representation of Title VII is evolutive in the sense of its relationship to foundational links and its survivability under the dynamics of time.<sup>302</sup> By 1973 Title VII had been on its temporal journey for nine years. Presuming the existence of evolutive concerns, particularly current policies, the *McDonnell Douglas* decision reflects that there were no such concerns over the intervening period relating to disparate treatment under Title VII.<sup>303</sup> To the degree that evolutive concerns attracted the Court's attention in subsequent iterations of *McDonnell Douglas*, those concerns favored employers and may be attributable to a growing bias against employment discrimination claims.<sup>304</sup> The ultimate result of the evolution of disparate treatment under Title VII was the formal statement that a claimant could prove discrimination, but receive no relief if an employer would have made the same decision for a reason detached from the claimant's race, color, religion, sex or national origin.<sup>305</sup> As a demonstration that statutes are launched across time to "live" as succeeding generations with changing concerns give them contextually appropriate meaning through interpretation, disparate treatment under Title VII looks like it never moved. That does not mean that it is not "living."

Title VII's failure to evolve or move suggests that, as a nation, there have been and are no material evolutive concerns about this form of employment discrimination. The absence of such concerns over the

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child of the Americans for Democratic Action, ADA, COPE, NAACP, and other leftwing, radical groups. And they are whooping it up in the old corral. One of these days some of the white folks may get tired of this sort of carrying on. One of these days the white folks may decide they have taken enough. \* \* \* These white folks may decide they somebody to speak up for their rights—that is, what is left of their rights after the politicians get through carving them up. Yes, there may yet be a *day of reckoning*." 110 CONG. REC. 2,568 (1964) (remarks of Rep. Fisher).

301. See generally *Supreme Court Rhetoric*, *supra* note 27.

302. See Eskridge & Frickey, *supra* note 71, at 358-59, n. 137.

303. Approaching 1973, the policy concerns had turned sharply against black rights to be free from discrimination as Nixon sought to continue to capitalize on the white-backlash. See SITKOFF, *supra* note 73, at 210-12.

304. See *Supreme Court Rhetoric*, *supra* note 27.

305. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

quantity and quality of discrimination that Title VII tolerates indicates that the tension set up between the cognition that Title VII prohibits all racial discrimination and the presence of racial discrimination is not sufficiently dissonant to cause action at the federal level. If the cognition of a broadly remedial Title VII is true, the absence of sufficient tension to cause action can be explained by the existence of a new cognition about racial discrimination or that the existing cognition has lost significance.<sup>306</sup> A belief that racial discrimination is no longer a problem in America and/or a bias against employment discrimination claims<sup>307</sup> would explain the lack of tension from any dissonance because these cognitions replace the cognition of the existence of racial discrimination or because, as additional cognitions they minimize the significance of any racial discrimination.<sup>308</sup>

Since Congress has not amended Title VII to address concerns with *McDonnell Douglas*, the cognition of, or belief in, Title VII as intolerant of racial discrimination, “subtle or otherwise” is likely false.<sup>309</sup> The confirmation that the *McDonnell Douglas* Court’s view of Title VII is legitimate, comes from Congress.<sup>310</sup> There is little more to ask of a decision in terms of confidence in its legitimacy if the one body with the power to say the decision was wrong says nothing. In this case, Congress has said nothing to indicate that *McDonnell*

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306. See *Supreme Court Rhetoric*, *supra* note 27.

307. See *id.*

308. The *Ash* litigation suggests that the cognition of racial discrimination in employment has lost value or has been replaced. The 11th Circuit’s initial conclusion, that a white man has to say “black boy,” not just “boy,” to a black man in the middle of Alabama describes a cognition that racial discrimination is not significant. From the persistence of this cognition after the Supreme Court directed the 11th Circuit to consider historical usage and context, one might conclude that the 11th Circuit’s cognition does not admit the existence of racial discrimination in employment. The Supreme Court’s failure to change this cognition suggests that the Court shares this cognition or does not consider racial discrimination in employment as a significant enough concern to justify its action. In other words, a white supervisor calling a black subordinate “boy” in the middle of Alabama caused it no cognitive dissonance.

309. Cooksey, *supra* note 84, 419-20 (1966) (arguing that Title VII will only address some of what he describes as “unreasonable discrimination” and concluding that “[t]he role of law in the area of equal employment opportunity is a limited one.”).

310. *St. Mary’s Honor Ctr v. Hicks*, 509 U. S. 502, 542 (1993) (Souter, J., dissenting) (“It is not as though Congress is unaware of our decisions concerning Title VII, and recent experience indicates that Congress is ready to act if we adopt interpretations of [Title VII] it finds to be mistaken. See Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071. Congress has taken no action to indicate that we were mistaken in *McDonnell Douglas* and *Burdine*.”).

*Douglas* inaccurately, improperly or incorrectly implements the mandate of Title VII for the protection of disparate treatment claimants.<sup>311</sup> In an era where there is a constant dialogue between the Court and Congress over civil rights,<sup>312</sup> Congress' silence about disparate treatment describes *McDonnell Douglas's* legitimacy as the congressionally sanctioned reading of Title VII.<sup>313</sup>

#### IV. GETTING WHAT WE NEED<sup>314</sup>

We need something Title VII, as interpreted by the Court and approved by Congress, cannot give. We need an actual, as opposed to

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311. Congress responded to the Court's *Price Waterhouse* mixed motives decision in the 1991 Civil Rights Act. The Court had described that the employer's successful establishment of a non-discriminatory motive as a complete defense to liability. Congress officially adopted the Court's formulation of mixed motives but rather than a complete defense, Congress made a successful affirmative defense a bar to any affirmative relief. In addition to the fact that this should have been the expected result under a foundational reading of Section 706(g), the Congressional reaction cannot be seen as a correction of an illegitimate result where the response prevented a party from relying on the juridical fact of disparate treatment to obtain the only meaningful benefits Title VII might give to an individual claimant: a job, a promotion, back-pay.

312. See Jack M. Beermann, *The Unhappy History of Civil Rights Legislation, Fifty Years Later*, 34 CONN. L. REV. 981, 1034 (2002) (Professor Beermann notes the legitimacy issue, commenting that: "If you start from the premise that Congress's legislative power is a legitimate aspect of our system of government, then the best evidence of the Court's unjustifiable obstructionism is the frequency with which Congress has found it necessary to legislatively overrule restrictive Supreme Court decisions.").

313. See Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1357 (1952) (tracing the impotency of Congress' Reconstruction era legislation to Congress' failure to define its intentions in the text of the legislation and concluding, in 1952, that the remnants of the civil rights program of the Reconstruction era "are mute testimony to the power of the judiciary to render impotent the expressed will of the people."). See also Beermann, *infra* note 322, at 1034 (Noting the applicability of Professor Gressman's criticisms of the "strict constructionist" Court of the post-Reconstruction era to the Court's treatment of civil rights legislation in the fifty years between 1952 and 2002, concluding that: "By and large, the Court has obstructed Congress and stood against efforts to legislatively redistribute power from the advantaged to the disadvantaged."). In the employment discrimination area, the best demonstration of the dynamics Professors Gressman and Beerman describe, is the Court's chipping away at the Americans with Disabilities Act of 1990 and Congress' restoration of the Court's damage to national policy regarding the employment of the disabled in the Americans with Disabilities Act Amendments Act of 2009.

314. See generally THE ROLLING STONES, YOU CAN'T ALWAYS GET WHAT YOU WANT (Decca Records 1969) ("You can't always get what you want. But if you try sometime, yeah, You just might find—you get what you need!").

rhetorical, purpose of eradicating employment discrimination, subtle or otherwise. We need a living definition of discrimination that accounts for actual human behavior including implicit bias.<sup>315</sup> We need a method of proof that eliminates the artificial and unhelpful distinction between direct and circumstantial evidence so that disparate treatment is the sole focus of fact finding.<sup>316</sup>

Obviously asking the Court to modify, change, improve or overrule *McDonnell Douglas* is not a good option. In the 40 years since *McDonnell Douglas* the Court’s refinements of its burden-shifting analysis have made things worse for disparate treatment claimants. Neither the Court nor Congress shows any signs of responsiveness to criticism of the *McDonnell Douglas* problem. We needn’t resort only to the Court or Congress. The remedy for the issue is at hand in the Fair Employment Practices (“FEP”) laws of the individual states. It is under state laws that those who desire the eradication of employment discrimination have been able to craft the law to achieve the results Title VII cannot attain. This is not to suggest that somehow, all state FEP laws differ in some radical way from Title VII.<sup>317</sup> They don’t. What I am suggesting is that state FEP laws offers a more realistic possibility of getting the results we need. There is likely an actual intent or purpose to animate the state FEP which does not require an act of Congress; which is what it would take to make Title VII what we want it to be.

States follow federal precedent for reasons of convenience and/or a fetish with symmetry. Under the right circumstances, it is easier to

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315. Ivan E. Bodensteiner, *The Implications Of Psychological Research Related To Unconscious Discrimination And Implicit Bias In Proving Intentional Discrimination*, 73 MO. L. REV. 83 (2008); *Some Thoughts*, *supra* note 16.

316. Tymkovich *supra* note 26.

317. Some states, notably Minnesota, have greater protections designed into their FEP laws. *See e.g.* M.S.A. § 363A.03 Subd. 2 (protections against age discrimination in employment cover people “over the age of majority.”) Montana is unique in having effectively abolished at-will employment with its Wrongful Discharge from Employment Act. M.C.A. § 39-2-904(1)(b) (a discharge is wrongful if “the discharge was not for good cause . . .”). By statute an employee in Montana can only be terminated for cause in addition to the fact that a Montana employer cannot discriminate because of race, color, religion sex, national origin etc. M.C.A. § 49-2-303(1)(a). It must be acknowledged that while a Montana claimant may file concurrent claims under The Wrongful Discharge from Employment Act and the Montana Human Rights Act and federal fair employment law, the wrongful discharge claim can be superseded by a determination that the claimant has a cause of action under state for federal antidiscrimination law. *Tonack v. Montana Bank of Billings*, 854 P.2d 326, 331 (Mont. 1993).

urge a state supreme court to abandon federal precedent in favor of state goals to eradicate employment discrimination than it is to ask the Supreme Court to overrule itself. What state jurist would reject an argument that the state's courts should abandon federal precedent as a measure of the rights of the state's citizens against discrimination where federal law's only recommendation is its ability to check only the most grotesque forms of discrimination and cases like *Ash* bring even that capacity into question? Where the state's FEP goals lack necessary clarity, it is also an easier project, relative to seeking Congressional action, to make state law conform to what we need via state legislatures. Moreover, concerted efforts to achieve a critical mass of states that reject *McDonnell Douglas* stands a better chance of getting Congress's attention.

The evidence of different results comes from California, Oregon, Tennessee, and Missouri. California has rejected one of *McDonnell Douglas*'s least defensible offshoots: the stray comments doctrine.<sup>318</sup> Oregon opted out of the *McDonnell Douglas* fiction in 1986.<sup>319</sup> The Supreme Court of Tennessee abandoned *McDonnell Douglas* in 2010.<sup>320</sup> Missouri dispensed with *McDonnell Douglas* in its entirety in

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318. See *Reid v. Google, Inc.*, 50 Cal. 4th 512, 536-46 (2010) I recognize that *Price Waterhouse* bore "stray comments." *Price Waterhouse*, however, would not exist without *McDonnell Douglas* having created the distinction between direct and indirect methods of proof in disparate treatment cases. Moreover, Justice O'Connor referenced "stray comments" in connection with circumstantial evidence to distinguish them from the stereotypical comments about Anne Hopkins that Price Waterhouse partners made about her promotability that Justice O'Connor considered to be direct evidence of discrimination.

319. See *Callan v. Confederation of Or. Sch. Adm'rs.*, 717 P.2d 1252 (1986) ("the objective of finding the facts correctly is not advanced by the artifice of making a chronological progression of evidentiary burdens the basis for deciding whether either party is entitled to survive the other's motion for summary judgment or a directed verdict.").

320. *Gossett v. Tractor Supply Company, Inc.*, 320 S.W.3d 777 (Tenn. 2010) superseded by statute TENN. CODE ANN. § 20-16-101 (2011); TENN. CODE ANN. § 4-21-311(e). The stated basis for the *Gossett* decision was not that Tennessee employment discrimination law was different from Title VII, but that the *McDonnell Douglas* burden shifting analysis was inconsistent with Tennessee's civil procedure rules governing summary judgment. *Gossett*, at 782 ("An employer therefore may meet its burden of production pursuant to *McDonnell Douglas* without satisfying the burden of production set forth in Tennessee Rule of Civil Procedure 56.04 for a party moving for summary judgment.") The *Gossett* court, however, specifically noted that the usual federal outcome, summary judgment for the employer based on the asserted legitimate non-discriminatory reason, was problematic because "[a] legitimate reason for a discharge . . . is not always mutually exclusive of a discriminatory or retaliatory motive

2007.<sup>321</sup> Missouri’s road to what we need arguably provides the best result.

Missouri’s FEP law, the Missouri Human Rights Act (“MHRA”) became state law in 1961.<sup>322</sup> The MHRA defines “discrimination” in employment as “any unfair treatment based on race, color, religion, national origin, ancestry, sex, age as it relates to employment.”<sup>323</sup> Missouri courts had evaluated disparate treatment claims using *McDonnell Douglas* since at least 1978.<sup>324</sup> The Missouri Supreme Court officially adopted *McDonnell Douglas* in 1984 because a substantial number of other states had done so and because it “offers ‘a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.’”<sup>325</sup> So, despite the definition of “discrimination,” MHRA disparate treatment claimants would remain as disadvantaged as any Title VII claimant for twenty-three years.

In 2003, the first of two developments occurred that paved the way for the Missouri Supreme Court to abandon *McDonnell Douglas* in its 2007 *Daugherty v. City of Maryland Heights*<sup>326</sup> decision. In 2003 the Missouri Supreme Court held that MHRA claimants had a right to a jury trial in *State ex rel. Diehl v. O’Malley*.<sup>327</sup> The second development occurred in 2005, because the *Diehl* decision caused the adoption of a

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and thus does not preclude the possibility that a discriminatory or retaliatory motive played a role in the discharge decision.” *Id.* The Tennessee legislature swiftly responded to Gossett. In 2011 the Tennessee legislature enacted a law to compel Tennessee state courts to follow Tennessee federal court summary judgment rules. TENN. CODE ANN. § 20-16-101. Simultaneously the Tennessee legislature codified the *McDonnell Douglas* burden shifting analysis as part of the Tennessee Human Rights Act. TENN. CODE ANN. § 4-21-311(e).

321. *See* *Daugherty v. City of Md. Heights*, 231 S.W.3d 814, (Mo. 2007).

322. MO. REV. STAT. §§ 213.010-137 (2000).

323. *Id.* § 213,010 (5) (emphasis added). Missouri does not keep legislative histories so there is no way to know how the legislators at the time made the logical decision to define “discrimination” or to use the “any unfair treatment” formulation. As the MHRA preceded Title VII, however, the decision to define “discrimination” and the definition cannot be seen as a response to Title VII.

324. *See* *General Motors Corp. v. Fair Emp’t Practices Div.*, 574 S.W.2d 394, 397 (Mo. 1978).

325. *Midstate Oil Co. v. Mo. Comm’n on Human Rights*, 679 S.W.2d 842, 845 (Mo. 1984).

326. *Daugherty*, 231 S.W.3d at 814.

327. *State ex rel. Diehl v. O’Malley*, 95 S.W.3d 82, 92 (Mo. 2003). Note that Congress had already given Title VII plaintiffs the right to a jury trial in the 1991 Civil Rights Act.

pattern jury instruction for MHRA cases.<sup>328</sup> The Missouri Approved Instruction (“MAI”) directs the jury to find for the plaintiff if the jury believes that plaintiff’s race, for example, “*was a contributing factor*” to the adverse employment action.<sup>329</sup>

The *Daugherty* court determined that MAI 31.24 called into question the reliability of *McDonnell Douglas* in the summary judgment analysis of claims under the MHRA.<sup>330</sup> Without explicitly describing *McDonnell Douglas* as a substantive hurdle for Title VII plaintiffs, the *Daugherty* court held that: “Analyzing summary judgment decisions under the standards set forth in MAI 31.24 [a contributing factor] is appropriate because a plaintiff has no higher standard to survive summary judgment than is required to submit a claim to a jury.”<sup>331</sup>

After *Daugherty*, Missouri courts have given meaning to the standard rhetoric that summary judgment should seldom be used in employment discrimination cases because they are so fact intensive

328. See Missouri Approved Jury Instructions (Civil) 31.24 (6th ed.). All Missouri juries are instructed from the Missouri Approved Instructions (“MAI”). A deviation from the MAI is grounds for reversal. Mo. Approved Jury Instructions (Civil) 70.02 (b), (c) (6th ed.).

329. Mo. Approved Jury Instructions (Civil) 31.24 (6th ed.).

330. *Daugherty*, 231 S.W.3d at, 819.

331. *Id.* at 820. The *Daugherty* court, of course recognized *McDonnell Douglas* for what it is and continues to be a substantive, rather than procedural, aspect of the Court’s interpretation of Title VII, which causes Title VII plaintiffs to have to prove more at summary judgment than the same plaintiff would have to prove at trial. *McDonnell Douglas* is such a powerful wolf in sheep’s clothing that, in states like Oregon, defense counsel urge federal judges to evaluate state FEP claims under *McDonnell Douglas* because it is merely a “procedural tool” and as a federal procedure is properly employed under the *Erie* doctrine. See *Snead v. Metropolitan Prop. & Cas. Co.*, 237 F. 3d 1080, 1090 (9th Cir. 2001). See also *Gacek v. Am. Airlines, Inc.*, 614 F. 3d 298 (7th Cir. 2010) (Posner, J., discussing applicability of *McDonnell Douglas* as a procedural tool in an Illinois worker’s compensation wrongful discharge case and concluding: “But when a retaliatory discharge case governed by Illinois law is litigated in a federal court, the federal court must apply the standard of the state law to a motion for summary judgment, and not the federal standard, because the standards are materially different and the difference is rooted in a substantive policy of the state. We are confirmed in this conclusion by the Supreme Court’s very recent decision in *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009). The question was whether the rule of *Price Waterhouse*, shifting the burden of proving causation in Title VII cases from plaintiff to defendant, should also govern cases under the Age Discrimination in Employment Act. The Supreme Court in *Gross* said no, thus treating the burden-shifting rule not as a substantively neutral rule of procedure but as a rule limited to a particular statute, in that case Title VII. *McDonnell Douglas* has a broader domain of applicability, at least as understood by the lower federal courts, but still a domain defined by a substantive category, namely discrimination.”).



and the outcomes depend on determinations of motive.<sup>332</sup> Since *Daugherty* there have been no reported successful summary judgments by defendants under the MHRA in Missouri state courts.

In addition to making the plaintiff’s burden of proof a “contributing factor”<sup>333</sup> rather than a “motivating factor,”<sup>334</sup> Missouri gives its employment discrimination teeth by limiting questions of “legitimate business reasons” to fact questions to be raised on summary judgment or to be argued in front of a jury. Any employer may also make the reason for an adverse employment decision an affirmative defense.<sup>335</sup> If a jury believes the affirmative defense the employer avoids liability.<sup>336</sup> Missouri law does not permit a mixed motives defense.<sup>337</sup>

Some would argue that Missouri goes too far in eradicating employment discrimination.<sup>338</sup> It not only dispenses with all of the problems of *McDonnell Douglas*, it effectively makes any adverse personnel decision a viable claim for discrimination because a “contributing factor” amounts to an extremely broad “any taint” standard.<sup>339</sup> If the goal is to eradicate *all* employment discrimination, subtle or otherwise, an “any taint” standard is the best place to start. Employers, at least in Missouri, find themselves learning that they cannot avoid liability at summary judgment. The focus of the case begins and ends with the question of discrimination rather than the distraction of legitimate non-discriminatory business reasons, stray comments, same actor inferences and other defenses which enable the kind of disparate treatment we believed Title VII was meant to prevent.

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332. “Summary judgment should seldom be used in employment discrimination cases, because such cases are inherently fact-based and often depend on inferences rather than on direct evidence. Summary judgment should not be granted unless evidence could not support any reasonable inference for the non-movant.” *Daugherty*, 231 S.W.3d at 818.

333. Mo. Approved Jury Instructions (Civil) 31.24 (6th ed.).

334. See Eighth Circuit Manual of Model Civil Jury Instructions-Instruction 5.96 (2008).

335. Mo. Approved Jury Instructions (Civil) 31.25 (6th ed.).

336. *Id.*

337. In Missouri, the employer has only the option to argue that the employee did not prove that a proscribed criterion was a “contributing factor” or to assert an affirmative defense that the employee was fired for a legitimate business reason under MAI 31.25.

338. See Kelly, Wiese, *GOP looks to roll back Supreme Court decisions*, MO. LAWYERS WEEKLY, Sept. 20, 2010, at 1.

339. See discussion of the causation issue *supra* section II.B.3.e.

Most important of all, under Missouri law you cannot both discriminate on the basis of a proscribed characteristic *and* avoid liability. The law acknowledges the existence of mixed motives, but, unlike Title VII, none of them can be race, color, religion, national origin or sex because the purpose of the MHRA is the eradication of employment discrimination.

If eradicating employment discrimination, subtle or otherwise, is the purpose and intent of the law, then a state would have to abandon *McDonnell Douglas* at a minimum. When *McDonnell Douglas* is gone there is no artificial distinction between circumstantial and direct evidence and the fact finder immediately goes to the issue of discrimination *vel non*. The door will be open for arguments based on implicit bias. There will be no motivational inferences at all. Summary judgment would become immediately anomalous in disparate treatment cases because in *McDonnell Douglas*' absence, courts would have to respect the fact that motivations and intentions are credibility determinations at heart which cannot be determined on the briefs. A next step would be a definition for discrimination, if it does not already exist. The definition need not go so far as "any unfair treatment." "Discrimination" could be defined as any adverse employment action or differentiation in treatment not supported by objective factors such as job qualifications or job performance.<sup>340</sup> Finally, the point of eradicating employment discrimination cannot be driven home in an environment where an employer can avoid all financial liability by claiming mixed-motives.<sup>341</sup> To the degree that a state might tolerate discriminatory animus being mitigated by other legitimate objective and true reasons, fault should be apportioned.<sup>342</sup> In that way, if there is any discrimination, the discriminator is always financially responsible for the harm caused to the victim of discrimination.

## CONCLUSION

The Civil Rights Era was a golden opportunity to begin the actual extirpation of discrimination as a social norm. Title VII could have been a way to ultimately correct the actual shortcomings of a society steeped in disparate treatment. It could have been engineered to make

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340. See discussion of definitions of discrimination *supra* section II.B.3.e.i.

341. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); Civil Right Act of 1991, Pub. L. No.102-166, 105 Stat. 1071.

342. It is standard practice under tort law to apportion fault and make those at fault liable for proportional damages.

its purpose the righting of a historical wrong by specifically recognizing the continuing impact of segregation on the ability of its intended beneficiaries and on the beliefs and behaviors of those who benefitted the most from the *status quo*. Title VII could have stood for the proposition that any discrimination was too much discrimination. If workplace discrimination had a high price tag, soon enough, discrimination would cease to make sense. The claim that it is impossible to legislate belief is simply that—a claim. The validity of the impossibility of legislating belief could have been tested. The will to test the validity of the claim was absent; the window of opportunity closed.

Instead, Title VII represents both a forgone opportunity and a statement of moral infirmity. The right to be free from all but the most obvious employment discrimination took a back seat to other demands on the apparently finite resource of rights or interests. Congress and the Court specifically identified some of these more valuable rights and interests: A trial by judge or jury rather than a potentially interested administrative body; the overarching interest in efficient and trustworthy workmanship. Underlying these direct statements, one senses recognition that granting Title VII rights endangered the rights of the majority. Indeed, the cost of Title VII rights was so keenly perceived that no amount of rhetoric could mask it. From that recognition the majority took specific action to preserve its rights by making Title VII relief profoundly unavailable. That fact does not make Title VII structurally unsound. Nor does it make the Supreme Court’s interpretations illegitimate. Title VII works.

In the absence of a Title VII that actually performs the function of eradicating workplace discrimination hope lives yet. Congress and the Supreme Court are not the only game in town. In the states it is possible to avoid what we do not want and get what we need. Missouri, for example, represents a world without *McDonnell Douglas*, where it is safe to believe that the purpose of laws against employment discrimination is the end of discrimination in employment. Admittedly, seeking relief on this issue in the states is an iffy proposition. The farther we move through time, the easier it becomes to believe that race is not an issue, so why do anything? Those who want to believe that race discrimination does not occur will adopt and adhere to that belief. However, with the constancy of race based economic disparities, the conclusion that America has moved beyond race cannot tolerate very much scrutiny. The 1967 Commission on Civil Disorders concluded that society is becoming separate and unequal. That society is separate

and unequal is subject to empirical confirmation by walking across campus or walking around a neighborhood.

No one can promise that pursuing a solution in the states will uniformly produce instant results. After almost forty years of *McDonnell Douglas*, anything is better than a Title VII that works. And if over the course of the next forty years work in the states results in any workplace discrimination leading to some unavoidable liability on the part of the discriminator, the investment will have been well worth the effort.

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