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Title VII of the Civil Rights Act at Fifty: Ruminations on Past, Present, and Future

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**TITLE VII OF THE CIVIL RIGHTS ACT AT FIFTY:
RUMINATIONS ON PAST, PRESENT, AND
FUTURE**

William B. Gould IV*

TABLE OF CONTENTS

Introduction.....	369
I. The Historical Overview of Equal Employment Opportunity	374
II. Title VII and the Debate Surrounding its Passage	378
III. 1972 Amendments to Title VII: A Second Look at EEOC Enforcement	383
IV. Compatibility of Collective Bargaining Seniority Provisions with Title VII	387
V. Jury Trials	396
Conclusion	399

INTRODUCTION

I came into the world of labor law and, derivatively, fair employment practice antidiscrimination law, through a rather roundabout process. As a high school student, I was inspired by the Supreme Court’s landmark ruling declaring “separate but equal” unconstitutional in public education in *Brown v. Board of Education*,¹ and was convinced by

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1. 347 U.S. 483 (1954).

Thurgood Marshall's success that a lawyer could produce real change in American society. Four years later, my first-year Constitutional Law course deepened my interest by examining what the NAACP had accomplished through litigation prior to *Brown*, particularly in the 1930s and 1940s,² as well as some of its progeny.³ Twenty years after *Brown*, I had this to say:

[*Brown*] gave me and other blacks the hope and belief that the law could address itself to racial injustices in this country and that I as a lawyer could make some contribution to end the old order against which my parents had struggled. In their day the struggle was against hopeless odds—hopeless because all who possessed African blood were isolated, ridiculed, despised—and thus regarded as unfit for occupations and work that the white man was willing to perform. . . . *Brown* was important to all black people because it gave us hope that we would have our day in court—both literally and figuratively.⁴

2. See, e.g., *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Sipuel v. Bd. of Regents*, 332 U.S. 631 (1948); *Morgan v. Virginia*, 328 U.S. 373 (1946); *Smith v. Allwright*, 321 U.S. 649 (1944); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Pearson v. Murray*, 182 A. 590 (Md. 1936).

3. See, e.g., *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama*, 357 U.S. 449 (1958), *Cooper v. Aaron*, 358 U.S. 1 (1958); see also HARRY KALVEN JR., *THE NEGRO AND THE FIRST AMENDMENT* (1965). Later I was able to rely on this line of authority in Washington. See *Novotel N.Y.*, 321 N.L.R.B. 624 (1996); *Shepherd Tissue, Inc.*, 326 N.L.R.B. 369, 373 (1998) (Gould, Chairman, concurring).

4. 120 CONG. REC. 16,229–30 (daily ed. May 22, 1974); *Conversations with Earl Warren*, STAN. LAW., Summer 1974, at 9. For a somewhat different perspective, see generally MICHAEL KLARMAN, *BROWN V. BOARD OF EDUCATION AND THE CIVIL RIGHTS MOVEMENT* (2007).

Though I followed assiduously the debate⁵ on the Civil Rights Act of 1957—the first civil rights legislation enacted since Reconstruction—and subsequently the Civil Rights Act of 1960, my growing realization that inequities in the workplace were a vital part of this struggle drove my career towards labor law.⁶ My experience in this field provided me with an early exposure to Title VII of the Civil Rights Act of 1964 and led to my involvement with the Equal Employment Opportunity Commission at its inception.⁷

I have always believed that labor law is a critically important prerequisite to employment discrimination law because of certain common characteristics shared by the National Labor Relations Act and Title VII, the former influencing the latter thirty years later. In the first place, the concept of unlawful employment practices in Title VII closely

5. I observed at the time that President Eisenhower expressed relative indifference or lack of knowledge about his own proposed bill:

Q. Mr. Reston: Mr. President, in light of that, would you be willing to see the bill written so that it specifically dealt with the question of right to vote rather than implementing the Supreme Court decision on the integration of schools?

THE PRESIDENT. Well, I would not want to answer this in detail, because I was reading part of that bill this morning, and there were certain phrases I didn't completely understand. So, before I made any more remarks on that, I would want to talk to the Attorney General and see exactly what they do mean.

President Dwight D. Eisenhower, News Conference (July 3, 1957), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=10828> [hereinafter Eisenhower News Conference]. General Eisenhower had earlier testified against President Truman's desegregation of the armed forces in 1948. *Universal Military Training: Hearings Before the S. Comm. on Armed Services*, 80th Cong. 986–1013 (1948) (statement of Dwight D. Eisenhower, General of the U.S. Army).

6. See William B. Gould IV, *Recollections of Kurt Hanslowe—A Dedication to Professor Kurt Löwus Hanslowe*, 69 CORNELL L. REV. 925, 929 (1984). My initial Labor Law course was taken with Professor Bertram Willcox at Cornell Law School, but my first year paper on *Oliphant v. Brotherhood of Locomotive Firemen & Enginemen*, 262 F.2d 359 (6th Cir. 1959), in Legal Research brought me to Professor Hanslowe's attention. He recommended me to the United Automobile Workers in Detroit in 1960, where I was employed as a law clerk that summer, and subsequently as Assistant General Counsel in 1961–1962.

7. This took place in the form of being a consultant to the EEOC on seniority issues under collective bargaining agreements, and drafting a report dealing with this subject while acting as a Conciliator in Title VII cases in 1966–1967, two of the first three years of Title VII and the EEOC.

resembles unfair labor practices in the NLRA. Second, both statutes create an expert administrative agency—the National Labor Relations Board (NLRB) and the Equal Employment Opportunity Commission (EEOC)—though, as noted below, they possess different enforcement roles. Third, the litigation that has emerged about how discrimination is proved under the NLRA⁸ and Title VII⁹ contain analytical similarities. Finally, both statutes contain provisions relating to remedies that, as the Supreme Court has noted, are nearly identical.¹⁰

Like the National Labor Relations Act,¹¹ the Supreme Court has interpreted Title VII to permit a finding of discrimination without intent as a prerequisite, in the landmark *Griggs v. Duke Power* holding,¹² which provided a disparate impact model for antidiscrimination law. But some members of the Court in recent years have begun to express skepticism about this precedent.¹³ Whatever the numerous difficulties with Title VII today (below I allude to an inhospitable judiciary, particularly at the trial level, as well as regrettable Supreme Court interpretations of antidiscrimination law involving the compatibility of collective bargaining seniority contract provisions with Title VII, and other issues), its influence has been substantial and enduring. It was the first such national law of its kind in the industrialized world, its enactment predating legislative

8. See e.g., *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393 (1983); cf. *Frick Paper Co.*, 319 N.L.R.B. 9, 12 (1995) (Gould, Chairman, concurring).

9. For example, for the disparate treatment cases, see *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The disparate impact principle is contained in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and subsequently appeared in cases such as *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009); and *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013).

10. See *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 848–49 (2001).

11. See *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963); *Radio Officers v. NLRB*, 347 U.S. 17 (1954).

12. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). For its application to sex-discrimination prohibitions, see also *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

13. See *Ricci v. DeStefano*, 557 U.S. 557 (2009); *id.* at 594 (Scalia, J., concurring); *id.* at 596 (Alito, J., concurring).

initiatives in the United Kingdom,¹⁴ and the Continent of Europe,¹⁵ which looked at the American experience before they addressed some of the same issues. Its basic tenets have stretched out to newer legislation on age,¹⁶ disability,¹⁷ and sexual orientation¹⁸ discrimination, and have impacted the law governing sexual harassment¹⁹ and wrongful discharge.²⁰

Here I discuss: (1) the background of antidiscrimination law; (2) the debate about the best administrative and judicial processes to handle antidiscrimination complaints; (3) the dispute arising out of the relationship between seniority and the law; (4) the emergence of front pay as a remedy for future compensation losses suffered by the victims of discrimination; and (5) the substantial changes in attitude by plaintiffs and defendants toward jury trials. I conclude by celebrating the role of the law in reducing discrimination, and yet I express

14. Race Relations Act, 1965, c. 73 (U.K.); Race Relations Act, 1968, c. 71 (U.K.); cf. William B. Gould, *No Coloured Need Apply*, COMMONWEAL, Mar. 22, 1968, at 14.

15. See Katerina Linos, *Path Dependence in Discrimination Law: Employment Cases in the United States and the European Union*, 35 YALE J. INT'L L. 115 (2010).

16. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.* (1967); see George Rutherglen, *From Race to Age: The Expanding Scope of Employment Discrimination Law*, 24 J. LEGAL STUD. 491 (1995). Recent research has helped contradict the notion that older individuals remaining in the workforce limits job opportunities for younger workers, and instead suggests that the opposite may be true. See Alicia H. Munnell & April Yanyuan Wu, Issue in brief, *Are Aging Baby Boomers Squeezing Young Workers Out of Jobs?*, CTR. FOR RET. RES. OF BOS. COLL., No. 12-18, Oct. 2012.

17. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.* (1990).

18. See Jeremy W. Peters, *Bill Advances to Outlaw Discrimination Against Gays*, N.Y. TIMES, Nov. 5, 2013, at A10 (discussing proposed federal legislation, the Employment Non-Discrimination Act). On the state-level, twenty-one states and the District of Columbia have adopted laws prohibiting discrimination in the workplace on the basis of sexual orientation. See WILLIAM B. GOULD IV, A PRIMER ON AMERICAN LABOR LAW 390 (5th ed. 2013).

19. Of course, Title VII has subsumed the law against sexual harassment. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986); see also *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993). The Anita Hill-Clarence Thomas hearings in 1991 highlighted the lack of effective remedies for sexual harassment, which Congress subsequently created in the form of compensatory and punitive damages as part of the Civil Rights Act of 1991. See GOULD, *supra* note 18, at 393; William B. Gould IV, Letter to the Editor, N.Y. TIMES, Oct. 10, 1991, at 14.

20. *E.g.*, *Phillips v. St. Mary Reg'l Med. Ctr.*, 116 Cal. Rptr. 2d 770, 781 (Ct. App. 2002) (relying on Title VII as source of public policy for wrongful discharge claim); cf. *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (noting that Title VII does not preempt or supplant state law causes of action).

caution and concern about the persistence of racist attitudes expressed sometimes by political leaders and those closely affiliated with them.

I. THE HISTORICAL OVERVIEW OF EQUAL EMPLOYMENT OPPORTUNITY

The struggle for equal employment opportunity in the past century has its roots in A. Philip Randolph and his Brotherhood of Sleeping Car Porters.²¹ As the trade union movement continued to grow after both the National Labor Relations Act and the Great Depression,²² Randolph and the Brotherhood cried out about black workers being left behind and began the March on Washington Movement.²³ As the clouds of World War II were on the horizon, requiring both labor unity and universal commitment to the war effort, President Franklin D. Roosevelt is purported to have told Mr. Randolph that Randolph needed to “make him” act.²⁴ When Randolph did so through a threatened march on Washington, D.C., in 1941, FDR fashioned Executive Order 8802 prohibiting racial discrimination by those who contracted with the federal government.²⁵ Twenty years later, the Order’s substantive reach was expanded by virtue of President John F. Kennedy’s Executive Order 10925, issued on March 6, 1961.²⁶ Kennedy’s Executive Order extended the obligations of contractors and subcontractors beyond a mere non-discrimination requirement so as to fashion an obligation to undertake “affirmative action” to recruit and promote

21. See generally JERVIS ANDERSON, A. PHILIP RANDOLPH; A BIOGRAPHICAL PORTRAIT (1st ed. 1973).

22. See generally IRVING BERNSTEIN, THE TURBULENT YEARS; A HISTORY OF THE AMERICAN WORKER, 1933–1941 (1970).

23. See WILLIAM B. GOULD, BLACK WORKERS IN WHITE UNIONS: JOB DISCRIMINATION IN THE UNITED STATES 33 (1977). See generally HERBERT R. NORTHRUP, ORGANIZED LABOR AND THE NEGRO (1944). Long a vocal critic of the labor movement on race-related issues, in later years Randolph adopted a more conciliatory stance. See GOULD, *supra*, at 285; see also W.B. Gould, *Race and the Unions: The Negro and Organized Labor by Ray Marshall*, NEW LEADER, July 5, 1965, at 20–21; William B. Gould, *Discrimination and the Unions*, 14 DISSENT 564 (1967); William B. Gould, *Discrimination and the Unions*, in POVERTY: VIEWS FROM THE LEFT (Jeremy Larner & Irving Howe eds., 1968).

24. See 155 CONG. REC. H14,894-95 (daily ed. Dec. 15, 2009) (statement of Rep. John Conyers).

25. Exec. Order No. 8802, 3 C.F.R. 957 (1938–1943).

26. Exec. Order No. 10925, 3 C.F.R. 443 (1959–1963).

minority group workers—a duty which now arises independent of any finding of discrimination.²⁷ Once the Johnson administration took office,²⁸ the Department of Labor was given responsibility for the Order though its Office of Contract Compliance—but it was not until 1971, under Richard Nixon,²⁹ that the federal government began to enforce these Orders by disbaring or cancelling the contract of an employer who failed to adequately recruit minority group workers.³⁰

But this was not the only backdrop to Title VII prior to its enactment. As early as 1945, Northern states began to enact state fair-employment practice legislation, which later emerged as a contentious issue during the debates on Title VII.³¹ Perhaps even more important was the development of litigation that established an implied duty of fair representation, first under the Railway Labor Act of 1926 and subsequently through the National Labor Relations Act (NLRA) of 1935.³² In the lead case, *Steele v. Louisville & Nashville Railroad*,³³ white unions had attempted to remove

27. *Id.*

28. The Johnson administration's policy relating to inequality was broader than Title VII, consisting of a "war on poverty." See Annie Lowrey, *50 Years Later, War on Poverty is a Mixed Bag*, N.Y. TIMES, Jan. 5, 2014, at 1. See generally ROBERT CARO, *THE YEARS OF LYNDON JOHNSON: THE PASSAGE OF POWER* (2012).

29. This coincided with the Nixon administration's aggressive stance against construction unions in the Philadelphia Plan and its progeny. See GOULD, *supra* note 23, at 101–02; see also William Gould, *Moving the Hard-Hats In*, NATION, Jan. 8, 1973, at 41; William B. Gould, *Blacks and the General Lockout*, N.Y. TIMES, July 17, 1971, at 23.

30. Much of the preceding paragraph is taken from GOULD, *supra* note 23, at 33.

31. See generally PAUL H. NORGREN & SAMUEL E. HILL, *TOWARD FAIR EMPLOYMENT* (1964); Paul H. Norgren, *Government Contracts and Fair Employment Practices*, 29 L. & CONTEMP. PROBS. 225 (1964). Twenty-two states enacted fair-employment practices laws prior to 1964: New York and New Jersey (1945); Massachusetts (1946); Connecticut (1947); New Mexico, Oregon, Rhode Island, and Washington (1949); Alaska (1953); Michigan, Minnesota, and Pennsylvania (1955); Colorado and Wisconsin (1957); California and Ohio (1959); Delaware (1960); Illinois, Kansas, and Missouri (1961); Hawaii and Indiana (1963). In addition, employment discrimination was made a misdemeanor in Idaho (1961), Iowa (1963), and Vermont (1963). William M. Landes, *The Effect of State Fair Employment Laws on the Economic Position of Nonwhites*, 57 AM. ECON. REV. 578, 578 n.1 (1967).

32. *Syres v. Oil Workers Int'l Union, Local No. 23*, 223 F.2d 739 (5th Cir. 1955), rev'd, 350 U.S. 943 (1955).

33. 323 U.S. 192 (1944).

black workers from the railways, particularly as the advent of the diesel engine converted the black fireman's job away from something that was dirty and unpleasant into featherbedded work that was easy if not nonexistent. In *Steele*, the Court held that unions operating as exclusive bargaining agents for all employees in an appropriate unit must represent them fairly, without hostility or discrimination.³⁴ The Court, albeit utilizing constitutional analysis that has since been abandoned,³⁵ assumed that if Congress could be deemed to have bestowed broad bargaining authority upon unions which engaged in hostile action toward blacks, they would have, in effect, sanctioned the practice of racial discrimination, thus producing grave constitutional questions.³⁶ The Court, however, found an implied statutory duty of fair representation and thus avoided the constitutional issues.³⁷

Steele emphasized that a strike was the minority's only recourse when an exclusive representative of the majority ignored minority interests, and that resort to such self-help contravened the statutory objective of achieving industrial peace.³⁸ There were limitations in *Steele*, not the least of

34. *See id.* at 204.

35. *Id.* at 198–99 (“[If] the Act confers this power on the bargaining representative of a craft or class of employees without any commensurate statutory duty toward its members, constitutional questions arise. . . . But we think that Congress, in enacting the Railway Labor Act and authorizing a labor union . . . to represent the craft, did not intend to confer plenary power upon the union to sacrifice . . . rights of the minority in the craft, without imposing on it any duty to protect the minority.”); *cf.* *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972). In this period, the Court also began to retreat from federal constitutional protection. *Compare* *Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), *with* *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972). *See also* *Marsh v. Alabama*, 326 U.S. 501 (1946); *cf.* *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980); *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); *Fashion Valley Mall LLC v. NLRB*, 172 P.3d 742 (Cal. 2007); *Ralph's Grocery Co. v. United Food & Commercial Workers Union Local 8*, 290 P.3d 1116 (Cal. 2012).

36. Justice Murphy accepted this view in his concurrence. *Steele*, 323 U.S. at 209 (Murphy, J., concurring) (“[T]his constitutional issue cannot be lightly dismissed. The cloak of racism surrounding the actions of the Brotherhood in refusing membership to Negroes and in entering into and enforcing agreements discriminating against them, all under the guise of Congressional authority, still remains. No statutory interpretation can erase this ugly example of economic cruelty against colored citizens of the United States.”).

37. *Id.* at 202–03.

38. *Id.* at 200 (“[Industrial peace] would hardly be attained if a substantial minority of the craft were denied the right to have their interests considered at

which was the Court's dicta that unions could exclude anyone from membership,³⁹ a conclusion confirmed subsequently by appellate authority at the federal level.⁴⁰ Though the National Labor Relations Board administratively remedied this in some respects on the very day that Title VII was enacted in 1964,⁴¹ *Steele* and its progeny⁴² required expensive and sometimes torturous litigation in courts of general jurisdiction, rather than an expedited administrative process. Although the Supreme Court was to subsequently hold that the Civil Rights Act of 1866 had prohibited racial discrimination in employment,⁴³ that issue was only to emerge as a significant matter much later.⁴⁴

Thus, to recapitulate, though Title VII broke new ground, it had genuine antecedents. The first of them was the executive orders beginning in 1941. Second came the *Steele* decision, establishing a duty of fair representation for unions acting as exclusive bargaining representatives and, in so doing, highlighting the gaps that could be plugged in only

the conference table and if the final result of the bargaining process were to be the sacrifice of the interests of the minority by the action of a representative chosen by the majority. The only recourse of the minority would be to strike, with the attendant interruption of commerce, which the Act seeks to avoid.”)

39. *Id.* at 204 (“While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith.”).

40. *Oliphant v. Bhd. of Locomotive Firemen & Enginemen*, 262 F.2d 359, 363 (6th Cir. 1959), *cert. denied*, 359 U.S. 935 (1959). *But see Betts v. Easley*, 169 P.2d 831 (Kan. 1946); *James v. Marinship Corp.* 155 P.2d 329 (Cal. 1944).

41. *Hughes Tool Co.*, 147 N.L.R.B. 1573 (1964). This analysis was derived from *Miranda Fuel Co., Inc.*, 140 N.L.R.B. 181 (1962). *See also* *Miranda Fuel Co., Inc.*, 125 N.L.R.B. 454 (1959), *enforced*, *NLRB v. Miranda Fuel Co.*, 284 F.2d 861 (2d Cir. 1960); *Local 12, United Rubber, Cork, Linoleum & Plastic Workers of America v. NLRB*, 368 F.2d 12 (5th Cir. 1966); *Richardson v. Texas & New Orleans R.R. Co.*, 242 F.2d 230 (5th Cir. 1957); *Cent. of Georgia Ry. v. Jones*, 229 F.2d 648 (5th Cir. 1956). *See generally* William B. Gould IV, *Labor Law and the Negro*, *NEW LEADER*, Oct. 12, 1964, at 10. The Board had taken the position since 1945 that unions which discriminate on the basis of race could not use the National Labor Relations Act's representation procedures, but refused to equate segregation with discrimination *per se*. *See Larus & Bro. Co.*, 62 N.L.R.B. 1075 (1945).

42. *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *Syres v. Oil Workers Local 23*, 350 U.S. 892 (1955); *Conley v. Gibson*, 355 U.S. 41 (1957).

43. *See Johnson v. Ry. Express Agency*, 421 U.S. 454 (1975); *see also Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

44. *E.g.*, *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987); *see also Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

through legislation. Third came legislation itself in the form of state fair-employment practices statutes just as World War II came to an end.

II. TITLE VII AND THE DEBATE SURROUNDING ITS PASSAGE

Although proposals for fair employment legislation had been made as early as 1948 under President Harry S. Truman, it would take more than a decade before the political climate demanded action. The early 1960s was a dangerous collision course of civil rights demonstrations, hoses, police dogs, and “Bull” Connor’s insistence that the South truly meant it when it said “Never” to integration of the races. As sit-ins and “freedom rider” demonstrations unfolded in the early 1960s,⁴⁵ by the summer of 1963 policymakers began to engage in a serious discussion about civil rights legislation relating to employment. It was June 1963 when President Kennedy proposed legislation in the wake of the demonstrations in Mississippi, Alabama, and Georgia, and said: “Who among us would be content to have the color of his skin changed, and stand in his place? Who among us would then be content with the counsels of patience and delay?”⁴⁶

Both prior and subsequent to the debate about detailed civil rights legislation, the 1960s also saw many workers’ strikes and slowdowns unauthorized by unions, known as wildcat work stoppages, with a variety of civil rights demands.⁴⁷ Demonstrations taking place in major cities such as San Francisco,⁴⁸ Seattle,⁴⁹ Detroit,⁵⁰ Chicago,⁵¹ and

45. See ANTHONY LEWIS, *PORTRAIT OF A DECADE: THE SECOND AMERICAN REVOLUTION* (1964); William B. Gould IV, *Review: Portrait of a Decade by Anthony Lewis*, *COMMONWEAL*, Mar. 12, 1965, at 767. See generally TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS 1954–63* (1989); TAYLOR BRANCH, *PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963–65* (1999); TAYLOR BRANCH, *AT CANAAN’S EDGE: AMERICA IN THE KING YEARS 1965–68* (2007).

46. LEWIS, *supra* note 45, at 193; see also GOULD, *supra* note 23, at 15. Much of the preceding paragraph and subsequent paragraphs is taken from the same.

47. See William B. Gould IV, *Black Power in the Unions: The Impact Upon Collective Bargaining Relationships*, 79 *YALE L.J.* 46 (1969); cf. *NLRB v. Tanner Motor Livery, Ltd.*, 349 F.2d 1 (9th Cir. 1965); *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50 (1975).

48. E.g., Carl Nolte, *Sit-In at Hotel Sparked City’s Civil Rights Era*, *S.F. CHRON.*, Mar. 1, 2014, at A1; *Hotel Emp’rs Ass’n*, 47 *Lab. Arb.* 873 (1966); cf. *Emporium Capwell*, 420 U.S. 50.

49. William B. Gould, *The Seattle Building Trades Order: The First*

Pittsburgh,⁵² sometimes led to agreements and controversies in arbitration about them.⁵³

But notwithstanding President Eisenhower's previously expressed reservations about the suitability of law to address race-relations disputes,⁵⁴ the consensus amongst those who sought change was that law was critical in breaking down racial inequality and necessary to promote fairness. As the demand for legislation grew, one of the first areas of debate involved the structure through which rights could be adjudicated and remedies enforced. Civil rights proponents assumed the model of the National Labor Relations Act and the National Labor Relations Board was the ideal.⁵⁵ When

Comprehensive Relief Against Employment Discrimination in the Construction Industry, 26 STAN. L. REV. 773 (1974).

50. See GOULD, *supra* note 23, at 180, 274, 388–93 (discussing the Dodge Revolutionary Union Movement in Detroit).

51. GOULD, *supra* note 23, at 303–09.

52. *Id.* at 309.

53. See *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974); *14 Penn Plaza v. Pyett*, 556 U.S. 247 (2009); William B. Gould IV, *Labor Arbitration of Grievances Involving Racial Discrimination*, 118 U. PA. L. REV. 40 (1969); William B. Gould IV, *A Half Century of the Steelworkers Trilogy: Fifty Years of Ironies Squared*, in ARBITRATION 2010: THE STEELWORKERS TRILOGY AT 50: PROCEEDINGS OF THE SIXTY-THIRD ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS (Paul D. Staudohar & Mark I. Lurie eds., 2011); David Gregory & Edward McNamara, *Mandatory Labor Arbitration of Statutory Claims, and the Future of Fair Employment: 14 Penn Plaza v. Pyett*, 19 CORNELL J.L. & PUB. POL'Y 429 (2010). Some special arbitration procedures reflecting Title VII standards were placed in collective bargaining agreements. See, e.g., *Basic Vegetable Prods., Inc.*, 64 Lab. Arb. Rep. (BNA) 60 (1975) (Gould, Arb.); *Weyerhaeuser Co.*, 78 Lab. Arb. Rep. (BNA) 1109 (1982) (Gould, Arb.).

54. At a 1957 press conference, commenting on Governor Orval Faubus's use of the Arkansas National Guard to prevent black students from integrating Little Rock's Central High School, President Eisenhower criticized "these people who believe you are going to reform the human heart by law," and spoke of "strong emotions" on the other side, and of "people that see a picture of the mongrelization of the race. . . . We are going to whip this thing in the long run by Americans being true to themselves, and not merely by law." Robert Shogan, *Book Mark: Is Eisenhower to Blame for Civil Rights Explosion?*, L.A. TIMES (Mar. 25, 1991), http://articles.latimes.com/1991-03-24/opinion/op-1214_1_eisenhower-civil-rights; see also President Dwight D. Eisenhower, News Conference (Oct. 30, 1957), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=10943> ("We just simply cannot solve [the problem] completely just by fiat or law and force. This is a deeper human problem than that."); President Dwight D. Eisenhower, News Conference (Sept. 3, 1957), available at <http://www.presidency.ucsb.edu/ws/?pid=10877> ("[T]ime and again . . . [I] have argued that you cannot change people's hearts merely by laws."); see *supra* note 5.

55. See David Freeman Engstrom, *The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights:*

President Truman initially advocated for fair employment practices legislation—proposals propounded as a plank in the 1948 Democratic Party platform but never able to overcome filibusters in 1949—the proposals provided cease-and-desist authority to a newly created administrative agency.⁵⁶ Under such an approach, hearings conducted before administrative law judges, appealable to both the agency itself as well as the courts, would nonetheless produce compliance in many cases before the process was exhausted. Thus, a path toward redress presided over by an expert agency would be relatively expeditious, and informal and economical as well. Because this was viewed to be superior to time-consuming and relatively expensive litigation in unsympathetic and inexperienced courts of general jurisdiction, liberal supporters of civil rights legislation rallied in support of this approach.⁵⁷

The underlying assumption was that these administrative procedures, while ultimately providing for and relying upon enforcement by the courts when a responding party resisted the agency's cease-and-desist order,⁵⁸ would be self-enforcing in many instances, and would provide relatively easy access for parties that found the judicial process time-consuming and expensive (laypeople can represent themselves as well as parties before the Board⁵⁹). Under the National Labor Relations Act itself, parties that file unfair labor practices charges have free counsel with the Board's General Counsel bearing the expense of prosecution throughout the administrative process,⁶⁰ a feature hardly insignificant for both impecunious and average income workers. On the other hand, civil rights proponents were always concerned with another feature of the NLRA administrative process, i.e., under the Act, the General Counsel has near-plenary authority to screen out what are deemed to be non-meritorious charges by refusing to issue a

1943–1972, 63 STAN. L. REV. 1071, 1081–84 (2011).

56. *E.g.*, *The Text of President Truman's Message on Civil Rights*, N.Y. TIMES, Feb. 3, 1948, at 22 (advocating for the creation of a permanent Fair Employment Practice Commission with substantive authority to prevent employment discrimination).

57. *Cf.* Engstrom, *supra* note 55, at 1085–86.

58. *See* 29 U.S.C. § 160(e), (f) (2006).

59. *See* NLRB, RULES AND REGULATIONS—PART 102 § 102.38, at 16, available at <http://www.nlr.gov/reports-guidance/rules-regulations>.

60. *Cf.* *United Auto. Workers Local 283 v. NLRB*, 382 U.S. 205 (1965).

complaint.⁶¹ This framework posed, then and now, potential harm to blacks, minorities, and women who had been excluded from decision-making for so long.

Although adopted by a House Judiciary Subcommittee, the NLRA cease-and-desist authority was not included within the legislative package that emerged from the House Judiciary Committee. Instead, the Committee gave the new Equal Employment Opportunity Commission authority to bring suits in federal court challenging employment discrimination.⁶² This provision passed the House but stalled in the Senate as a result of the Republican-Southern Democrat filibuster threat, which had provided for the burial of fair employment practice legislation ever since the 1948 campaign. Out of this impasse came negotiations between Senator Hubert Humphrey and the conservatives, and the Dirksen-Mansfield amendments to the statute, which had the effect of lifting the filibuster threat in the spring of 1964.⁶³

The Dirksen-Mansfield amendments to Title VII were a compromise that preserved the state role of enforcement by requiring a complaining party to take a charge to the state agency before proceeding to the EEOC itself.⁶⁴ The amendments contradicted the NLRA policy, which ousted state jurisdiction wherever the NLRA could apply.⁶⁵ Thus, tensions with state labor relations boards have been historically minimized by virtue of the doctrine of preemption, through which their authority is constitutionally sidelined.⁶⁶ On the other hand, state fair employment practices commissions had existed for some period of time and were thought, by emphasizing conciliation, to facilitate “soft settlements” that did little to remedy discrimination because of the fact that settlements were frequently negotiated

61. *E.g.*, *NLRB v. Food & Commercial Workers Local 23*, 484 U.S. 112 (1987); *United Elec. Contractors Ass’n v. Ordman*, 366 F.2d 776 (2d Cir. 1966).

62. This information can be found in GOULD, *supra* note 23, at 39.

63. *See* TODD S. PURDUM, *AN IDEA WHOSE TIME HAS COME: TWO PRESIDENTS, TWO PARTIES, AND THE BATTLE FOR THE CIVIL RIGHTS ACT OF 1964* (2014).

64. *Love v. Pullman Co.*, 404 U.S. 522 (1972).

65. *Guss v. Utah Labor Relations Bd.*, 353 U.S. 1 (1957).

66. *See, e.g.*, *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). *Cf. Colo. Anti-Discrimination Comm’n v. Cont’l Air Lines, Inc.*, 372 U.S. 714 (1963) (finding that state anti-discrimination law was not preempted by federal law).

without a full investigation and factual support.⁶⁷

Although the Dirksen-Manfield amendments were essential in the passage of Title VII, in the process the role of the EEOC was altered so as to provide it with little-to-no independent enforcement capability. The authority of the new five-member Commission was to investigate, find reasonable cause or no reasonable cause to believe that discrimination was taking place, and attempt to conciliate. The Commission had no authority to alter behavior in any other way, and could not issue orders or, as the House had initially provided, proceed to court. Thus, the Commission was, in Professor Michael Sovern's words, "a poor, enfeebled thing."⁶⁸ The second Chairman of the Commission (FDR Jr. was the first), Stephen Schulman, colorfully described the EEOC's enforcement role in 1967: "We're out to kill an elephant with a fly gun."⁶⁹

The EEOC, however, was not entirely toothless. The process of issuing reasonable cause findings carried with it a role comparable to that of the NLRB in connection with the writing of decisions and formulation of legal rationale, and thus ultimately led to formulating key positions in such issues as seniority, testing, sex discrimination, maternity leave, and state protective laws.⁷⁰ In the early days of the statute, particularly in 1965-1966, the EEOC's decisions and guidelines established much of the framework for federal court decisions that flowed from litigation. Moreover, the Commission played an important role in dramatizing discrimination by holding public hearings, a practice engaged in by both Chairman Clifford Alexander and, particularly, Chairman William H. Brown III. This brought them criticism from Senators McClellan and Dirksen for putting undue pressure on business and labor.⁷¹

As a result of the EEOC's limited enforcement authority, and although the 1964 legislation did give the Attorney

67. See GOULD, *supra* note 23, at 39. The New York fair-employment commission in particular played a noteworthy role. *Id.*

68. MICHAEL I. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 205 (1966); see also GOULD, *supra* note 23, at 39.

69. James P. Gannon, *Uphill Bias Fight: After Faltering Start, Agency Readies Attack on Job Discrimination*, WALL ST. J., Apr. 12, 1967, at 1.

70. GOULD, *supra* note 23, at 40.

71. Much of the preceding paragraph is taken from GOULD, *supra* note 23, at 40.

General authority to institute suits where there was a “pattern or practice” of discrimination,⁷² the majority of the burden of enforcement fell in the hands of individuals authorized by the legislation to sue as private-party plaintiffs. This became a most important avenue for civil rights enforcement, as the Supreme Court deemed a plaintiff not to be acting “for himself alone” but rather as a “private attorney general” who puts on “the mantle of the sovereign” in the public interest.⁷³ This led the courts to take the view that discrimination claims, though initiated by an employee for whom “past due wages may be tiny,” could warrant a “full scale inquiry” into employment practices that would otherwise go unremedied because of a divide-and-conquer or “resist-and-withdraw” technique.⁷⁴ Class actions filed under Rule 23 of the Federal Rules of Civil Procedure were utilized considerably,⁷⁵ although ultimately circumscribed in this century.⁷⁶

III. 1972 AMENDMENTS TO TITLE VII: A SECOND LOOK AT EEOC ENFORCEMENT

When Congress had the second crack at employment discrimination law in 1972 through new amendments to Title VII, a debate quite different from that of 1964 emerged. The Nixon administration then favored EEOC court actions rather than cease-and-desist authority of the type that the NLRB possessed. Liberals favored the latter, and the debate assumed a liberal-versus-conservative divide. But at this point, and in the years to come, the question of which of the two alternatives would be more effective by no means provided a clear-cut answer.⁷⁷

72. 42 U.S.C. § 2000e-6(a) (2012).

73. See *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968) (Title II); *Jenkins v. United Gas Co.*, 400 F.2d 28, 32 (5th Cir. 1968) (Title VII); GOULD, *supra* note 23, at 53 & n.2.

74. *Jenkins*, 400 F.2d at 33.

75. *E.g.*, *Huff v. N.D. Cass Co. of Alabama*, 485 F.2d 710 (5th Cir. 1973).

76. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). *But see* Dustin Massie, *Too Soon for Employers to Celebrate? How Plaintiffs Are Prevailing Post-Dukes*, 29 A.B.A. J. LAB. & EMP. L. 117 (2013).

77. See, *e.g.*, Editorial, N.Y. TIMES, Jan. 25, 1972, at M-32 (“Superficially, the cease-and-desist route holds out the promise of swifter action and more uniform administration of the law, but experience with N.L.R.B. hearing examiners suggests that they do not dispose of cases more rapidly than Federal district judges. As for the uniformity of interpretation, the harder issues will

One argument, relied upon by the EEOC court-enforcement proponents, is that a principal consideration in creating the NLRB and its special expertise was the lack of understanding and hostility of federal courts of general jurisdiction. This level of judicial hostility simply did not apply to Title VII case in the early stages of the statute, particularly in the 1960s and early-to-mid-1970s. Today, if one examines the posture of the Supreme Court in antidiscrimination cases,⁷⁸ the pendulum seems to have swung back the other way.⁷⁹ This, along with similar hostility on the part of the judiciary,⁸⁰ undercuts some of the

only be settled by appeal to the Supreme Court whether they originate in E.E.O.C. orders or in district court law suits.”); see GOULD, *supra* note 23, at 41.

78. *E.g.*, *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013). The Court’s holding in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), though a voting case not involving employment, vividly illustrates how far the Court has retreated from the tenor of both the *Brown* and *Griggs* holdings. See generally William B. Gould IV, *The Supreme Court, Job Discrimination, Affirmative Action, Globalization, and Class Actions: Justice Ginsburg’s Term*, 36 U. HAW. L. REV. (forthcoming May 2014). Even prior to recent developments, the Court’s hostility to Title VII and employment discrimination law manifested itself in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); and *Martin v. Wilks*, 490 U.S. 755 (1989). These decisions induced Congress to overrule the Court in the Civil Rights Act of 1991 amendments. See, e.g., William B. Gould IV, *The Law and Politics of Race: The Civil Rights Act of 1991*, 44 LAB. L.J. 323 (1993); Kingsley R. Browne, *The Civil Rights Act of 1991: A “Quota Bill,” a Codification of Griggs, a Partial Return to Wards Cove, or All of the Above?*, 43 CASE W. RES. L. REV. 287 (1993); Robert Belton, *The Unfinished Agenda of the Civil Rights Act of 1991*, 45 RUTGERS L. REV. 921 (1993); Ronald D. Rotunda, *The Civil Rights Act of 1991: A Brief Introductory Analysis of the Congressional Response to Judicial Interpretation*, 68 NOTRE DAME L. REV. 923 (1993); Daniel F. Piar, *The Uncertain Future of Title VII Class Actions After the Civil Rights Act of 1991*, 2001 BYU. L. REV. 305 (2001).

79. See generally Sandra F. Sperino & Suja A. Thomas, *Fakers and Floodgates*, 10 STAN. J. C.R. & C.L. (forthcoming 2014); Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139 (2007); Suja A. Thomas, *Judicial Modesty and the Jury*, 76 U. COLO. L. REV. 767 (2005); Suja A. Thomas, *Re-Examining the Constitutionality of Remittitur Under the Seventh Amendment*, 64 OHIO ST. L.J. 731 (2003); see also Amanda Farahany & Tanya McAdams, *Analysis of Employment Discrimination Claims for Cases* (Sept. 16, 2013), available at <http://ssrn.com/abstract=2326697>, in which an Order was Issued on Defendant’s Motion for Summary Judgment in 2011 and 2012 in the U.S. District Court for the Northern District of Georgia.

80. See Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL’Y REV. 103, 104–05 (2008) (“[C]ases proceed and terminate less favorably for plaintiffs than other kinds of cases. Plaintiffs who appeal their losses or face appeal of their victories again fare remarkably poorly in the circuit courts. The

EEOC court-enforcement arguments.

Yet problems abound with the NLRB cease-and-desist approach. In the first place, though not very apparent at the time of the 1972 amendments debate, the problem of administrative inefficiency and delay is a feature that has made remedies a major element of the labor law reform debate, as well as proposals to streamline the administrative process.⁸¹ Second, beyond the problems with the NLRB itself, however, its relative speediness was put forward as an argument favoring the administrative process. This, of course, was all before the advent of jury trials, which have begun to dominate Title VII proceedings—a phenomenon which makes the judicial process longer.⁸²

Third, the NLRB primary jurisdiction and preemption approaches seem ill suited to antidiscrimination law, where individuals would be precluded from having their day in court by virtue of the Board's unwillingness to move forward and issue a complaint through the Regional Director or General Counsel. Closely tied to this problem is the sharp swings in the NLRB's willingness to enforce the law,⁸³ with appointments of temporary duration,⁸⁴ the most recent example illustration being that of the Bush Board in the early

fear of judicial bias at both the lower and the appellate court levels may be discouraging potential employment discrimination plaintiffs from seeking relief in the federal courts.”); *id.* at 119 (“[E]mployment discrimination plaintiffs or, more realistically, their lawyers are becoming discouraged with their chances in federal court.”); *id.* at 131–32 (“Today employment discrimination plaintiffs still must swim against a strong tide—in the federal district court and on appeal. . . . [D]efendants in the federal courts of appeals have managed over the years to reverse forty-one percent of their trial losses in employment discrimination cases, while plaintiffs manage only a nine percent reversal rate. The most startling change in the last few years’ data is the substantial drop of almost forty percent in the number of employment discrimination cases in the federal district courts.”).

81. *Administration of the Labor-Management Relations Act by the NLRB: Hearings Before the Subcomm. on National Labor Relations Board of the H. Comm. on Education and Labor*, 87th Cong. (1961) (Pucinski Committee report).

82. See discussion, *infra* Part VI.

83. See WILLIAM B. GOULD IV, *LABORED RELATIONS: LAW, POLITICS AND THE NLRB—A MEMOIR* (2000).

84. Clyde W. Summers, *Politics, Policy Making, and the NLRB*, 6 SYRACUSE L. REV. 93 (1954); W. Willard Wirtz, *New National Labor Relations Board: Herein of “Employer Persuasion,”* 49 NW. U. L. REV. 594 (1954); *cf.* William B. Gould IV, *Crippling the Right to Organize*, N.Y. TIMES, Dec. 17, 2011, at A25.

part of this century.⁸⁵ Will minority interests fare well in this model? Notwithstanding labor's precipitous decline in recent decades,⁸⁶ for better or worse, both labor and management are able to influence the policy administration of labor law depending on which party is in power.⁸⁷ This is not as likely to be true where civil rights organizations, like the NAACP, the Mexican American Legal Defense and Education Fund (MALDEF), or the National Organization for Women (NOW), are the parties affected. They may not have the same institutional presence or staying power as labor and management under the NLRA.

Finally, one of the problems with NLRB remedies is the fact that its contempt procedures are so ill suited to the statutory framework, given the fact that enforcement of the Board's orders is generally obtained in the circuit courts of appeals and that the appellate process is not accustomed to dealing with contempt problems.⁸⁸ A major virtue of the EEOC enforcement avenue is to be found in the fact that courts of general jurisdiction (which preside over both EEOC and private-party actions) are particularly concerned with the integrity of and compliance with their own entered orders. Obviously, the appellate courts, taking appeals from the administrative law judges and NLRB decisions, do not have the same institutional vested interest and stake in seeing the

85. See GOULD, *supra* note 18, at ix–x, 246–47 (discussing the Bush Board's so-called "September Massacre of 2007"). This problem culminated in *New Process Steel, L.P. v. NLRB*, 560 U.S., 674 (2010), where a quorum was found to be lacking, and in the new constitutional recess appointment issue, see *NLRB v. Noel Canning*, 705 F.3d 490 (2013), *cert. granted*, 133 S. Ct. 2861 (2013).

86. See generally SOLOMON BARKIN, *THE DECLINE OF THE LABOR MOVEMENT: AND WHAT CAN BE DONE ABOUT IT* (1961); A.H. Raskin, *The Big Squeeze on Labor Unions*, ATLANTIC MONTHLY, Oct. 1979, at 41; A.H. Raskin, *The Squeeze on the Unions*, ATLANTIC MONTHLY, June 1961, at 55; PAUL JACOBS, *THE STATE OF THE UNIONS* (1963); WILLIAM B. GOULD IV, *AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW* (1993). This has now begun to affect the public sector. See Joseph E. Slater, *Public-Sector Labor in the Age of Obama*, 87 IND. L.J. 189 (2012); Kenneth Glenn Dau-Schmidt & Winston Lin, *The Great Recession, the Resulting Budget Shortfalls, the 2010 Elections and the Attack on Public Sector Collective Bargaining in the United States*, 29 HOFSTRA LAB. & EMP. L.J. 407 (2012); Steven Greenhouse, *Wisconsin's Legacy for Unions*, N.Y. TIMES, Feb. 23, 2014, at 1, 4.

87. See William B. Gould IV, *Independent Adjudication, Political Process, and the State of Labor-Management Relations: The Role of the National Labor Relations Board*, 82 IND. L.J. 461 (2007).

88. See Florian Bartosic & Ian D. Lanoff, *Escalating the Struggle Against Taft-Hartley Contemnors*, 39 U. CHI. L. REV. 255 (1972).

2014]

TITLE VII AT FIFTY

387

order enforced. Contempt sanctions aimed at recidivists will not be as effective at the appellate level.

IV. COMPATIBILITY OF COLLECTIVE BARGAINING SENIORITY PROVISIONS WITH TITLE VII

A second debate in the early days of Title VII arose from disputes about seniority provisions adopted by unions and employers in negotiated collective bargaining agreements. Although provisions in collective bargaining agreements were far more important in the 1960s than now in 2014 given the dramatic decline in the trade union movement,⁸⁹ and although resolved in some major respects, these disputes continue to have a bearing upon much of the contemporary litigation, and involved substantive law rather than the procedural framework discussed above.

At least three important issues were involved in litigation about the relationship between seniority provisions and discrimination under Title VII. The first was the recognition of the disparate impact approach by the Supreme Court in its seminal decision *Griggs v. Duke Power*.⁹⁰ In interpreting Title VII, the Court's disparate impact approach recognized that intentional discrimination was not a prerequisite to show a violation and establish consequent liability.⁹¹ Specific intent to discriminate was generally absent in the seniority cases—the proof of this point was to be found in the fact that identical seniority systems could in one context create Title VII liability, but in another context create no liability where blacks or other discriminatees were not part of the relevant labor market. A seniority system might exist and be lawful in a remote part of North Dakota or Montana where no blacks were present, and yet the identical language could create liability in Alabama. The key in *Griggs* was disparate impact, i.e., did the seniority system retard or exclude blacks in the workplace just as effectively as the written examinations and educational requirements did in *Griggs*?

89. News Release, Bureau of Labor Statistics, Union Membership (Jan. 24, 2014), <http://www.bls.gov/news.release/union2.toc.htm>.

90. 401 U.S. 424 (1971).

91. *Cf. Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375 (1982) (holding that a showing of intentional discrimination was required to establish liability under the Civil Rights Act of 1866).

Second, unions had argued that any discriminatory practices flowing from seniority were attributable to employer discriminatory hiring policies. These practices made it impossible or more difficult for black workers to accumulate the necessary seniority credits to compete effectively for the better-paying jobs where departmental or job-classification seniority was established by the collective bargaining agreement. Thus, those workers pushed into the less-desirable jobs by discriminatory hiring and no-transfer policies could not use their seniority in bidding for the better ones because they had been unable to acquire the requisite and relevant seniority credits during the years of hiring and transfer discrimination.

Third, the relationship between past discrimination prior to the effective date of the statute, July 2, 1965, and prospective practices was in play as well. As Judge John Wisdom of the Court of Appeals for the Fifth Circuit stated: “[O]ne of the most perplexing issues troubling the courts under Title VII [was] how to reconcile equal employment opportunity *today* with seniority expectations based on *yesterday’s* built-in racial discrimination.”⁹²

All three of these seniority issues were particularly contentious given the fact that Senator Lester Hill of Alabama (which by virtue of its steel plants in Birmingham was more unionized than most of the Deep South) campaigned against the proposed law in 1963-1964 by arguing that blacks would take away the seniority of whites under fair-employment legislation. The AFL-CIO, supporters of the legislation, sought to assure union members that the proposed legislation would not interfere with their seniority rights.⁹³ However, the definition of discrimination and unlawful conduct under Title VII was broad, and Senators Joseph Clark of Pennsylvania and Clifford Case of New Jersey attempted to address the tensions between seniority and discrimination while putting together a so-called Clark-Case memorandum in consultation with the Department of

92. *Local 189, United Papermakers v. United States*, 416 F.2d 980, 982 (5th Cir. 1969), *cert. denied*, 411 U.S. 939 (1973); GOULD, *supra* note 23, at 19 & n.10.

93. *See* AFL-CIO, CIVIL RIGHTS: FACT VS. FICTION (1964). Much of the information from this paragraph can be found in GOULD, *supra* note 23, at 68-70.

2014]

TITLE VII AT FIFTY

389

Justice. This position, put forward as a rebuttal to Senator Hill, stated, in part, that “last hired—first fired seniority” would not be affected by Title VII. Out of this debate emerged subsequently the so-called “bona fide seniority” proviso, which deemed seniority rules to be immune from Title VII unless they were “the result of an intention to discriminate.”⁹⁴

The Clark-Case memorandum appeared weeks before the seniority proviso emerged as part of the Dirksen-Mansfield amendments. But the ambiguity of the legislative history was made no more unambiguous by the proviso, i.e., the question of what was discriminatory or nondiscriminatory relating to departmental seniority systems and disputes between incumbent workers was not explicitly addressed.

The only issue that seemed to be resolved clearly was that Title VII could not be interpreted to permit unemployed black workers to oust incumbent white employees by virtue of a “fictional” seniority predicated upon the period of initial exclusion, i.e., the amount of time that they had been barred from the enterprise by hiring discrimination. The bona fide seniority proviso contained in section 703(h) was aimed at this problem—but no other, especially given the expansive prohibition against discrimination contained in the statute. Thus, seniority that would have been acquired but for discrimination in this context would not be recognized—it would be viewed as a fiction unless specific individuals evidenced their discriminatory exclusion from a firm on an individual basis.

The fact that the hiring color bar was removed did not permit an unemployed black worker to come off the streets seeking new employment opportunities by removing current white employees from positions that might have been obtained due to previously discriminatory practices. But this hypothetical was dramatically different from the problems that emerged in the early days of Title VII, i.e., disputes about the use of seniority when blacks attempted to move out

94. 42 U.S.C. § 2000e-2(h) (2012) (“[I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . .”).

of previously segregated jobs into which they had been hired (it was clear that hiring into such categories exclusively was now unlawful), and the use of seniority to obtain access to more-desirable jobs and to use such in progressing further up lines of progression inside better-paying departments or job classifications. Here, seniority, while not rooted in contract,⁹⁵ was less fictional for statutory purposes given the fact that blacks (and sometime Latinos or women) were identifiable⁹⁶ as victims of discrimination in that they had actually been hired into the jobs and been employed at the enterprise—and they had been barred from the better-paying jobs by prohibitions against transfers to them, which froze their consequent inability to accumulate relevant seniority for the good jobs under a system that did not recognize seniority acquired in the low-paying, less-desirable departments or job classifications.

Prior to Title VII, Judge Wisdom, speaking for the Court of Appeals for the Fifth Circuit in *Whitfield v. United Steelworkers*,⁹⁷ had said of a collective bargaining agreement denying seniority credits for black workers, which nonetheless opened up transfers to better paying jobs in the future:

The Union and the Company made a fresh start for the future. We might not agree with every provision, but they have a contract that from now on is free from any discrimination based on race. Angels could do no more.

It is undeniable that negroes in Line Number 2, ambitious to advance themselves to skilled jobs, are at a disadvantage compared with white incumbents in Line Number 1. This is a product of the past. We cannot turn back the clock. Unfair treatment to their detriment in the past gives the plaintiffs no claim now to be paid back by unfair treatment in their favor. We have to decide this

95. See William B. Gould IV, *Employment Security, Seniority and Race: The Role of Title VII of the Civil Rights Act of 1964*, 13 HOWARD L.J. 1 (1967); William B. Gould IV, *Seniority and the Black Workers—Reflections on Quarles and Its Implications*, 47 TEX. L. REV. 1039 (1969); George Cooper & Richard B. Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598 (1969).

96. See *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976).

97. 263 F.2d 546 (5th Cir. 1959), *cert. denied*, 360 U.S. 902 (1959).

case on the contract before and its fairness to all.⁹⁸

I advised the Equal Employment Opportunity Commission,⁹⁹ after acting as a Conciliator in seniority disputes in South Carolina and Alabama, that Title VII provided for prospective relief for advancing black workers previously locked into low-level segregated jobs and that *Whitfield* was bad law, at least under Title VII—a position accepted by every circuit court of appeals in the country, including opinions by Judge Wisdom himself!¹⁰⁰ Indeed, Congress itself approved these decisions in the committee reports leading to the 1972 amendments.¹⁰¹ But the Supreme Court, in *International Brotherhood of Teamsters v. United States*,¹⁰² was to the contrary, stating that Congress at this juncture could not affirm its understanding of what the previous body had done in 1964.¹⁰³ *International Brotherhood of Teamsters* involved low-paid local city freight drivers who were unable to catch up while bidding for long-distance, over-

98. *Id.* at 551. The contractual practices in *Whitfield* were challenged under the duty of fair representation initially established in *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192 (1944).

99. See generally Gould, *supra* note 95. My 1967 article was, in essence, the report that I had done for the Commission that same year.

100. Justice Marshall had it right in this respect in dissent: “Without a single dissent, six Courts of Appeals have so held in over 30 cases, and two other Courts of Appeals have indicated their agreement, also without dissent. In an unbroken line of cases, the Equal Employment Opportunity Commission has reached the same conclusion. And the overwhelming weight of scholarly opinion is in accord.” *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 378–80 (1977) (Marshall, J., dissenting) (citations omitted).

101. S. REP. NO. 92-415, at 5 & n.1 (1971); H.R. REP. NO. 92-238, at 8 & n.2 (1971); see *Teamsters*, 431 U.S. at 391–93 (Marshall, J. concurring in part and dissenting in part). But see Justice Marshall’s pronouncement on behalf of a unanimous Court the following year: “Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.” *Lorillard v. Pons*, 434 U.S. 575, 580 (1978); see also *id.* at 581 (“So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.”). Indeed, Congress strengthened the remedial provisions of Title VII when it was amended in 1972. See 42 U.S.C. § 2000e-5.

102. 431 U.S. 324 (1977).

103. *Id.* at 354 n.39 (“[T]he section of Title VII that we construe here, § 703(h), was enacted in 1964, not 1972. The views of members of a later Congress, concerning different sections of Title VII, enacted after this litigation was commenced, are entitled to little if any weight. It is the intent of the Congress that enacted § 703(h) in 1964, unmistakable in this case, that controls.”).

the-road line jobs. Although there was no dispute that this inability was caused by a seniority system in which local drivers had been unable to accumulate seniority due to discriminatory hiring, Justice Stewart, speaking for the court, held that Title VII offered no remedy:

Were it not for § 703(h), the seniority system in this case would seem to fall under the *Griggs* rationale. The heart of the system is its allocation of the choicest jobs, the greatest protection against layoffs, and other advantages to those employees who have been line drivers for the longest time. Where, because of the employer's prior intentional discrimination, the line drivers with the longest tenure are, without exception, white, the advantages of the seniority system flow disproportionately to them and away from Negro and Spanish-surnamed employees who might by now have enjoyed those advantages had not the employer discriminated before the passage of the Act. This disproportionate distribution of advantages does, in a very real sense, "operate to 'freeze' the status quo of prior discriminatory employment practices." But both the literal terms of § 703(h) and the legislative history of Title VII demonstrate that Congress considered this very effect of many seniority systems and extended a measure of immunity to them.¹⁰⁴

It seems clear that the Clark-Case memorandum did not focus upon the departmental classification seniority issue of the early days of Title VII. Nonetheless, the Court majority stated that:

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

104. *Id.* at 349–50.

system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination. . . . That conclusion is inescapable even in a case, such as this one, where the pre-Act discriminatees are incumbent employees who accumulated seniority in other bargaining units. *Although there seems to be no explicit reference in the legislative history to pre-Act discriminatees already employed in less desirable jobs, there can be no rational basis for distinguishing their claims from those of persons initially denied any job but hired later with less seniority than they might have had in the absence of the pre-Act discrimination. . . . It would be as contrary to that mandate to forbid the exercise of seniority rights with respect to discriminatees who held inferior jobs as with respect to later hired minority employees who previously were denied any job. If anything, the latter group is the more disadvantaged.*¹⁰⁵

But Justice Marshall, dissenting with Justice Brennan,¹⁰⁶ had it right in this regard. His persuasive dissent noted that section 703(h) carved out “an exemption from [] broad prohibitions.”¹⁰⁷ The dissent found the seniority proviso inapplicable. Moreover, the dissent noted that the proviso was focused on the attempt to exercise truly so-called “fictional” seniority, i.e., seniority that would have been accumulated by minority-group workers as they sought to obtain any kind of access to more desirable, better paying jobs rather than the transfers sought when no-promotion or transfer of policies had previously denied them the ability to accumulate requisite seniority credits. Second, the dissent relied upon the above-referenced 1972 amendments, in which Congress has explicitly placed its *imprimatur* on the circuit court case law in its reports. The dissent thus castigated the Court’s grant of “immunity” to this kind of seniority system.

But in major respects, the genesis of what was adopted by the dissent, as well as the circuit courts, lives on in major cases since then. In the early 1970s, prior to *Teamsters*, the courts began to award front pay for future compensation

105. *Id.* at 352–55 (emphasis added).

106. See generally William B. Gould IV, *The Supreme Court’s Labor and Employment Docket in the 1980 Term: Justice Brennan’s Term*, 53 U. COLO. L. REV. 1 (1981).

107. Int’l Bhd. of Teamsters v. United States, 431 U.S. 324, 381 (1977) (Marshall, J., dissenting).

losses in Title VII seniority cases, inasmuch as, even with the award of prospective seniority, the black workers affected could not be made whole given the fact that the job they might have been qualified for and entitled to was presently held by white workers. What was at issue was the right of black workers to use seniority credits when *vacancies arose*—not in connection with jobs that were currently being held by employees not subject to discriminatory policies. Accordingly, the idea of front pay was to compensate for earnings and other benefits lost in the interim, as the victim of discrimination made his or her way up the ladder. A unanimous Court, in an opinion authored by Justice Thomas, subsequently assumed the propriety of front pay under Title VII (without explaining all of the circumstances under which it is an appropriate remedy) and found it to be equitable relief under the statute rather than an element of compensatory damages under the 1991 amendments subject to that provision's statutory cap on such damages.¹⁰⁸ Though some of the judicially-crafted front pay awards preceded the 1972 amendments,¹⁰⁹ the Court noted that Congress expanded the remedies previously listed to include “any other equitable relief as the court deems appropriate” and that courts had subsequently endorsed a broad view of front pay.¹¹⁰

Thus, though *Teamsters* has made the issue of front pay in seniority disputes a moot point because of its interpretation of the proviso—an erroneous one in my view—the issue of compensation where equitable relief is not appropriate at the time of the award remains very much alive in other employment circumstances both in and outside the Title VII context. This has been acknowledged in labor arbitration cases where, for instance, the collective bargaining agreement has been violated procedurally¹¹¹ or

108. Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843 (2001).

109. United States v. Ga. Power Co., Civil No. 12355, 1971 WL 162 (N.D. Ga. June 30, 1971); cf. Stamps v. Detroit Edison Co., 365 F. Supp. 87, 121–22 (E.D. Mich. 1973), *rev'd in part on other grounds*, EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975). The author was lead counsel for plaintiffs in the *Stamps* case. See William Wong, *Lawyer William Gould Prods Courts to End Job Bias; His Activism Sometimes Irks Peers*, WALL ST. J., Aug. 21, 1974, at 3.

110. See, e.g., Patterson v. Am. Tobacco Co., 535 F.2d 257, 269 (4th Cir. 1976); EEOC v. Enter. Ass'n Steamfitters, 542 F.2d 579, 590 (2d Cir. 1976); Bush v. Lone Star Steel Co., 373 F. Supp. 526, 538 (E.D. Tex. 1974).

111. E.g., Safeway Stores, Inc., 64 Lab. Arb. Rep. (BNA) 563 (1974) (Gould, Arb.).

2014]

TITLE VII AT FIFTY

395

substantively, but where reinstatement is not an appropriate remedy. Front pay compensation, however, is admittedly rare in labor arbitration because neither labor nor management are generally attracted to this kind of compromise.¹¹² Now, as the Court has said, front pay may be appropriate in such circumstances in lieu of reinstatement where, for instance, there is “continuing hostility” between the parties or where the employee has suffered “psychological injuries.”¹¹³ The Age Discrimination in Employment Act of 1967, enacted three years after Title VII and amended in 1986 so as to eliminate in virtually all circumstances mandatory retirement, has seen the award of front pay utilized even more frequently where the employee is estimated to be near retirement.¹¹⁴

Again, the Supreme Court has said that front pay is appropriate in lieu of reinstatement, and has said that the Civil Rights Act authorizes those awards where they are made “in lieu of reinstatement.”¹¹⁵ Ironically, notwithstanding the importance of reinstatement particularly under statutes like the National Labor Relations Act where the remedy is central to its orders, a substantial number if not the overwhelming percentage of settlements obtained under that Act (and in arbitration proceedings as well) provide for compensation without reinstatement. In contrast to antidiscrimination law,¹¹⁶ the NLRA does not contain the authority to fashion punitive relief.¹¹⁷ But this does not affect

112. On the other hand, reinstatement without back pay remains another form of compromise, and where the collective bargaining agreement has been violated but the employee does not have clean hands seems to be well accepted.

113. *Pollard*, 532 U.S. at 853.

114. *See, e.g.*, *Munoz v. Oceanside Resorts, Inc.*, 223 F.3d 1340 (11th Cir. 2000); *Davis v. Combustion Eng'g, Inc.*, 742 F.2d 916, 923 (6th Cir. 1984); *Goss v. Exxon Office Sys. Co.*, 747 F.2d 885 (3d Cir. 1984); *cf. Donlin v. Phillips Lighting N. Am. Corp.* 581 F.3d 73, 87 (3d Cir. 2009); *Meacham v. Knolls Atomic Power Lab.*, 381 F.3d 56, 79 (2d Cir. 2004); *Pierce v. Atchison, Topeka & Santa Fe R.R. Co.*, 65 F.3d 562, 574 (7th Cir. 1995); *Hukkanen v. Int'l Union of Operating Eng'rs*, 3 F.3d 281, 286 (8th Cir. 1993); *Proctor v. Consol. Freightways Corp.*, 942 F.2d 793 (9th Cir. 1991).

115. *Pollard*, 532 U.S. at 846.

116. *Cf. Kolstad v. Am. Dental Ass'n*, 527 U.S. 526 (1999); *Johnson v. Ry. Express Agency*, 421 U.S. 454 (1975).

117. *See Republic Steel Co. v. NLRB*, 311 U.S. 7 (1940); *NLRB v. Seven-Up Bottling*, 344 U.S. 344, 346 (1953); *Local 60, United Bhd. of Carpenters v. NLRB*, 365 U.S. 651, 655 (1961); *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970); GOULD, *supra* note 18, at 230.

front pay, and thus the General Counsel has properly concluded that Board settlements (as well as non-Board settlements where they were previously permissible) may include front pay along with reinstatement and thus constitute compensation rather than a penalty. Accordingly, the Board, this past year, in part relying upon Supreme Court Title VII authority, held that even though front pay is not a remedy which the Board includes in its remedial orders, the General Counsel nonetheless “may approve as part of a voluntary settlement . . . seek informal proceedings.”¹¹⁸ The General Counsel has said that where front pay “in lieu of reinstatement is proposed, the offer should be communicated. In addition, a Region may raise the issue of front pay if the Region is confident that reinstatement will not be achieved absent litigation.”¹¹⁹ But the approach of the Board has thus far been that front pay will not be sought in formal proceedings—in contrast to the position of the EEOC under Title VII and related antidiscrimination law.¹²⁰ Nonetheless, perhaps, through the influence of the subsequently enacted antidiscrimination law (a kind of role reversal), in future years this will change.

V. JURY TRIALS

The posture of the federal courts toward Title VII today is appreciably different than it was in the 1960s when the federal courts were viewed to be overly sympathetic to Title VII plaintiffs.¹²¹ The jury trial debate at the time of the passage of Title VII is the mirror image of this shift and one which is predicated upon the hostility of juries to plaintiffs.

At the time of Title VII, it was feared that juror bias would undermine the effectiveness of the statute and thus undercut civil rights. In part, this was foreshadowed by the debate relating to the Civil Rights Act of 1957, when the jury

118. Memorandum from Lafe E. Solomon, Acting Gen. Counsel, N.L.R.B. on Subject: Inclusion of Front Pay in Board Settlements to all Division Heads, Regional Directors, Officers-in-Charge, and Resident Officers, 2013 WL 154207, at *1 (N.L.R.B.G.C. Jan. 9, 2013).

119. *Id.* at *2.

120. See Chairman Clarence Thomas, Equal Emp't Opportunity Comm. on Policy Guidance: A Determination of the Appropriateness of Front Pay as a Remedy Under the Age Discrimination in Employment Act of 1967 (ADEA), 1988 WL 912194, at *1 (E.E.O.C. Guidance Oct. 25, 1988).

121. See *supra* note 80.

trial became a key element of debate, sometimes viewed as a labor versus conservative issue. The positions in the debate, like the one involving administrative process, have been turned on its head over the past half-century.

The Civil Rights Act of 1957 was the first piece of civil rights legislation seriously considered and ultimately enacted since Reconstruction. It almost foundered on the jury trial issue, i.e., whether a jury would be provided in contempt cases arising out of disobedience of court decrees providing for black voter eligibility. The concern was that, notwithstanding the Supreme Court's holding that discrimination against jurors was unconstitutional in 1880,¹²² juries, particularly in the South, were simply too hostile to enforce civil rights.¹²³ Ultimately, the Jury Trial Amendment in 1957 would pass with then-Senator Kennedy casting his vote with the South, perhaps in anticipation of the 1960 presidential election.¹²⁴

The same considerations animated the Title VII debate, leaving unresolved congressional intent with regard to the jury trial issue. Because Congress did not expressly provide for a jury trial in Title VII, it was left to the courts to determine if the right was provided implicitly, or was constitutionally mandated by the Seventh Amendment's preservation of the right to a jury trial in civil cases. In *Curtin v. Loether*, where compensatory and punitive damages were awarded under Title VIII's prohibitions on racial housing discrimination, the Court in dicta noted that the Seventh Amendment was not presumed to be applicable to the NLRA, or "in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere

122. See *Strauder v. West Virginia*, 100 U.S. 303 (1880).

123. Anthony Lewis, *Senate's Rights Bill: How It Would Operate*, N.Y. TIMES, Aug. 11, 1957, at 147; William S. White, *Johnson Charges Nixon Distortion in Rights Battle*, N.Y. TIMES, Aug. 6, 1957, at 1; *Civil Rights—Reactions to the Jury Trial Amendment and the Key Vote*, N.Y. TIMES, Aug. 4, 1957, at E1; *Stevenson on Jury Trial*, N.Y. TIMES, July 28, 1957, at 32; *The Nation—Southern Jury Trial*, N.Y. TIMES, July 14, 1957, at 136.

124. *Washington Wire—Democrats and Dixie*, NEW REPUBLIC, July 15, 1957, at 2 ("We find ourselves a little uncomfortable over Presidential aspirant John Kennedy's flirtation with Southern politicians."); see also *Stevenson on Jury Trial*, *supra* note 123, at 32; *The Nation—Southern Jury Trial*, *supra* note 123, at 136. In a receiving line for Senator Kennedy at that time, I queried him about his jury trial position, and he responded thoughtfully.

with the NLRB's role in the statutory scheme."¹²⁵ In the same case, the Court spoke approvingly of lower court decisions holding that a jury trial was not required in an action for reinstatement and back pay. The Court assumed that a jury trial was not applicable to cases involving equitable relief such as reinstatement, and also held back pay to be incidental to the equitable relief under both the NLRA and Title VII. Said the Court: "Whatever may be the merit of the 'equitable' characterization in Title VII cases, there is surely no basis for characterizing the award of compensatory and punitive damages here as equitable relief."¹²⁶ Accordingly, in such cases a jury trial is mandated.

But the Court's reasons for denying a jury trial, particularly where policy-makers were concerned with juror bias, seemed to be undermined for a number of reasons in the 1970s and 1980s.¹²⁷ Foremost amongst the new developments was the advent of common-law wrongful discharge actions in the 1980s, fueled in substantial part by jury trials, where plaintiffs relied upon juries to assess substantial damages, both punitive and compensatory, against defendant-employers perceived to possess deep pockets.¹²⁸ Plaintiffs now saw juries as worker-friendly, and corporations grew to fear them. Ultimately, Congress, dissatisfied with numerous Supreme Court decisions in the late-1980s, enacted the Civil Rights Act of 1991, which provided for punitive and compensatory damages, and thus more use of jury trials.¹²⁹ All of this has meant that fears of juror bias in race cases have been submerged by the employer-employee divide regarding jury trials, spurred initially by the wrongful-discharge actions.

Plaintiffs were not in the least bit concerned. Indeed, they welcomed this development:

125. *Curtis v. Loether*, 415 U.S. 189, 194 (1974). Here the Court referenced its own landmark holding in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), where the NLRA was held to be constitutional.

126. *Loether*, 415 U.S. at 197.

127. See Kerry R. Lewis, Note, *A Reexamination of the Constitutional Right to a Jury Trial Under Title VII of the Civil Rights Act of 1964*, 26 TULSA L.J. 571, 579-80 (1991).

128. See William B. Gould IV, *Stemming the Wrongful Discharge Tide: A Case for Arbitration*, 13 EMP. REL. L.J. 404 (1988).

129. See *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001).

In employment discrimination cases, the annual number of jury trials has increased. . . . In non-jobs [civil rights cases involving discrimination], over the twenty-eight-year period the ratio went from under two out of five to over three out of five. The ratio in jobs cases much more dramatically increased: in 1979, only about one in ten trials was a jury trial; by 2006, jury trials were about nine in ten. Compared to other plaintiffs, jobs plaintiffs prefer jury trial to judge trial.¹³⁰

This is because the win rate for plaintiffs is “substantially worse in judge trials than in jury trials. In numbers, employment discrimination plaintiffs have won only 19.62% of judge trials. While employment discrimination plaintiffs have thus won fewer than one in five of their judge trials, other plaintiffs have won 45.53% of their judge trials.”¹³¹ It is difficult to know why this is so, though the above-noted proclivity of juries to be unsympathetic to those with deep pockets cannot be dismissed. Equally important, the judiciary itself appears less receptive to Title VII claims. In any event, this development constitutes one of the sharpest contrasts between the law and assumptions about protection under it today as compared to fifty years ago when the statute was first enacted.

CONCLUSION

The developments to Title VII since 1964 are considerable. The professions, as well as supervisory and employment ranks, are more integrated. There is more contact between the races.¹³²

The administrative process debate seems to have been turned on its head, in large part due to developments under both the National Labor Relations Act and Title VII. Even through seniority litigation, where the Court engaged in a contorted assessment of Title VII legislative history to deny plaintiff claims, front pay has emerged as an additional and important remedy.

130. Clermont & Schwab, *supra* note 80, at 125–26.

131. *Id.* at 130.

132. *Cf.* *Loving v. Virginia*, 388 U.S. 1 (1967) “Virginia is now one of 16 states which prohibit and punish marriages on the basis of racial classifications.” *Id.* at 6.

Though the Supreme Court and the lower courts under it have become increasingly unsympathetic to plaintiffs seeking redress under employment discrimination law, juries, made available by virtue of the Civil Rights Act of 1991 amendments providing for compensatory and punitive damages, have provided plaintiffs with something of a life raft. The jury trial debate has been turned on its head. The common law wrongful discharge actions which emerged in the 1980s have made the jury an institution that can occasionally cabin judicial hostility.

Progress in the war against discrimination has been made over the half-century, notwithstanding more societal inequality. A black candidate for President has been elected twice, albeit with a minority of the white vote. The world is different and in some respects better in 2014 as compared to 1964. But there are many who do not subscribe to antidiscrimination law.¹³³ The challenge remains in the next half-century to unfold.

What then can or should be done next in the struggle to diminish racial considerations¹³⁴ in a truly post-racial society—and yet simultaneously tackle the societal and economic inequities recognized in both *Brown* and *Griggs*? Surely policies designed to reduce inequity¹³⁵ should also in

133. For example, even the Republican candidate for governor of Texas endorsed musician Ted Nugent after the latter called President Obama a “communist-nurtured subhuman mongrel.” Manny Fernandez, *Candidate for Texas Governor Stands by Outspoken Musician*, N.Y. TIMES, Feb. 19, 2014, at A10; see also, e.g., Igor Volsky, *South Dakota Lawmaker Says Businesses Should Be Able to Turn Away African-Americans*, THINKPROGRESS (Mar. 17, 2014), <http://thinkprogress.org/lgbt/2014/03/17/3413901/south-dakota-lawmaker-says-businesses-should-be-able-to-turn-away-african-americans>.

134. The Supreme Court has never found an affirmative action program that it liked. Cf. *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013); *Ricci v. DeStefano*, 557 U.S. 557 (2009); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). But see, *United Steelworkers v. Weber*, 443 U.S. 193 (1979); cf. *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986). See also, in particular, Justice Ginsburg's dissents in *Fisher*, 133 S. Ct. at 2432 (Ginsburg, J., dissenting), and *Ricci*, 557 U.S. at 608 (Ginsburg, J., dissenting).

135. They will have to be considerable and comprehensive. See, e.g., Eduardo Porter, *A Relentless Widening of Disparity in Wealth*, N.Y. TIMES, Mar. 12, 2014, at B1. Adhoc Committee on Termination at Will and Wrongful Discharge, Labor & Employment Law Section, State Bar of California, *To Strike a New Balance*, reprinted in LABOR & EMP. L. NEWS (SPECIAL EDITION) 1 (Feb. 8, 1984), available at <http://www.law.stanford.edu/sites/default/files/publication/>

2014]

TITLE VII AT FIFTY

401

all probability reduce racial divisiveness.¹³⁶ The same holds true regarding legislation or policy protecting workers from *all* arbitrary treatment in the workplace.¹³⁷ Race, sex, national origin, religion, and the other grounds upon which discrimination is currently prohibited should not be the only basis for protection in the employment relationship. For, after all, the current system induces non-meritorious complaints about discrimination (because they are virtually the only complaints which can be entertained outside a collective bargaining agreement), which are meritorious considered against a standard of fairness.

These steps are important prerequisites toward a road leading to a post-racial era in which administrative agencies and the judiciary focus upon arbitrary treatment under a standard where all consideration of arbitrary matters like race is itself arbitrary. In 2014, that day is still a distant one.

259017/doc/slspublic/gould_strikeanewbalance.pdf (I was co-chairman of the Committee which authored this report addressing wrongful discharge actions, jury trials, and arbitration).

136. *Cf.* *United Packinghouse, Food & Allied Workers Int'l Union v. NLRB*, 416 F.2d 1126 (D.C. Cir. 1969).

137. *See* William B. Gould IV, *The Idea of Jobs as Property in Contemporary America: The Legal and Collective Bargaining Framework*, 1986 BYU L. REV. 885 (1986).