Vanderbilt Law Review

Volume 31
Issue 4 *Issue 4 - May 1978*

Article 8

5-1978

A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964

Robert Belton

A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964

*Robert Belton**

TABLE OF CONTENTS

> Congress gave private individuals a significant role in the enforcement process of Title VII. . . . And although the 1972 amendment to Title VII empowers the Commission to bring its own actions, the private right of action remains an essential means of obtaining judicial enforcement of Title VII. . . . In such cases, the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices.
> . . . .

* Associate Professor of Law, Vanderbilt University. B.A., University of Connecticut, 1961; J.D., Boston University, 1965. The author was associated with the NAACP Legal Defense Fund as a staff attorney with responsibility for Title VII litigation strategies. The views expressed are those of the author and not those of the Legal Defense Fund.

> In the Civil Rights Act of 1964, . . . Congress indicated that it considered the policy against discrimination to be of the "highest priority."[1]

I. INTRODUCTION

On March 8, 1971, the United States Supreme Court decided *Griggs v. Duke Power Company,*[2] its first major decision interpreting Title VII of the Civil Rights Act of 1964. Title VII, as amended in 1972, prohibits employment discrimination in the public and private sectors on the basis of race, sex, national origin, or religion.[3] *Griggs* enunciated a statutory concept of discrimination based on the "consequences" or "adverse effects" that an employment practice has on the employment opportunities of those protected by the Act. The *Griggs* concept has been described as "disparate impact," "adverse impact," "disproportionate impact," or "statistical discrimination." *Griggs* not only established the doctrinal foundation for the contemporary development of employment discrimination law,[4] but also provided the doctrinal framework for a transition from the human relations/administrative enforcement model to the public law enforcement model.

Prior to Title VII, federal and state agencies had essentially preemptive roles in the enforcement of fair employment practices laws, and opportunity for private participation was almost nonexistent. A person claiming to be aggrieved by a prohibited practice could initiate the enforcement process by filing a complaint, but once the process was initiated, the aggrieved person usually had no further meaningful participation. In some jurisdictions the complainant could not seek administrative or judicial review if the enforcement agency dismissed his claim, nor could he invoke the public hearing procedure included in many of the earlier laws.[5]

---

1. Alexander v. Gardner-Denver Co., 415 U.S. 36, 45, 47 (1974).

2. 401 U.S. 424 (1971).

3. 42 U.S.C. §§ 2000e to 2000e-15 (1970), *as amended by* the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (current version at 42 U.S.C. §§ 2000e to 2000e-17 (Supp. V 1975)) [Hereinafter all references to Title VII will be cited only to the *United States Code*].

4. Terms such as "fair employment practices," "equal employment opportunity laws," and "employment discrimination law," have been used interchangeably to describe the body of law that has developed in the wake of Title VII. Because the term "fair employment practices" is so closely identified with pre-Title VII enforcement efforts to remedy employment discrimination, and because the post-Title VII enforcement efforts appear to differ, the term "employment discrimination law" is more appropriate to describe the post-Title VII developments.

5. *See generally* Hill, *Twenty Years of State Fair Employment Practice Commissions: A Critical Analysis with Recommendations,* 14 BUFFALO L. REV. 22 (1964); Witherspoon, *Civil Rights Policy in the Federal System: Proposals for a Better Use of Administrative Process,* 74 YALE L.J. 1171 (1965).

Title VII provided the first meaningful opportunity for private participation in the enforcement process of the national policy against employment discrimination. Although the enactment of Title VII culminated a twenty-year campaign by civil rights advocates for a clear enunciation and implementation of a national policy against employment discrimination,[6] the civil rights demonstrations of the early 1960's provided the immediate impetus for legislative and executive action.[7] The prevailing attitude toward Title VII, as finally enacted, was that the civil rights movement had suffered a defeat—prompted by the political reality of compromise, Congress had deprived the primary federal enforcement agency, the Equal Employment Opportunity Commission, of cease and desist power, the centerpiece for effective enforcement.[8] Congress substituted three enforcement processes for cease and desist power: administrative enforcement by the EEOC,[9] "pattern or practice" civil litigation by the Attorney General,[10] and private civil actions by aggrieved persons—the "private attorney general."[11] The Act afforded to those responsible for each enforcement process the unique opportunity to develop the law on employment discrimination, because a major shortcoming of earlier efforts to eliminate employment discrimination was the failure to develop a coherent body of law, a *sine qua non* for effective implementation.

During the first decade of Title VII's enforcement, the development in the law of employment discrimination was explosive,[12] a development that is perhaps unparalleled in the whole of civil rights enforcement. Although Title VII has not brought Nirvana or Arma-

6. *See* Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 431 n.2 (1966).

7. *See* Schlei, *Foreword* to B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (1976).

8. *See* A. BLUMROSEN, BLACK EMPLOYMENT AND THE LAW 57-58 (1971); Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOKLYN L. REV. 62 (1965).

9. 42 U.S.C. § 2000e-5 (1970).

10. 42 U.S.C. § 2000e-6(a) (1970). Responsibility for pattern or practice civil litigation against private defendants was transferred from the Attorney General to the EEOC by a 1972 amendment to Title VII. 42 U.S.C. § 2000e-6(c) (Supp. V 1975). This transfer became effective two years later. The Attorney General still has sole authority under Title VII to sue state and local governments. 42 U.S.C. § 2000e-5(f)(1) (Supp. V 1975).

11. 42 U.S.C. § 2000e-5(f)(1) (Supp. V 1975). *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 415 (1975) (applying the notion of a "private attorney general" to private plaintiffs in Title VII cases).

12. For a detailed review of the procedural and substantive developments of the law under Title VII, see Belton, *Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Developments*, 20 ST. LOUIS U.L.J. 225 (1976); *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109 (1971).

geddon,[13] foundations have been established for the orderly progression from administrative procedure, through the definition and proof of discrimination, and ultimately to the fashioning of appropriate remedies. The efforts of the EEOC, the Department of Justice, and other federal and state agencies during the first decade of enforcement have been the subject of a great deal of commentary and review. Much of this commentary has been critical.[14] Private enforcement of Title VII has produced the major legal developments, but these efforts have received little attention in the literature. This Article therefore will present a comparative review of governmental and private enforcement efforts under Title VII. A brief overview of the historical efforts to eliminate employment discrimination prior to Title VII is necessary to place private enforcement efforts in proper perspective. It is not the purpose of this Article to review the development of the substantive law during the first decade of Title VII; this has been covered elsewhere.[15] The beginning of the second decade of Title VII's enforcement has produced new issues, such as "reverse discrimination" and "quotas," whose resolution may determine whether the legal principles of employment discrimination law that developed during the first decade will remain a potent tool for the elimination of employment discrimination, or whether it will be reduced to "mellifluous but hollow rhetoric."[16] The more important of these evolving issues will be discussed.

II. Efforts To Eliminate Employment Discrimination Before Title VII: Historical Overview

A. *Federal Efforts*

The evil that Title VII is designed to remedy—employment discrimination—is a well-documented historical, economic, and social fact. Although employment discrimination has existed throughout American history,[17] the federal government did not join

13. *See* Rodino, *Preface to the First Decade of Title VII of the Civil Rights Act: Past Developments and Future Trends*, 20 St. Louis U.L.J. 222 (1976).

14. *See, e.g.*, U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort: To Eliminate Employment Discrimination 18-132 (1971) [hereinafter cited as 1971 Federal Effort].

15. *See, e.g.*, Belton, *supra* note 12; Jones, *The Development of the Law Under Title VII Since 1965: Implications of the New Law*, 30 Rutgers L. Rev. 1 (1976).

16. Griggs v. Duke Power Co., 420 F.2d 1225, 1237-38 (4th Cir. 1970) (Sobeloff, J., concurring in part, dissenting in part).

17. *See, e.g.*, H.R. Rep. No. 1370, 87th Cong., 2d Sess. 2155-56 (1962), *reprinted in* EEOC, Legislative History of Titles VII and XI of Civil Rights Act of 1964 (1970); Edwards, *Race Discrimination in Employment: What Price Equality?*, 1976 U. Ill. L.F. 572.

even symbolically the concern of black civil rights advocates and their supporters over employment discrimination until President Roosevelt, on June 25, 1941, issued Executive Order 8802,[18] which prohibited discrimination on the basis of race, color, national origin, or religion by federal defense agencies and private corporations performing defense work under contracts with the federal government. The purpose of Executive Order 8802 was to "*reaffirm* the policy of the United States that there shall be no discrimination in the employment of workers in defense industries or government because of race, creed, color, or national origin . . . ."[19] But the circumstances under which President Roosevelt issued Executive Order 8802 parallel the circumstances under which Congress enacted the Civil Rights Act of 1964.[20]

> It was not the hopes of minorities that brought relief, nor even the horrors of racism elsewhere in the world, although the President was surely moved by them. The disquieting reality is that President Roosevelt was embarrassed into acting by the threat of a demonstration march on Washington. Scheduled for July 1, 1941, the march seemed likely to attract 100,000 Negroes to the capitol to protest against the suhstantial exclusion of Negroes from employment in government and defense industries. The Administration exerted itself to have the march called off. Letters were written and conferences held, but without the President's firm commitment to use his powers to obtain equal employment opportunity, the Negro leaders held fast. Finally, on June 25, the President capitulated and promulgated Executive Order 8802 . . . .[21]

Executive Order 8802 established a five-person Fair Employment Practices Committee (FEPC) to administer the Order's policy of equal employment in defense contracts awarded by the federal government and in vocational and training programs administered by federal agencies. The first FEPC suspended its operations in 1943, and a new FEPC[22] with broader jurisdiction was established. The Committee processed about 8000 complaints of employment dis-

---

18. 3 C.F.R. 957 (1938-1943 Compilation).

19. *Id.* (emphasis added). It seems ironic that the order sought to "reaffirm" a policy that evidently did not exist. *See* U.S. COMMISSION ON CIVIL RIGHTS, EMPLOYMENT 6 (1961) [hereinafter cited as 1961 EMPLOYMENT REPORT].

20. *See* text accompanying notes 54-57 *infra*. For a summary of conditions leading to the establishment of the first Federal Fair Employment Practice Committee, see L. RUCHAMES, RACE, JOBS & POLITICS 11-21 (1953).

21. M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 9 (1966). *See* H. GARFINKEL, WHEN NEGROES MARCH: THE MARCH ON WASHINGTON MOVEMENT IN THE ORGANIZATIONAL POLITICS FOR FEPC (1959) (history of the march on Washington).

22. On May 27, 1943, less than two years after the first FEPC was established, President Roosevelt issued a second order, Exec. Order No. 9346, 3 C.F.R. 1280 (1938-1943 Compilation). This order reorganized the FEPC and expanded its jurisdiction to "all employers, including the several Federal departments and agencies, and all labor organizations . . . to eliminate discrimination in regard to hire, tenure, terms or conditions of employment, or union membership because of race, creed, color, or national origin." *Id.*

crimination under a weak mandate to "take appropriate steps to obtain elimination of . . . discrimination [forbidden by this Order]."[23] It was recognized at this early date that employment discrimination presented complex structural and remedial problems but no sanctions were specified.[24]

In 1944 Congress adopted the Russell amendment,[25] which provided that any agency created by executive order and in existence for more than one year could receive federal funds only if Congress specifically appropriated funds for the agency. As a result of this amendment and fear that Congress would not appropriate funds for the Committee's continued existence, the FEPC was allowed to die a quiet death.[26]

From 1946 until 1964, the principal federal effort to eliminate employment discrimination was in the area of government contracts. Presidents Truman and Eisenhower established Committees on Government Contract Compliance.[27] Neither of these committees, however, had direct enforcement power, and studies of these programs conclude that their impact on the elimination of job discrimination was minimal.[28] Other efforts under the FEPC model during the period 1941-1961 have received mixed reviews, but the consensus is that the FEPC approach proved to be incapable of coping with the complex problems of employment discrimination.

In 1961 through Executive Order 10,925,[29] President Kennedy created the President's Committee on Equal Employment Opportunity. In October 1965 this order was superseded by President Johnson's Executive Order 11,246.[30] The Johnson order effected an administrative reorganization abolishing the President's Committee

23. *Id.* The FEPC had the authority to receive and investigate complaints of discrimination, to hold public hearings, to make findings of fact, and to take appropriate steps to eliminate discrimination. Two reports of its activities were issued. FAIR EMPLOYMENT PRACTICE COMMITTEE, FIRST REPORT (1945), FINAL REPORT (1947). The FEPC received 4081 complaints during its first fiscal year, of which 3198, or 80.8 percent, alleged racial discrimination. FAIR EMPLOYMENT PRACTICE COMMITTEE, FIRST REPORT 37 (1945).

24. *See generally* Witherspoon, *supra* note 5.

25. Independent Offices Appropriation Act, 1945, Pub. L. No. 358, § 213, 58 Stat. 361 (1944) (current version at 31 U.S.C. § 696 (1970)).

26. *See* SOVERN, *supra* note 21, at 15.

27. *See* 1961 EMPLOYMENT REPORT, *supra* note 19, at 12-16.

28. *See, e.g.*, H. HILL, BLACK LABOR AND THE AMERICAN LEGAL SYSTEM 173-84 (1977); SOVERN, *supra* note 21, at 9-17; Jenkins, *A Study of Federal Effort to End Job Bias: A History, A Status Report, and a Prognosis*, 14 HOW. L.J. 259, 269-74 (1968).

29. 3 C.F.R. 448 (1959-1963 Compilation). This order revived the federal effort to remedy employment discrimination. *See* 1961 EMPLOYMENT REPORT, *supra* note 19, at 16-17.

30. 3 C.F.R. 339 (1964-1965 Compilation). This 1965 Executive Order did not include a prohibition against sex discrimination in employment. This omission was corrected by Executive Order 11,478, 3 C.F.R. 133 (1969 Compilation).

and assigning its responsibility and jurisdiction over government contractors to the Department of Labor. These orders led to the creation of the Office of Federal Contract Compliance (OFCC) within the Department of Labor. OFCC was given primary responsibility for the administration and enforcement of Executive Order 11,246. The order prohibits employment discrimination on the basis of race, color, religion, or national origin by firms that contract with the government. It requires federal contractors to take affirmative action to insure that employees are treated in accordance with the broad mandate. Sanctions for violation of this order include debarment from future government contracts.[31] These sanctions, however, never have been used effectively to remedy employment discrimination.[32]

The first federal legislation to remedy employment discrimination was introduced in Congress in 1943, during the existence of the first FEPC. A number of other bills, including Senator Taft's bill proposing to reduce discrimination through voluntary efforts and the Dawson-Scanlon bill proposing to establish an agency with direct enforcement powers, were introduced between 1943-1963.[33]

Before Title VII, the National Labor Relations Act[34] and the Railway Labor Act[35] were the only federal legislation that afforded an opportunity for judicial redress of employment discrimination claims. These congressional enactments were designed to regulate the relations between employers and unions, not to provide a remedy for employment discrimination. Nevertheless, they have afforded some protection against employment discrimination when a collective bargaining relationship exists between an employer and a union. The most significant protection against employment discrimination under these acts has been the duty of fair representation, largely a creature of the federal judiciary and private efforts. In *Steele v. Louisville & Nashville Railroad,*[36] a case arising under the Railway Labor Act, black railway firemen challenged a collective bargaining agreement that conditioned seniority on race. Creating the duty of fair representation, the Court held that a majority union, acting as the collective bargaining agent under federal law,

31. *See* SOVERN, *supra* note 21, at 103-42.

32. U.S. COMMISSION ON CIVIL RIGHTS, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—A REASSESSMENT 74 (1973).

33. *See* EEOC, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 7-11 (1970).

34. 29 U.S.C. §§ 151-168 (1970 & Supp. V 1975).

35. 45 U.S.C. §§ 151-162 (1970).

36. 323 U.S. 192 (1944). In a companion case the Court interpreted the National Labor Relations Act to require a similar duty. Wallace Corp. v. NLRB, 323 U.S. 248 (1944).

may not enter into contracts that discriminate against black workers because the law imposes upon the statutory representative a duty to protect equally the interests of all members of a craft at least as exacting as the duty that the constitution imposes upon legislatures to provide equal protection to those for whom it legislates.[37] Subsequent decisions have extended the implications of the *Steele* doctrine.

Although the duty of fair representation is not explicit in the National Labor Relations Act, the National Labor Relations Board (NLRB) with its extensive administrative resources could have applied the *Steele* doctrine against overt discriminatory practices of employers and labor unions.[38] For many years, however, the Board remained unresponsive to complaints of race and sex discrimination. One commentator has characterized the history of the NLRB's policy toward employment discrimination as "the slow transformation of a vague public policy into a judicially developed body of law reluctantly enforced by an administrative agency."[39] The NLRB's attitude apparently was consistent with the attitude of the executive and legislative branches during 1941-1961. The *Steele* duty of fair representation developed not as a result of federal initiative; its development instead is a legal brainchild of private civil rights litigation activities.[40]

B. State and Local Efforts

In the 1940's states and municipalities began enacting measures to remedy employment discrimination. Before 1963 twenty state and local governments had established human relations commissions or fair employment commissions for this purpose. In 1963 and 1964 local pressure prompted an additional two hundred communities and several additional states to enact similar measures.[41]

---

37. So long as a labor union, assumes to act as the statutory representative of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft. 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.

323 U.S. at 204. *See* SOVERN, *supra* note 21, at 143-75.

38. *See* HILL, *supra* note 28, at 93-169; Axelrod & Kaufman, *Manion House—Bekins—Handy Andy: The National Labor Relations Board's Role in Racial Discrimination Cases*, 45 GEO. WASH. L. REV. 675 (1977).

39. *Id.* at 93.

40. *See* R. KLUGER, SIMPLE JUSTICE 233-34 (1975).

41. *See* Witherspoon, *supra* note 5, at 1173. For an excellent list of state and local

The statutes and ordinances created agencies with powers ranging from the power only to conciliate to full cease and desist power. A 1961 study summarized these statutes and ordinances:

> They declare discrimination in public and private employment on racial, religious, or ethnic grounds to be illegal; they authorize a state administrative agency to receive and investigate complaints; they empower the agency to eliminate, by persuasion and mediation, any discrimination found to exist; if unsuccessful in such efforts, the agency is authorized to proceed by public hearing, findings of fact and law, and cease and desist orders, which are enforceable by court decree; judicial review is available to a person claiming to be aggrieved by an agency ruling; and finally, the state agency is responsible for an educational program intended to reduce and eliminate discrimination and prejudice.[42]

States with such provisions had the authority to undertake more forceful roles in eliminating employment discrimination, but like their federal counterpart, they did not use that authority effectively. Because state agencies failed to develop a coherent concept of "discrimination" and relied upon what may be called the human relations/administrative enforcement model, their records of accomplishments are bleak.[43]

Doctrinally, the human relations/administrative model views discrimination as a moral rather than a legal wrong. Thus, under this model legal coercion is considered inappropriate even when judicial enforcement authority is provided.[44] State agencies adopted the human relations/administrative enforcement model even though philosophical differences existed among the persons and organizations that established and staffed fair employment practice

---

human relations commissions, including their areas of competency, citations to their enabling legislation, and statistics concerning their activities, see the appendix to Witherspoon's article.

42. M. KONVITZ & T. LESKES, A CENTURY OF CIVIL RIGHTS 203 (1961).

43. The Federal Fair Employment Practice Committee developed the following guidelines to determine the validity of a complaint: facts showing that it was the policy or practice of an employer to hire members of a minority group as laborers or custodial workers without regard to qualification; recruiting a substantial group of skilled workers from a technical school that blacks and Jews attended, but hiring no blacks and only a small number of Jews; placing racial or religious limitations in job advertisements; discharging an employee for failing to salute the flag because of religious conviction; requiring black applicants to obtain a permit from a union known to discriminate; and quota hiring to restrict the number of blacks in the work force. The mere fact that an employer had no blacks or only a small number in its employment was insufficient for a finding of discrimination unless coupled with two other conditions: the plant guard turned black applicants away, and the employer contended that certain skills were concentrated in certain nationalities. FAIR EMPLOYMENT PRACTICE COMMITTEE, FIRST REPORT, *supra* note 23, at 55-57.

44. A Study by the Senate Committee on Labor showed that of the more than 19,000 complaints that had been filed in thirteen states before December 31, 1961, there had been only eighteen court actions. *See* 110 CONG. REC. 7207 (1964).

commissions. The following observation demonstrates this philosophical conflict:

> [T]he [dominant] groups were doctrinally committed to human relations rather than civil rights. The distinction is that the human rights organizations define the problem only in class terms and look to moral suasion, drawing their support and inspiration from natural law and theology but tending to overlook the instruments of the states, except insofar as they might be made to affirm such principals [*sic*] rhetorically. The civil rights organizations on the contrary look primarily to law, courts and statecraft as the primary instruments of progress—and this not only to pronounce but to deliver and protect the rights of the individual as well as the rights of a class.
>
> In spite of the leadership of a militant socialist, A. Phillip Randolph, the human rights organizations maintained the balance of power in the effort to forge a permanent statutory FEPC. Accordingly, their propaganda and proposals were drawn in the moralistic language of their YMCA type membership. They believed in education, dialogue, reconciliation and conciliation as the methods for resolving the basic problem of employment bias.[45]

The informal methods of conference, conciliation, and persuasion were to be conducted in private, without the threat of sanctions and without objective standards for compliance.[46]

C. *Private Efforts*

Prior to Title VII, few opportunities were open for private enforcement of employment discrimination laws. The available opportunities were manifestly limited and uncertain. No right of private enforcement existed under the federal fair employment practice orders and regulations beyond the opportunity to file a complaint. If the complaint were dismissed, or if the complaint were valid but efforts to conciliate failed, no further private recourse was available.[47] Some state laws provided aggrieved individuals the oppor-

45. Jenkins, *supra* note 28, at 270. *See generally* L. KESSELMAN, THE SOCIAL POLITICS OF FEPC (1948).

46. Settlement by moral suasion in many cases did not result in a compulsory order for the employer who violated the law to hire, promote, or reimburse for back pay. Many commissioners did not feel compelled to demand such relief because they considered their main function to be the promotion of the educational message, rather than the settlement of complaints by enforcement of the laws. *See, e.g., Hearings on S. 773, S. 1210, and S. 1937 Before the Subcomm. on Employment and Manpower of the Senate Comm. on Labor and Public Welfare*, 88th Cong., 1st Sess. 228-29 (1963), when an official of the California commission testified that he was more concerned with attainment of a proper educational environment than with the full use of the commission's powers to secure new jobs for complainants. Similar testimony was offered by an official from the Missouri commission. *Id.* at 240. In Hill, *supra* note 5, at 38, the author states, "It is evident that state commissions are much too concerned with avoiding hostility from businessmen, too careful to refrain from interfering with the stability of manufacturing enterprise or union power, and insufficiently concerned with the welfare of the Negro job seeker."

47. *See* 1961 EMPLOYMENT REPORT, *supra* note 19, at 10-11; *see also* Annot., 31 A.L.R. FED. 108 (1977) (discussing the right of private action for employment discrimination through the OFCC pursuant to Executive Order 11,246).

tunity to seek judicial review of adverse commission actions, but the chances of obtaining a favorable judicial ruling were slim.[48] Federal and state courts normally gave considerable weight to administrative determinations, presuming them to be correct unless clearly persuaded that the determinations were not supported by substantial evidence.[49] Some private litigation to remedy employment discrimination in federal, state, and local governments was conducted under the fifth and fourteenth amendments.[50]

Costs, litigation expenses, and attorneys fees were major factors imposing a general limitation:[51] precisely because of employment discrimination, the victims of discrimination did not have the resources to finance the costs of litigation.[52] Another limiting factor was that civil rights cases, particularly ones involving race, occupied high priority on the list of unpopular cases among attorneys.[53] Thus, even assuming that costs were not a barrier, the probability for hiring an attorney who was willing to represent a black victim of employment discrimination was severely limited. The school deseg-

48. SOVERN, *supra* note 21, at 24.

49. In Draper v. Clark Dairy, Inc., 17 Conn. Supp. 93 (Super. Ct. 1950), the court established the rule that findings of fact of the commission are binding on the court unless the record shows that the commission acted arbitrarily or capriciously. *Id.* at 96-97. This case reviewed most of the present rules applicable to judicial review of FEP commission actions. *See also* Jeanpierre v. Arbury, 4 N.Y.2d 238, 149 N.E.2d 882, 173 N.Y.S.2d 597 (1958); Holland v. Edwards, 307 N.Y. 38, 119 N.E.2d 581 (1954).

50. *See, e.g.*, J. GREENBERG, RACE RELATIONS AND AMERICAN LAW 154-207 (1959). A leading Supreme Court case involving aliens, Truax v. Raich, 239 U.S. 33 (1915), held that requiring an employer's work force to comprise at least eighty percent qualified electors or natural born citizens denied aliens equal protection of the law. This case was relied upon to make some inroads against employment discrimination in state employment.

51. Civil rights litigation is costly. It has been estimated that a suit involving a trial in a district court, an appeal to a circuit court, and a petition for certiorari to the Supreme Court costs between $15,000 and $18,000. 110 CONG. REC. 6541 (1964) (remarks of Senator Humphrey in the debate over Title VII). Litigation in Brown v. Board of Education, 349 U.S. 294 (1955), cost over $200,000. *Id.* In Griggs v. Duke Power Co., 401 U.S. 424 (1971), the district court awarded plaintiffs over $65,000 in costs, expenses, and attorneys fees.

52. William H. Brown, III, EEOC Chairman from 1969 to 1973, testified before a congressional committee that

> the disadvantaged individual is told that in the pinch he must become a litigant, which is an expensive proposition and traditionally the prerogative of the rich. Thus minorities are locked out of the proffered remedy by the very condition that led to its creation, and the credibility of the Government's guarantees is accordingly diminished.

Equal Employment Opportunities Enforcement Procedures: Hearings on H.R. 6228 and H.R. 13517 Before the Gen. Subcomm. on Labor of the House Comm. on Education and Labor, 91st Cong., 1st & 2d Sess. 34 (1969-1970).

53. "Lawsuits attacking racial discrimination . . . are neither very profitable nor very popular. They are not an object of general competition among . . . lawyers; the problem is rather one of an apparent dearth of lawyers who are willing to undertake such litigation." NAACP v. Button, 371 U.S. 415, 443 (1963) (footnote omitted), *quoted in* Sanders v. Russell, 401 F.2d 241, 245 (5th Cir. 1968).

regation campaign consumed many of the resources available to private enforcement efforts; consequently few resources were available for similar campaigns with other laws.

On June 25, 1941, President Roosevelt issued Executive Order 8802. On July 2, 1965, Title VII of the Civil Rights Act of 1964 became effective. During the twenty-four years between the presidential executive order and Title VII, an imposing arsenal consisting of the federal Fair Employment Practice Commission, state and local fair employment practice commissions, federal statutory law, federal decisional law, and to a more limited extent, private litigation was employed to remedy employment discrimination. The overwhelming majority of those who have studied the record of the pre-Title VII efforts to eliminate employment discrimination have concluded that the efforts were ineffective. These earlier efforts can be characterized only as bandaid and cosmetic. The principal reason for ineffective enforcement was the federal government's failure to enunciate and implement a national policy against employment discrimination. The time for such a policy was long overdue when Title VII became law.

III. THE EMERGENCE OF TITLE VII

By 1963 the pressure for strong civil rights legislation was building. All of America was alarmed. Americans saw on their television screens civil rights activists beaten and dragged through the streets. They saw the suppression of nonviolent demonstrators asking only for service in a restaurant or a seat on a bus. The campaign for equality resulted in hundreds of civil rights demonstrations across the nation in 1963.[54] The demands of the oppressed had awakened many white Americans to a new sense of responsibility to correct the result of two centuries of blatant inequality.

On June 11, 1963, President Kennedy on national television said that it ought to be possible "for every American to enjoy the privilege of being American without regard to his race or color . . . . It is better to settle these matters *in the courts* than on the streets, and new laws are needed at every level."[55] Eight days later, on June 19, 1963, he sent a civil rights bill to Congress. The Administration's bill dealt with discrimination in employment, voting, public accommodations, education, and federally assisted programs. As finally enacted, Title VII bore no resemblence to the bill submitted by the Kennedy Administration.[56]

54. *See* CIVIL RIGHTS, 1960-66 at 168-230 (A. Soble ed. 1967).
55. N.Y. Times, June 12, 1963, at 1, col. 5 (emphasis added).
56. Schlei, *supra* note 7, at viii-xiii.

On August 28, 1963, 250,000 people gathered beneath the Washington Monument to hear Dr. Martin Luther King's "I Have a Dream" speech. On November 22, 1963, President Kennedy was killed. Soon after President Kennedy's death, President Johnson met with civil rights leaders to assure them that he would press vigorously for the civil rights bill. By that time the civil rights bill that President Kennedy had sent to Congress had gone to the Judiciary Committee of the House of Representatives. The committee chairman, Emmanual Celler, a seventy-six year-old liberal Democrat, for years had fought for constitutional and civil liberties by introducing civil rights bills in Congress in 1949, 1957, and 1960. After extensive committee hearings, the omnibus civil rights bill was reported out with bipartisan support. A coalition of seventy-nine civil rights and labor organizations, known as the Leadership Conference on Civil Rights, joined together to lobby for the bill. The coalition urged that the proposed Equal Employment Opportunity Commission be given power to order employers to cease and desist from discriminatory employment practices, a power already held by the National Labor Relations Board. At the very least, the civil rights advocates insisted that the Commission be given the right to file suit in federal court against recalcitrant employers. In the end, however, the EEOC was given only informal powers of conference, conciliation, and persuasion. This meant that if the EEOC was unable to conciliate a claim of employment discrimination, the individual complainant or the Department of Justice, not the EEOC, had to take the matter to court.

The House adopted a number of amendments. A sex discrimination amendment, the most important one, was introduced by Congressman Smith of Virginia as a joke in an attempt to defeat the bill. The bill, including the sex discrimination amendment, passed in the House of Representatives on February 10, 1964. The bill then went to the Senate where a Southern block began a filibuster to defeat the bill. Five hundred amendments, 534 hours, one minute, and 37 seconds after the filibuster began, the Senate voted cloture. The bill passed the Senate on June 17, 1964, by a vote of 76 to 18. On July 2, 1964, one hour after debate, the House of Representatives passed the Senate version of the bill by a vote of 289 to 126.[57] At seven o'clock that evening, President Johnson signed the Civil Rights Act of 1964 in the East Room of the White House.

57. *See* EEOC, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 11 (1970).

A. Statutory Enforcement Scheme

When Title VII was passed, it was expected that the major responsibility for enforcement would rest with the EEOC and the Department of Justice. The role of private enforcement was expected to be minimal, with focus on the individual claims of discrimination; pattern, practice, or systemic discrimination would be handled by the federal enforcement agencies. The statutory scheme for private enforcement of Title VII requires the aggrieved person to file a charge with the EEOC. The charge must be filed within a specified time after the occurrence of the alleged unlawful practice.[58] The EEOC is required to conduct an investigation to determine whether reasonable cause exists to believe that a violation of the Act has occurred. If reasonable cause is found, the EEOC is directed to attempt to eliminate the violation through informal methods of conciliation.[59] If conciliation efforts fail, the EEOC must notify the charging party and inform him of his right to seek judicial enforcement of his claim.[60] The Department of Justice may seek direct judicial enforcement without regard to the EEOC procedures.[61]

B. Enforcement Models

The Title VII enforcement scheme includes both the human relations/administrative model and the traditional judicial enforcement model. The human relations/administrative model is set out in section 706(b), which provides that if, after an investigation, the EEOC finds reasonable cause to believe the Act has been violated, the agency "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."[62] The "reasonable cause" standard applicable to the EEOC administrative process differs from the "intentional" discrimination standard that governs proceedings under the judicial model.[63]

The judicial enforcement model is found in two different sections of Title VII. Section 707 gave the Department of Justice the authority to bring "pattern or practice" civil action against employers. A pattern or practice of discrimination consists of the denial of rights in "something more than an isolated, sporadic incident."[64]

58. 42 U.S.C. § 2000e-5(f)(1) (Supp. V 1975).
59. 42 U.S.C. § 2000e-5(b) (Supp. V 1975).
60. 42 U.S.C. § 2000e-5(f)(1) (Supp. V 1975).
61. 42 U.S.C. § 2000e-6 (1970 & Supp. V 1975).
62. 42 U.S.C. § 2000e-5(b) (Supp. V 1975).
63. *See* text accompanying notes 64-68 *infra.*
64. 110 CONG. REC. 14,270 (1964) (remarks of Senator Humphrey), *quoted in* International Bhd. of Teamsters v. United States, 431 U.S. 324, 336 n.16 (1977).

The authority for private civil actions is found in section 706(f)(1).[65] The 1972 amendments to Title VII empowered the EEOC to seek temporary relief in cases when a preliminary investigation affords a basis for prompt judicial action;[66] only the Attorney General has the authority to bring Title VII actions against state and local governmental units.[67] According to section 706(g), judicial relief may be granted only "if the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint."[68] Jurisdiction over Title VII civil actions is vested in the federal district courts.

Chayes has described employment discrimination litigation as one of the "avatars" of the emerging model of public law litigation. He describes the characteristics of this model as follows:

> The party structure is sprawling and amorphous, subject to change over the course of the litigation. The traditional adversary relationship is suffused and intermixed with negotiating and mediating processes at every point. The judge is the dominant figure in organizing and guiding the case, he draws for support not only on the parties and their counsel, but on a wide range of outsiders—masters, experts, and oversight personnel. Most important, the trial judge has increasingly become the creator and manager of complex forms of ongoing relief, which have widespread effects on persons not before the court and require the judge's continuing involvement in administration and implementation.[69]

Many of the Title VII class actions have these characteristics, which provide private litigants the opportunity to pursue judicial enforcement that is functionally equivalent to the "pattern or practice" authority of the Department of Justice and the EEOC.[70]

IV. Efforts To Enforce Title VII: The First Decade

A. *The Equal Employment Opportunity Commission*

Title VII was enacted into law on July 2, 1964, but its effective date was delayed one year to provide potential defendants, such as

65. 42 U.S.C. § 2000e-5(f)(1) (Supp. V 1975).

66. 42 U.S.C. § 2000e-5(f)(2) (Supp. V 1975).

67. 42 U.S.C. §§ 2000e-5(f)(1) (Supp. V 1975), 2000e-6(a) (1970).

68. 42 U.S.C. § 2000e-5(g) (Supp. V 1975).

69. Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1284 (1976).

70. *See, e.g.*, Jenkins v. United Gas Corp., 400 F.2d 28, 34 (5th Cir. 1968). In reversing the dismissal of a Title VII class action because plaintiff had received a previously denied promotion, the court noted:

> Indeed, if class-wide relief were not afforded expressly in any injunction or declaratory order issued in Employee's behalf, the result would be the incongruous one of the Court—a Federal Court, no less—itself being the instrument of racial discrimination, which brings to mind our rejection of like arguments and result in Potts v. Flax, 5 Cir., 1963, 313 F.2d 284, 289.

employers, labor unions, and employment agencies, an opportunity to undertake voluntary compliance measures. This grace period also was intended to give the EEOC an opportunity to organize, to employ a staff, and to establish procedures for its operation. A 1971 study of the federal civil rights enforcement effort reported that the EEOC completely failed to take advantage of this opportunity:

> Since its inception, the Equal Employment Opportunity Commission has been plagued by organizational and personnel problems which have impaired its ability to operate at maximum effectiveness. The agency opened its doors on July 2, 1965, under inauspicious circumstances. Since the implementing provisions of Title VII, passed on July 2, 1964, were not to become effective until 1 year later, it was anticipated that the interim year would be used to organize and staff the new agency and to establish procedures for its operation. President Johnson, however, did not appoint a Chairman and Commissioners until May 10, 1965. Sworn in on June 1, 1965, they had only a month to make the Commission operational. Consequently, on the date Title VII became effective, EEOC had only a skeletal organization and staff and no operational procedures.[71]

The report noted that the structural deficiencies were compounded by acute staffing problems, high turnover rates, and insufficient personnel. The study concluded that these structural and staffing deficiencies caused the Commission to suffer from a critical lack of continuity and direction, thereby impairing its ability to operate efficiently and to fulfill its Title VII mandate.[72]

The language and legislative history of Title VII suggest that the EEOC should complete the administrative process on a charge within thirty days with certain deferral periods for state and local agency actions. During the early years of its operation, the EEOC attempted to process charges within the statutory time periods.[73] The period for the administrative processing of charges, however, has increased steadily since the EEOC began operation. A study

71. 1971 FEDERAL EFFORT, *supra* note 14, at 87-88. On September 28, 1976, in a report to the Congress, the Comptroller General concluded that the EEOC, although having some success in its enforcement efforts, a decade after the effective date of Title VII, did not appear to have made enough advances against employment discrimination to have made a real difference. COMPTROLLER GENERAL OF THE UNITED STATES, REPORT TO THE CONGRESS: THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION HAS MADE LIMITED PROGRESS IN ELIMINATING EMPLOYMENT DISCRIMINATION, H.R. Doc. No. 147, 94th Cong., 2d Sess. (1976) [hereinafter cited as COMPTROLLER REPORT].

72. 1971 FEDERAL EFFORT, *supra* note 14, at 88.

73. *See, e.g.*, Quarles v. Philip Morris, Inc., 1 Empl. Prac. Dec. ¶ 9782 (E.D. Va. 1967). Charges were filed in September 1965. A right to sue letter was sent in November 1965 stating:

> Since your case was presented to the Commission in the early months of the administration of Title VII of the Civil Rights Act of 1964, the Commission was unable to undertake extensive conciliation activities. Additional conciliation efforts will be continued by the Commission.

Id. at 747.

issued by the Comptroller General reported that some charging parties now have to wait about two years for their complaints to be resolved by the EEOC. Some charges have remained in the backlog for as long as seven years.[74]

The EEOC expected no more than 2000 charges to be filed during its first year of operation, and its initial budget of 3.25 million dollars and staffing requirements had been geared to that expectation. The agency, however, received 8854 charges during its first fiscal year, most of which were claims of race discrimination. The number of charges steadily increased in subsequent years from 12,148 in 1969 to 71,023 in 1975.[75] The substantial backlog of cases has decreased the effectiveness of the EEOC since its first year of operation.

In March 1966, within the first year of the effective date of Title VII, the EEOC, the Department of Labor, and the Department of Justice combined their efforts to negotiate the settlement of an employment discrimination complaint against the Newport News Shipbuilding and Drydock Company in Newport News, Virginia.[76] The settlement was achieved without invoking the full administrative or judicial processes. New theories and enforcement techniques were utilized for the first and only time in the history of federal efforts to eliminate employment discrimination. The human rights/administrative approach and notions of group wrong were rejected. Reliance instead was placed upon an official written decision finding reasonable cause.[77] The negotiations proceeded on the theory that individuals and groups have a right to be free from discrimination. Although the seeds for innovative enforcement techniques were planted in this settlement, they never have been nurtured.[78]

The EEOC made some significant contributions to the enforcement effort during the Act's first decade. Perhaps its major contribution has been the publication of guidelines and interpretations of the substantive provisions of Title VII.[79] In many instances courts

74. COMPTROLLER REPORT, *supra* note 71, at 8.

75. 1 EEOC ANN. REP. 14-15 (1966). COMPTROLLER REPORT, *supra* note 71, at 3.

76. *See* Blumrosen, *The Newport News Agreement—One Brief Shining Moment in the Enforcement of Equal Employment Opportunity,* 1968 U. ILL. L.F. 269.

77. *Id.* at 275.

78. *See* Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970). Some cooperation among the federal agencies has been achieved within the framework of the judicial enforcement model. *See* United States v. Allegheny-Ludlum Indus., 517 F.2d 826 (5th Cir. 1975), *cert. denied,* 425 U.S. 944 (1976).

79. Guidelines have been issued on testing and personnel selection procedures, sex discrimination, national origin discrimination, and religious discrimination. 29 C.F.R. §§ 1604-1607 (1977).

have deferred to the guidelines as proper interpretations of the Act.[80] The EEOC published regulations that liberalized the administrative process,[81] and through its Office of General Counsel, gave its support to private litigants by filing amicus briefs on many difficult legal issues. The Department of Justice originally took the position that, except for those circumstances described in section 705(h),[82] it had the exclusive right to represent the EEOC on all Title VII legal issues. Section 705(h) authorizes EEOC attorneys to appear in court on behalf of the Commission, and it clearly authorizes the EEOC attorneys to seek enforcement of demands for information to complete its investigations, but it is questionable whether it allowed the EEOC to appear as amicus in private litigation. After some dispute between the EEOC and the Department of Justice, the EEOC prevailed and now appears regularly as amicus in private litigation.

B. The Department of Justice

Section 707 of Title VII authorized the Attorney General of the United States to file "pattern or practice" employment discrimination suits.[83] Enforcement was assigned to the Employment Section of the Department of Justice. Section 705(g)(6)[84] empowered the EEOC to refer cases to the Attorney General either to institute a pattern or practice suit or to intervene in a pending private action. Although Congress expressed a preference for voluntary and conciliatory methods of compliance, it is clear that Congress intended the principal enforcement mechanisms of the Act to be the combination of administrative enforcement by the EEOC and judicial enforcement under the pattern or practice authority of the Attorney General. Enforcement through private litigation was to play a subordinate yet supportive role to these federal efforts.

In 1971 the Employment Section of the Civil Rights Division consisted of a chief, thirty-two attorneys, and ten research assistants.[85] By that date it had filed seventy-five Title VII cases.[86] Some

80. *Compare* Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971) (deference given to EEOC testing guidelines) *with* General Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (EEOC interpretation of pregnancy disability guideline rejected).

81. 29 C.F.R. § 1601.1-.59 (1977). The EEOC issued revised procedural gnidelines in 1977, 42 Fed. Reg. 55,388 (1977).

82. 42 U.S.C. § 2000e-4(b)(2) (Supp. V 1975).

83. 42 U.S.C. § 2000e-6 (1970 & Supp. V 1975). The 1972 amendment to Title VII transferred pattern or practice authority to the EEOC. The authority to sue government units, however, remains vested solely with the Attorney General. 42 U.S.C. § 2000e-5(f)(1) (Supp. V 1975).

84. 42 U.S.C. § 2000e-4(g)(6) (Supp. V 1975).

85. 1971 FEDERAL EFFORT, *supra* note 14, at 118.

of these cases were brought to enforce subpoena demands of the EEOC; others involved intervention in pending private litigation.[87] All seventy-four cases involved discrimination against blacks. Prior to 1970 the Department of Justice brought no cases against defendants for discrimination against Spanish-surnamed Americans, women, or American Indians.[88] In comparison, between 1965 and 1971 the NAACP Legal Defense Fund,[89] the principal private legal organization involved in the enforcement of Title VII, and its cooperating attorneys had participated in over 150 cases[90]—more than twice as many as the Department of Justice.

The power granted by section 707 was potentially one of the strongest weapons to enforce Title VII, but the Department of Justice did not use all its authorized power. The failure of the Department of Justice to use its authority more vigorously has been attributed to several factors. First, it initially failed to appreciate the critical role that Congress had assigned to it in the enforcement scheme.[91] When compared to the vigorous enforcement campaign that it undertook with the public accommodation section of the Civil Rights Act of 1964,[92] the Justice Department's neglect of Title VII is apparent. The Department of Justice filed thirteen original cases and intervened in three cases under the public accommodation section during the first year the section was in effect.[93] The Department filed only one Title VII pattern or practice suit during the same period.[94] Only five pattern or practice cases had been filed

86. Below opposite the year are the number of Title VII cases filed by the Employment Section:

1965	—
1966	1
1967	—
1968	26
1969	20
1970	10
1971	18

The above figures were collected from *Attorney General Annual Reports* for the years 1966, 1968, 1969, 1970, and 1971.

87. *See, e.g.*, Local 53, Int'l Ass'n of Heat & Frost Insulators & Asbestos Workers v. Vogler, 407 F.2d 1047, 1051 (5th Cir. 1969) (private suits filed in November 1966; Department of Justice filed suit in December 1966); [1971] ATT'Y GEN. ANN. REP. 52-55.

88. 1971 FEDERAL EFFORT, *supra* note 14, at 136.

89. *See* text accompanying notes 99-106 *infra*.

90. *Hearings on S. 2515, S. 2617 & H.R. 1746 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 1st Sess. 243 (1971) (statement of Jack Greenberg, Director-Counsel, NAACP Legal Defense & Education Fund, Inc.).

91. 1971 FEDERAL EFFORT, *supra* note 14, at 118.

92. Title II of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 243 (codified at 42 U.S.C. §§ 2000a to 2000a-6 (1970)).

93. [1965] ATT'Y GEN. ANN. REP. 180-82.

94. [1966] ATT'Y GEN. ANN. REP. 211. The case was United States v. Building & Constr.

by the end of fiscal 1967.[95] Second, the Department of Justice failed to fill the void created by the ineffective performance of the EEOC and the Office of Federal Contracts Compliance.[96] Third, the growth in manpower and fiscal resources of the Civil Rights Division did not keep pace with the vast responsibilities assigned to it under the civil rights legislation enacted by Congress in the 1960's. In 1971 the Civil Rights Division was less than half the size of the Antitrust Division, less than two-thirds the size of the Tax Division, and considerably smaller than either the Criminal or Civil Divisions.[97] The inadequate allocation of resources to the Civil Rights Division demonstrates the low priority that the federal government assigned to the elimination of employment discrimination—a priority that was clearly contrary to the intent of Congress.[98]

C. *Private Efforts To Enforce Title VII*

Throughout the history of the enforcement of civil rights laws, private initiative has pioneered the way with law development programs; large scale governmental enforcement has followed private initiative.[99] The enforcement of Title VII has followed this pattern largely because of the default of the EEOC and the Department of Justice. The EEOC at first was ineffective because it had power to conciliate, but no power to compel. Initially deferring in substantial part to the EEOC and the Office of Federal Contract Compliance, the Department of Justice took a restrictive view of its role in Title VII enforcement. Development of the law under Title VII, and employment discrimination law generally, is the result of private enforcement. A significant factor in the private enforcement effort was that for almost a decade prior to Title VII the major civil rights litigation, primarily school desegregation cases, was brought before Southern federal judges. Because of the great volume of litigation following *Brown v. Board of Education,*[100] by 1965 a few of these judges had become sensitive to claims of racial discrimination.

The organization most involved in Title VII's private enforcement effort is the NAACP Legal Defense and Education Fund (Legal Defense Fund). Other civil rights organizations[101] played a

Trades Council, 271 F. Supp. 447 (E.D. Mo. 1966).

95. [1967] ATT'Y GEN. ANN. REP. 168.

96. 1971 FEDERAL EFFORT, *supra* note 14, at 118, 136.

97. *Id.* at 321.

98. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974).

99. *Hearings on S. 2515, S. 2617, H.R. 1746, supra* note 90, at 246.

100. 347 U.S. 483 (1954).

101. *E.g.,* Lawyers Constitutional Defense Committee, Employment Rights Project of Columbia Law School, and the Lawyer's Committee for Civil Rights Under Law. *See* Cooper,

substantial role in the development of the law during Title VII's first decade, but the Legal Defense Fund's program was the most expansive and programmatic. The Legal Defense Fund, a well-known instrument of American liberalism, is a professional resource made available through the loosely connected efforts of those who seek to form a powerful institution to reform the injustices of racial discrimination and poverty. In the mid-1960's the Legal Defense Fund annual income of more than four million dollars was raised entirely from private sources. It now has a staff of more than twenty civil rights lawyers stationed in New York City, field offices in California and four Southern states, and a network of about two hundred cooperating lawyers, most of whom are black. The Legal Defense Fund also receives assistance from social scientists, educators, commercial lawyers, law professors, foundation executives, liberal politicians, corporations, and government administrators.[102] One of the Legal Defense Fund's most notable achievements is *Brown v. Board of Education,* the United States Supreme Court decision that overruled the "separate but equal" doctrine in public education. A recent study of public interest lawyers described the changes that have occurred in the Legal Defense Fund since *Brown* as follows:

> The LDF, then, was a very different organization in 1975 from that which had planned and successfully brought the *Brown* case two decades earlier. By the mid-1960's the character of LDF litigation had been so thoroughly transformed that continued management by the staff of a decade earlier would have been virtually impossible. First, in the 1960's there was defense of the Movement: the freedom-riders, the sit-in demonstrators and the multitudes of other activists who required counsel during the heyday of Southern civil rights activities. Then, beginning in the late 1960's, the LDF became involved in what was to become its major field of activity during the next decade: Title VII employment discrimination litigation. A common thread running through these cases is the need for extensive lawyering manpower. The controlled, limited constitutional litigation of the *Brown* case could be managed by a handful of lawyers, a close-knit group of talented civil rights advocates. The staggering caseload of Movement activists and the subsequent massive workload of employment discrimination grievances required a substantial number of attorneys and, concomitantly, the additional resources to handle trials involving questions of fact.[103]

About the time the EEOC was undertaking its initial organizational efforts, the Legal Defense Fund began to implement the ini-

Introduction: Equal Employment Law Today, 5 COLUM. HUMAN RIGHTS L. REV. 263, 266, 266 n.26 (1973).

102. *See* M. MELTSNER, CRUEL AND UNUSUAL 6 (1973); LEGAL DEFENSE FUND, ANNUAL REPORT 1976/77; LEGAL DEFENSE FUND, 30 YEARS OF BUILDING AMERICAN JUSTICE (1970). The Legal Defense Fund is a separate organization from the NAACP. *See* Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law,* 28 STAN. L. REV. 207, 216 (1976).

103. Rabin, *supra* note 102, at 217.

tial stages of its Title VII enforcement program. On July 2, 1965, the Legal Defense Fund publicly announced its plan to assist black persons seeking redress of employment discrimination.[104] The aims of the project, initially limited to the summer of 1965 and ten Southern states, were to inform black persons of their Title VII rights, to solicit media publication of the new Act, to assist in the preparation of charges to be filed with the EEOC, to stimulate the interest of local leadership in an on-going project of a similar nature, and to train local workers in community organizations to participate in the enforcement of the new Act. Law students were employed for the summer to execute the aims of the project. The students met with local leaders, made presentations to church, business, and social groups, and worked with civil rights and civic groups to establish community-based fair employment committees. Attorneys cooperating with the Legal Defense Fund were available to provide legal assistance when necessary. The Title VII summer project was rather successful. By the end of the third week after the effective date of the Act, fifty-four of the 140 charges then pending before the EEOC had been filed through the efforts of the project.[105] Many of the 8854 charges received by the EEOC in its first fiscal year were attributable to the summer project.[106]

(1) Employment Discrimination Litigation Strategy

Employment discrimination litigation does not fit neatly into the traditional civil rights law reform model that was honed to a fine art in the campaign leading to the landmark decision in *Brown v. Board of Education.* Under the *Brown* model, organizational control over the sequence and pace of the litigation was the cornerstone of successful implementation of the Legal Defense Fund's goals.[107] An attorney who participated in the early programming of the litigation strategies of the Legal Defense Fund described the differences:

> The difficulties of litigation as a remedial tool without the black community independently generating its pressure are readily apparent. First, persons must know how to make a complaint and, at least initially, they may risk discharge from employment. The attorney must have sufficient facts about the internal operation of the plant in order to judge whether a violation of [Title

104. N.Y. Times, July 2, 1965, at 1, col. 3.

105. N.Y. Times, July 30, 1965, at 23, col. 3.

106. 1 EEOC ANN. REP. 58 (1966). *See also* EEOC, EMPLOYMENT PATTERNS IN THE TEXTILE INDUSTRY 10 (1967). The Legal Defense Fund participated in the filing of 1800 charges with the EEOC during the agency's first eighteen months of existence. LEGAL DEFENSE FUND, 30 YEARS OF LAW WHICH CHANGED AMERICA (1970).

107. *See* Greenberg, *Litigation for Social Change: Methods, Limits, and Role in Democracy,* 29 REC. N.Y.C.B.A. 320 (1974).

> VII] has occurred. Such information is difficult to ascertain; whereas in school desegregation suits the discriminatory pattern in one school district resembled the pattern in another, employment discrimination patterns differ from industry to industry. Also, the typical voting rights suit involved a Southern state agency with mediocre attorneys; the defendants in employment cases were the largest companies in the country, retaining highly paid, competent counsel who offered vigorous opposition and were extremely adept at delay. With the added ingredient of a hostile federal Southern judiciary, a single suit could last two years or more. In the interim, the plaintiffs may have lost faith in the efficacy of litigation, moved to other jobs, or accepted inadequate settlements. It is in this kind of trench warfare, with limited staff, limited financial resources, and the inherent capacity in the law for delay, that civil rights attorneys will face serious difficulties in having a major impact on employment discrimination.[108]

Employment discrimination litigation prior to Title VII presented easy and obvious targets such as explicit policies or union contracts excluding blacks from desirable jobs,[109] segregated departments and facilities,[110] or discriminatory pay scales.[111] Much of the overt racial discrimination was eliminated by the Plans for Progress[112] and state FEP Commission activities. By 1965 overt discrimination on the basis of race was not fashionable. The forms of employment discrimination at the time Title VII became effective were far more subtle. Major employers and unions had begun to cloak exclusionary and discriminatory policies in superficially neutral practices, such as testing and educational devices or seniority systems that appeared facially neutral or color-blind but operated to perpetuate the effects of past discrimination. A 1971 Senate report concluded:

> Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, perpetuation of the present effect of pre-act discriminatory practices through various institutional devices, and testing and validation requirements.[113]

---

108. Clark, *The Lawyer in the Civil Rights Movement—Catalytic Agent or Counter-Revolutionary?*, 19 KAN. L. REV. 459, 468 (1971). Professor Clark was associated with the Legal Defense Fund during the early days of mapping the Title VII strategy.

109. *See, e.g.*, James v. Marinship Corp., 25 Cal. 2d 721, 156 P.2d 329 (1944) (union with a work monopoly in an area could not enforce contract against blacks, whom it would not admit to membership because of race).

110. *See, e.g.*, Brotherhood of R.R. Trainmen v. Howard, 343 U.S. 768 (1952) (blacks who were in a segregated bargaining unit entitled to seek injunction against enforcement of contract to abolish their jobs); Local 12, United Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967).

111. *See, e.g.*, Alston v. School Bd., 112 F.2d 992 (4th Cir.), *cert. denied*, 311 U.S. 693 (1940) (school board required to pay black teachers on the same basis as white teachers).

112. *See* SOVERN, *supra* note 21, at 103, 140.

113. S. REP. No. 415, 92d Cong., 1st Sess. 5 (1971), *cited with approval in* Franks v. Bowman Transp. Co., 424 U.S. 747, 764 n.21 (1976).

With many of the overt incidents of deliberate racial or ethnic discrimination abandoned, what was left was systemic discrimination imbedded in basic personnel policies or organizational structures of companies and unions. Unlike racial discrimination, many overt manifestations of sex discrimination continued after 1965 because employers believed that the "bona fide occupational qualification" exception exempted their practices from the prohibitions of Title VII. The more subtle brand of discrimination did not constitute the easiest target for an effective litigation campaign to eradicate the effects of job discrimination. Consequently, Title VII litigation required substantial manpower to analyze the voluminous records and extremely technical factual and legal questions involved. Proving the existence of discrimination in hiring, testing, seniority, and promotion practices proved demanding.[114] The great effort required to litigate a Title VII case severely strains the limited resources of the private plaintiffs' bar,[115] while defendants are able to bear the demands of litigation with less difficulty. Consequently, one court has aptly described the posture of a private Title VII lawsuit as a "David-Goliath confrontation."[116]

A coherent body of employment discrimination law did not exist at the time Title VII became effective. Some federal and state case law[117] existed, but these decisions did not have the coherence to qualify as a corpus of law.[118] Moreover, much of the employment discrimination case law at the federal level was constitutionally premised because discrimination in the private sector was not subject generally to legal restraints. The existing case law did become useful, but not until efforts were devoted to the development of legal concepts of discrimination that could be applied to private employers. A litigation strategy patterned after *Brown* for several reasons

114. *See* Mazaroff, *Surviving the Avalanche: Defendant's Discovery in Title VII Litigation*, ABA LITIGATION SECTION 14 (Fall 1977) (copy on file with the *Vanderbilt Law Review*) ("Discovery in Title VII cases frequently is so burdensome that employers often weigh the costs of preparing their responses against the price of an early settlement.").

115. Griggs v. Duke Power Co., 401 U.S. 424 (1971), was a relatively easy case to prepare for trial as compared to most cases tried during the early stages of Title VII enforcement. *But see, e.g.*, James v. Stockham Valves & Fittings, 559 F.2d 310 (5th Cir. 1977); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974). Yet over 1000 lawyer hours were devoted to the litigation of *Griggs* through the Supreme Court level.

116. Jenkins v. United Gas Corp., 400 F.2d 28, 33 (5th Cir. 1968).

117. *See generally* GREENBERG, *supra* note 50, at 154-207.

118. *See* Cooper, *supra* note 101, at 265 ("I sometimes have difficulty convincing each new generation of law students that the *Griggs* principle is a startling breakthrough in the jurisprudence of fair employment, since the result is so clearly essential to achieving the equal employment objective of Title VII."). *See also* G. COOPER, H. RABB & H. RUBIN, FAIR EMPLOYMENT LITIGATION 31 (1975).

would not have been satisfactory to develop employment discrimination law. First, the enforcement authority of the Department of Justice and the parallel interest of other law reform organizations and individuals eliminated the possibility of a single entity such as the Legal Defense Fund having exclusive control over the sequence and pace of litigation.[119] Second, the *Brown* paradigm was ill-suited for the more subtle discriminatory tactics that had replaced the earlier, more blatant, forms of discrimination. Overt racial discrimination in employment was less prevalent in 1965 than in earlier years, but the effects of the pre-1965 overt discrimination continued pervasively. Third, the requirement of exhaustion of administrative remedies before the EEOC made it likely that ideal "test cases" would be settled or conciliated in an unsatisfactory way. Finally, Title VII presented procedural technicalities to private enforcement that required judicial clarification before substantive interpretations could be reached.[120]

Lawyering skills and techniques could have made the EEOC administrative process a more responsive conflict resolution device for employment discrimination claims, but the experience under older administrative enforcement procedures and the uncertain start of the EEOC suggested that the limited private resources could better be used in the judicial enforcement process. A major factor that ultimately determined the strategy to be used was recognition of the difficulty in identifying the best constellation of facts that would best raise the issues considered critical to programmatic law development. Two such issues were seniority and testing, both having been crystallized by prior case law. In *Myart v. Motorola*[121] the hearing examiner found that the tests used by the employer were culturally biased against the black claimant. This case was brought to the attention of Congress during the debate over Title VII, and to assuage the uproar by employers over the potential precedential value of the decision, section 703(h)[122] was included in the Act.[123] This section provides that it is not an unlawful employment practice for an employer to use a professionally developed ability test provided its use, administration, and results are not predicated on an

119. *See* Greenberg, *supra* note 107, at 331.

120. Before a federal district court can assert jurisdiction, a person claiming to be a victim of discrimination must first exhaust administrative remedies before the EEOC. *See* Belton, *supra* note 12, at 231-34.

121. 9 RACE REL. L. REP. 1911 (FEPC Ill. 1964).

122. 42 U.S.C. § 2000e-2(h) (Supp. V 1975).

123. *See* Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1649-51 (1969).

intention to discriminate. Seniority was at issue in *Whitfield v. Steelworkers Local 2708,*[124] in which black workers brought a duty of fair representation claim to end the present and continuing effects of a discriminatory seniority system. The seniority plan had been negotiated through the collective bargaining process, which purported to eliminate racially segregated lines of progression through a testing requirement. The challenged practice withstood judicial scrutiny, and as expected, defendants placed heavy reliance upon this decision in subsequent Title VII cases.

The Legal Defense Fund finally settled upon a litigation strategy requiring a large volume of cases in the federal courts, and a monitoring system to identify cases, issues, and industries that suggested a systematic law reform approach.[125] Individual cases were filed when appropriate, but the principal procedural mold was the class action. Because the Legal Defense Fund's staff was too small to handle the anticipated volume of cases, a project to develop standards for the appointment of counsel was considered.[126] This strategy, however, was assigned a low priority because of the need first to develop the legal concepts of employment discrimination. Legal Defense Fund attorneys drafted model pleadings and discovery papers. Professors at leading law schools agreed to "supervise" special projects such as the recruitment of recent law school graduates associated with major Wall Street law firms to draft discovery papers, research, and write briefs. Other professors acted as "sounding boards" on procedural and substantive issues that were expected to be raised. Contacts were established with the EEOC, particularly with its Office of General Counsel, to assure that the

124. 263 F.2d 546 (5th Cir.), *cert. denied,* 360 U.S. 902 (1959).

125. The tobacco industry became the subject of much of the Legal Defense Fund's Title VII litigation. *See, e.g.*, Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir.), *cert. denied,* 429 U.S. 920 (1976); Russell v. American Tobacco Co., 528 F.2d 357 (4th Cir. 1975), *cert. denied,* 425 U.S. 935 (1976); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *cert. dismissed,* 404 U.S. 1006 (1971); Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968). The following industries also were the subject of much litigation. Textile: Lea v. Cone Mills Corp., 438 F.2d 86 (4th Cir. 1971); *see* EEOC, EMPLOYMENT PATTERNS IN THE PAPER INDUSTRY: SUMMARY OF TRANSCRIPT OF HEARING OF JANUARY 12-13 (1967). Pulp and Paper: Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Miller v. International Paper Co., 408 F.2d 283 (5th Cir. 1969). Railroad: Rock v. Norfolk & W.R.R., 473 F.2d 1344 (4th Cir.), *cert. denied,* 412 U.S. 933 (1973); English v. Seaboard Coastline R.R., 10 Empl. Prac. Dec. ¶ 10,476 (S.D. Ga. 1975). Steel: Hardy v. United States Steel Corp., 371 F. Supp. 1045 (N.D. Ala. 1973). In some instances various groups and organizations participated jointly in litigation projects. *See, e.g.,* Sledge v. J.P. Stevens & Co., 12 Empl. Prac. Dec. ¶ 11,248 (E.D.N.C. 1976).

126. The courts have not been uniform on the standard to be applied for appointment of counsel in Title VII cases. *Compare* Davis v. Boeing Co., 2 Fair Empl. Prac. Cas. 62 (W.D. Wash. 1969) *with* Norpel v. Iowa Highway Patrol, 4 Fair Empl. Prac. Cas. 391 (N.D. Iowa 1971).

EEOC would have some input from a representative of victims of employment discrimination on issues of importance to the administrative enforcement process. Regular communication was maintained among the organizations engaged in the enforcement process to coordinate the various strategies of enforcement. Finally, on October 18, 1965, less than four months after the effective date of the Act, the Legal Defense Fund and a cooperating attorney filed the first civil action under Title VII.[127]

(2) Litigation Strategy and Development of the Law

The first several years of private enforcement were devoted to settling procedural issues. The requirement that plaintiffs exhaust all their administrative remedies before the EEOC offered defendants an opportunity to raise several issues. Almost all of these issues were decided in favor of plaintiffs. A principal issue was whether the EEOC must initiate an investigation and attempt conciliation within sixty days following receipt of a complaint and before notifying the charging party of his right to bring a civil action. Courts ruled that the jurisdictional prerequisites were satisfied when a plaintiff filed a timely charge with the EEOC, and after receipt of a notice of right to sue, filed a timely complaint in the district court. The failure of the EEOC to undertake an investigation of the claim or to attempt conciliation was not jurisdictionally fatal. The courts gave an expansive reading to the claims that could be raised in the complaint based upon the allegations made in the charge, and they made clear that the judiciary would be the final arbiter of claims arising under Title VII even though other remedial avenues, such as state commissions, collective bargaining agreements, or other federal laws and agencies, were available to the claimants. Most procedural issues were settled in the lower courts, but one issue, involving the relationship between Title VII and the arbitration process, was decided by the Supreme Court. The Court, in *Alexander v. Gardner-Denver Co.*,[128] held that the two remedies were separate and distinct, but that courts could consider arbitral decisions in Title VII cases. *Alexander* raised many questions involving the obligation, appropriateness, and competency of the arbitral process to accommodate claims of employment discrimination based on race or sex. Today these issues remain unresolved.[129]

127. Brinkley v. Great Atl. & Pac. Tea Co., No. 65-1107 (E.D.N.C. 1965).

128. 115 U.S. 36 (1974).

129. *See* Edwards, *Labor Arbitration at the Crossroads: The "Common Law of the Shop" v. External Law*, 32 ARB. J. 65 (1977). *See generally* THE FUTURE OF LABOR ARBITRATION IN AMERICA (J. Correge, V. Hughes, & M. Stone, eds. 1976).

The judicial developments on the issue of exhaustion of administrative remedies and an EEOC regulation[130] allowing a charging party to request a right to sue letter after the charge has been pending before the EEOC for the period set forth in Title VII provided plaintiffs an opportunity to begin a program of enforcement more akin to the *Brown* paradigm. With the assistance of institutional attorneys, many complaints were filed with the EEOC, but a right to sue letter generally was requested only in the cases that offered the greatest opportunity for law development. The limited private resources were devoted to these important cases as part of the continuing process of law development. At the same time, other claims remained in the administrative process until their conclusion, or until noninstitutional legal representation could be obtained. Even under this procedure only a limited number of the potentially "good cases" that were considered appropriate for law development could be handled by the private plaintiffs' bar.

If the short statutory time periods (then 30 days, now 180 days) had been upheld as mandatory and the EEOC had been required to complete the administrative process within these periods, the result would have been undesirable. The federal courts would have been flooded with Title VII cases, or many complainants would have lost their valid claims because of an inability to find an attorney willing to represent them. On the other hand, if the courts had not held the time periods to be mandatory, but instead had required the EEOC to complete the administrative process before the right to sue letter could be issued, private enforcement efforts could have been delayed and frustrated.

Plaintiffs' access to Title VII class action proceedings and defendants' inability to obtain jury trials were two procedural matters critical to private enforcement. Title VII was the first federal civil rights legislation that imposed an exhaustion of administrative remedies requirement. Defendants argued that class actions allowed class members who had filed no charges with the EEOC to circumvent this requirement. Defendants also argued that the circumstances surrounding the claim of an aggrieved employee differed substantially from the claims of other aggrieved employees. In addition, Rule 23 of the Federal Rules of Civil Procedure was amended in 1966 to eliminate the "true," "hybrid," and "spurious" distinctions under the old rnles.[131] Civil rights cases under the old rules had been

130. 29 C.F.R. § 1601.25b(c) (1977).

131. *See* Frankel, *Some Preliminary Observations Concerning Civil Rule 23,* 43 F.R.D. 39, 43 (1967).

classified as spurious; thus if a class action was unsuccessful, the doctrine of res judicata did not preclude the institution of the same suit by another member of the class who was unnamed in the first suit. The 1966 amendment was designed to remedy this situation.[132] The courts, however, always have been receptive to Title VII class actions. Three important cases established the doctrinal framework for Title VII class actions. In *Hall v. Werthan Bag Corp.*,[133] the district court in allowing a Title VII class action held that:

> Racial discrimination is by definition a class discrimination. If it exists, it applies throughout the class. This does not mean, however, that the effects of the discrimination will always be felt equally by all the members of the racial class. For example, if an employer's racially discriminatory preferences are merely one of several factors which enter into employment decisions, the unlawful preferences may or may not be controlling in regard to the hiring or promotion of a particular member of the racial class. But although the actual effects of a discriminatory policy may thus vary throughout the class, the existence of the discriminatory policy threatens the entire class. And whether the Damoclean threat of a racially discriminatory policy hangs over the racial class is a question of fact common to all the members of the class.[134]

This line of reasoning was followed by the Fifth Circuit in *Jenkins v. United Gas Corp.*[135] in reversing a lower court decision denying a class action. The district court had denied class status on the ground of mootness because after the case had been filed plaintiff received the job in question. The district court believed that Title VII cases were substantively different from school desegregation cases. Finally, in *Oatis v. Crown Zellerbach Corp.*[136] the Fifth Circuit adopted the Supreme Court's Title II public accommodations rationale in holding that a Title VII plaintiff is no less a "private attorney general" than a plaintiff in a public accommodation case. By successfully obtaining an injunction for himself, the Title VII class action plaintiff vindicates a policy that Congress considered to be of the highest priority.[137] Reaffirming the *Hall v. Werthan Bag Corp.* result that racial discrimination is by definition class discrimination, the Fifth Circuit held that requiring a multiplicity of separate, identical charges to be filed with the EEOC against the same employer as a prerequisite to court enforcement would frustrate our system of justice and order.[138] The Supreme Court approved this

132. *See Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1394-1402 (1976).

133. 251 F. Supp. 184 (M.D. Tenn. 1966).

134. *Id.* at 186.

135. 400 F.2d 28 (5th Cir. 1968).

136. 398 F.2d 496 (5th Cir. 1968).

137. *Id.* at 499.

138. *Id.*

result in *Albemarle Paper Co. v. Moody.*[139] The development of the Title VII class action was critical in the private enforcement efforts. It provided an enforcement technique that is substantially similar to the federal pattern and practice authority. Law development can occur in individual cases as well, but to require implementation of an established principle on an individual-by-individual basis soon would have dissipated the limited resources of the private plaintiffs' bar.

In school desegregation and voting rights cases the question of a jury trial is not an issue because usually no monetary relief is sought. In Title VII cases back pay may be awarded as part of the relief.[140] Traditionally, monetary relief has been treated as a legal remedy. Several Supreme Court cases have held that when legal and equitable claims are asserted in the same case, because the seventh amendment guarantees a jury trial for the legal claim, the defendant is entitled to have the legal claim tried before the equitable claim.[141] The jury trial issue had an impact on the drafting of the model Title VII complaints. Most of the early charges filed with the EEOC came from Southern states,[142] and consequently most of the early Title VII litigation took place in federal courts in the South. Plaintiffs were concerned that meaningful law development would be impossible if employment discrimination cases had to be tried before Southern juries. In 1965 neither courts nor legal scholars had developed a workable concept of discrimination, and it was not unreasonable to anticipate that judges in their charges to juries would consider freedom from discrimination to be a moral rather than a legal right. A jury under such instruction could be expected to replicate the experience under the human rights/administrative model.[143]

With back pay a possibility, a major issue for the courts was whether Title VII proceedings were purely equitable claims or whether they involved mixed claims of law and equity. Some Supreme Court precedents supported plaintiffs who argued that Title VII claims were purely equitable and not subject to the seventh amendment jury trial guarantee.[144] In the model complaints the prayer for relief specifically sought injunctive relief, clearly not enti-

139. 422 U.S. 405, 414 n.8 (1975).

140. 42 U.S.C. § 2000e-5(g) (Supp. V 1975).

141. *See, e.g.*, Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959).

142. 1 EEOC ANN. REP. 7 (1966).

143. *See* notes 43-44 *supra* and accompanying text.

144. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (back pay merely incidental to equitable relief does not carry with it a right to jury trial).

tling the defendant to a jury trial. To preserve plaintiffs' claims for back pay, the prayer for relief simply requested "other additional relief as may appear to the Court to be equitable and just."[145] Eventually the courts held that defendants were not entitled to a jury trial because Title VII claims are equitable and back pay is simply part of the equitable relief to which plaintiffs may be entitled.[146] The Supreme Court had not directly addressed this issue, but its decision in *Albemarle Paper Co. v. Moody*,[147] holding that back pay relief is equitable, clearly supported the rulings of the lower courts. The resolution of the jury trial issue foreclosed any possibility that punitive damages would be available in Title VII cases. Although some lower courts have held that punitive damages are available in Title VII cases,[148] the Supreme Court decisions in *Curtis v. Loether*,[149] a housing discrimination case, and *Lorillard Corp. v. Pons*,[150] an age discrimination case, support the proposition that punitive damages are not available under Title VII.[151]

Decisions on the merits began to appear within two years after the effective date of the Act. The initial cases involved claims of disparate treatment, such as practices that were facially discriminatory. Defendants in *Gunn v. Layne & Bowler, Inc.*,[152] after the effective date of the Act continued dual seniority lines for black and white employees. Because the prohibition against sex discrimination was included as a "joke" to defeat the Act, it is ironic that the first cases included several decisions now considered to be the leading cases on sex discrimination. In *Weeks v. Southern Bell Telephone & Telegraph Co.*[153] the company excluded women from certain jobs because of a weight-lifting limitation. In *Bowe v. Colgate-*

145. *See* Robinson v. Lorillard Corp., 444 F.2d 791, 802 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971) (holding this language in the prayer for relief sufficient to support a claim for back pay).

146. *See, e.g.*, Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969). An advisory jury may be used in Title VII cases if justifiable circumstances are present. Moss v. Lane Co., 471 F.2d 853 (4th Cir. 1973); Cox v. Babcock & Wilcox Co., 471 F.2d 13 (4th Cir. 1972).

147. 422 U.S. 405 (1975). *But see id.* at 442-43 (Rehnquist, J., concurring).

148. Evans v. Sheraton Park Hotel, 503 F.2d 177, 179, 186 (D.C. Cir. 1974) (upholding $500 award for harassment of plaintiff for filing Title VII complaint; court suggested that the award was proper as back pay); Rosen v. Public Serv. Elec. & Gas Co., 477 F.2d 90, 96 (3d Cir. 1973).

149. 415 U.S. 189 (1974).

150. 98 S. Ct. 866 (1978).

151. *See, e.g.*, EEOC v. Detroit Edison Co., 515 F.2d 301, 308-10 (6th Cir. 1975), *vacated and remanded*, 431 U.S. 951 (1977).

152. 1 Empl. Prac. Dec. ¶ 9823 (W.D. Tenn. 1967).

153. 277 F. Supp. 117 (S.D. Ga. 1967), *aff'd in part, rev'd in part*, 408 F.2d 228 (5th Cir. 1969).

Palmolive Co.,[154] the company and union continued to maintain gender-based seniority rosters and jobs after Title VII's effective date.

Griggs v. Duke Power Co.,[155] a product of private enforcement, is the most important case in employment discrimination law. Its importance parallels that of *Brown v. Board of Education* in school desegregation law. *Griggs* established fundamental doctrines of Title VII law. In addition, it validated the lower courts' liberal interpretations of Title VII, which provided meaningful protection for victims of employment discrimination. *Griggs* developed from the programmatic enforcement efforts of the Legal Defense Fund; consequently it illustrates the strategies in the private enforcement of Title VII. Other leading cases, such as *Albemarle Paper Co. v. Moody*,[156] upholding back pay awards, *Franks v. Bowman Transportation Co.*,[157] allowing post-Act victims in a seniority discrimination case to receive retroactive seniority, and *Quarles v. Philip Morris, Inc.*,[158] allowing seniority adjustments for victims of pre-Act discrimination, developed from some of the same strategies. Most of the major arguments on issues of Title VII liability were raised in *Griggs*.

Like most of the earlier Title VII cases, *Griggs* arose against the backdrop of long years of rigid and persistent racial discrimination. Black employees had been relegated to a handful of physically demanding jobs. Until the early 1960's, locker rooms, showers, drinking fountains, and other facilities were maintained by custom on a segregated basis.[159] For operational purposes, the plant's work force was divided into five main departments plus the labor department in which the plaintiffs were employed. In 1955, nine years prior to the effective date of Title VII, Duke Power initiated a new policy of hiring and advancement for whites. White applicants, except those seeking employment in the labor department, were required to have a high school education or its equivalent. On September 10, 1965, approximately two months after Title VII became effective, and almost a year before the EEOC issued its first employment testing guidelines,[160] Duke Power instituted a testing program to provide an

154. 272 F. Supp. 332 (S.D. Ind. 1967), *aff'd in part, rev'd in part*, 416 F.2d 711 (7th Cir. 1969).

155. 401 U.S. 424 (1971).

156. 422 U.S. 405 (1975).

157. 424 U.S. 757 (1976).

158. 279 F. Supp. 505 (E.D. Va. 1968).

159. Record at 27b, Griggs v. Duke Power Co., 401 U.S. 424 (1971).

160. EEOC GUIDELINES ON EMPLOYMENT TESTING PROCEDURES (1966). New and more detailed guidelines on employee selection procedures, not limited to testing, were subse-

opportunity for white employees who did not have a high school education to transfer from the labor department to the more desirable departments. White employees in departments other than the labor department who did not have a high school diploma were not required to take the tests.

During pretrial discovery, efforts were made to obtain pass/fail scores for black and white employees and applicants, but the available evidence was inconclusive. Several of the plaintiffs stated during pretrial depositions that they had taken the tests, but records could not be located. Of the thirty-seven applicants for employment between August 2 and January 17, 1977, all six black applicants and twenty-nine white applicants declined to take the tests.[161] None of the applicants were offered employment because no job vacancies existed. More useful statistics were obtained on the number of black and white employees who had a high school diploma: three out of fourteen blacks and fifteen out of eighty-one whites.[162] The trial evidence was developed only from Duke Power's Dan River steam operation, which had a work force of less than 100 employees, even though Duke Power had facilities in other locations for a combined work force that exceeded 5000 employees.

On March 15, 1966, the fourteen black employees at the Dan River steam station filed complaints with the EEOC alleging employment discrimination. These charges grew out of the Title VII summer project. The EEOC investigation[163] disclosed that the fourteen black employees occupied the same semiskilled job classification of laborer; none had ever been promoted even though some had as much as twenty years of seniority. No black earned more than $1.65 per hour, whereas all white employees earned more than $1.81 per hour. Some white employees had been upgraded without testing even though they lacked a high school education. Moreover, segregated facilities were maintained. Whites were permitted to work overtime, but blacks were not. Based upon its investigation, the EEOC made a reasonable cause finding on September 8, 1966. Because conciliation efforts were unsuccessful, on September 9, 1966, the EEOC notified plaintiffs of their right to file suit in federal court.

On October 20, 1966, plaintiffs filed a class action complaint in the United States District Court for the Middle District of North

quently issued by the EEOC. The current guidelines are published at 29 C.F.R. §§ 1607.1-.14 (1977).

161. Record at 74b, Griggs v. Duke Power Co., 401 U.S. 424 (1971).

162. *Id.* at 126b-27b.

163. *Id.* at 1b.

Carolina. The allegations in the complaint closely paralleled the EEOC findings, but went one step further on the testing issue. Plaintiffs alleged that the tests used by Duke Power had not been developed professionally within the meaning of section 703(h) of Title VII. Plaintiffs requested injunctive relief, costs, reasonable attorneys fees, and "such other relief as may appear equitable and just."[164] The prayer for relief did not ask specifically for back pay because of the concern over the necessity of a jury trial. The phrase "other relief as may be equitable and just," however, preserved the claim for back pay. The complaint was grounded solely upon Title VII. Duke Power questioned the plaintiffs' standing to maintain a class action,[165] generally denied the allegations, and asserted two defenses—failure to state a claim and good faith reliance upon an opinion of the General Counsel for the EEOC. Responding to plaintiffs' testing claim, Duke Power simply asserted that its tests were applicable to all similarly situated employees regardless of race or color. On April 12, 1967, the district court ruled in the plaintiffs' favor on the class action issue.

During pretrial discovery issues concerning the legality of the departmental structure, the segregated facilities, and the testing and high school requirements as applied to black applicants were dropped from the case. The case presented two issues to the district court. The first issue was whether, given defendant's practice of relegating blacks to the less desirable department, the defendant lawfully could condition transfers to the more desirable departments upon the possession of a high school diploma or success on tests when neither a high school education nor the ability to pass the tests was required to perform the jobs in the more desirable departments. The second issue was whether the company's allocation of overtime violated Title VII.

The case was tried on February 6 and 9, 1968. The district court ruled against the plaintiffs on both issues on September 30, 1968.[166] To resolve the first issue the court relied on section 703(h),[167] which exempts professionally developed ability tests administered with no "intention to discriminate" from the prohibitions of Title VII. The effect of the court's interpretation of the term "intentionally" required Title VII plaintiffs to prove subjective intent to discriminate on the part of defendants.[168] The court found that Congress intended

164. *See* note 145 *supra* and accompanying text.

165. *See* notes 131-39 *supra* and accompanying text.

166. 292 F. Supp. 243, 251-52 (M.D.N.C. 1968).

167. 42 U.S.C. § 2000e-2(h) (1970).

168. The terms "to discriminate," "intended," and "intentionally" are found in various sections of Title VII.

Title VII to be applied prospectively only, and that discriminatory practices committed prior to July 2, 1965, could not be remedied. The court recognized that plaintiffs had been victims of past discrimination, but nevertheless held that plaintiffs had been subject to racially neutral practices since the effective date of the Act. Refusing to follow the principle established in *Quarles v. Philip Morris, Inc.*,[169] the court said: "If the decision in *Quarles* may be interpreted to hold that present consequences of past discrimination are covered by the Act, this Court holds otherwise."[170]

The court rejected plaintiffs' argument that section 703(h) requires tests to be job-related. Plaintiffs' position was supported by the 1966 EEOC guideline stating that "professionally developed ability test means a test which fairly measures the knowledge or skills required by the particular job or class of jobs which the appellant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs."[171] The district court read the legislative history of section 703(h) as protecting the employer's right to use ability tests in hiring and promotions, so long as the tests have a professional stamp of approval and are applied in a nondiscriminatory manner. The district court concluded that "[n]owhere does the Act require that employers may utilize only those tests which accurately measure the ability and skills required of a particular job or group of jobs."[172] According to the district court, section 703(h) would have protected the practice of using a college entrance examination to select retail salespersons so long as the exam was prepared by someone in the business of preparing college entrance exams. In addition, the court sustained the high school education requirement for transferring out of the labor department by finding a legitimate business purpose underlying this requirement. The district court's holding that "professionally developed" simply means "prepared by someone who is a professional testmaker," and its rejection of the *Quarles* "present effects of past discrimination" theory made an appeal inevitable.

Griggs was one of the first cases to be tried under Title VII, and nothing during the pretrial discovery or the trial indicated its potential as a landmark case. Further appellate review probably would not have been sought had the district court decided the case on the basis of plaintiffs' failure to show that transfer requirements re-

169. 279 F. Supp. 505 (E.D. Va. 1968).
170. *Id.*
171. *See* note 160 *supra.*
172. 292 F. Supp. at 250.

jected blacks at a greater rate than it rejected whites. No direct evidence on the test rejection rates for blacks and whites was available, but even if such evidence had been available, the small number of employees at the plant probably would not have been a sufficient sample to be statistically significant. Nevertheless, a decision was made to go through the first level in the appellate process.

By a split decision, the court of appeals reversed the district court in so far as it denied relief to plaintiffs who had been employed prior to the testing requirement.[173] In an opinion by Judge Boreman, the court held that the *Quarles* holding that present consequences of past discrimination violate Title VII was correct. Under the *Quarles* principle, the six plaintiffs who were hired before the institution of the education and testing requirement were entitled to relief. For those hired after the institution of these requirements, the court found no continuing effects of prior discrimination. The court also found no present discrimination because the tests and high school requirements fulfilled genuine business needs and were adopted without the subjective intent to discriminate against black employees and applicants. The court rejected plaintiffs' contention that the tests must be job-related by stating that "the legislative history of § 703(h) will not support the view that a 'professionally developed ability test' *must* be job-related."[174]

Concerned that the majority opinion would have the effect of sanctioning discriminatory employment practices and noting that the decision would place the Fourth and Fifth Circuits in direct conflict, Judge Sobeloff dissented partially.[175] He concurred with the majority's holding that Title VII prohibitions encompass the present and continuing effects of past discrimination and that Duke Power had discriminated against the six plaintiffs hired before the institution of the high school requirement. To Judge Sobeloff, however, using a transfer standard that was not job-related to "freeze out" blacks from more desirable jobs violated Title VII. The "freezing" principle was adopted from the voting rights cases.[176] The theory describes a requirement that theoretically applies equally to all, but maintains an advantage that one class has over another.[177]

173. Griggs v. Duke Power Co., 420 F.2d 1225 (4th Cir. 1970).

174. *Id.* at 1234 (emphasis by the court).

175. *Id.* at 1237. A few months earlier the Fifth Circuit had decided Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970), one of the leading Title VII cases on the present effects of past discrimination theory.

176. 420 F.2d at 1247-48. *See* Fiss, Gaston County v. United States: *Fruition of the Freezing Principle*, 1969 SUP. COURT REV. 379.

177. 420 F.2d at 1247-48.

Judge Sobeloff adopted the Eighth Circuit's "business needs" test, which requires a demonstration that an employment criterion is job-related. Judge Sobeloff found that the business purpose asserted by Duke Power—to upgrade the work force and to insure promotability—was insufficient to make the tests job-related.[178] Judge Sobeloff concluded that Duke Power had violated Title VII by using transfer requirements not related to job performance to exclude blacks from the more desirable, predominantly white, departments.

Because the appeal to the court of appeals was not entirely successful for the plaintiffs, the Legal Defense Fund had to decide whether to appeal to the United States Supreme Court. *Griggs* was not an ideal "test case" for review by the Supreme Court. The term "test case" is not a self-defining concept, and its definition currently is being debated.[179] Some commentators argue that appropriate test cases stretch old concepts. Others look at the case's possible impact in numbers beyond the immediate litigants, and still others look at the case's potential for stimulating reform in social institutions. In deciding whether to appeal *Griggs* to the Supreme Court, several elements of the case were considered. The first consideration was whether the case was intellectually or politically mature. The Legal Defense Fund had to evaluate critically whether the Court was prepared to make a major change in the law by enunciating a doctrine that would have widespread impact. After the decision of the court of appeals, *Griggs* presented an issue ripe for review. Section 703(h) had been included in Title VII because of the congressional debate over *Myart v. Motorola.*[180] The court of appeals had decided that tests did not have to be job-related to fall within the protection of section 703(h). The use of tests and educational requirements was a form of the subtle, facially neutral racial discrimination that replaced overt discrimination about the time of Title VII's enactment.[181]

The second, and more difficult, consideration was whether the

178. United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969).

179. *See generally* J. GREENBERG, JUDICIAL PROCESS AND SOCIAL CHANGES: CONSTITUTIONAL LITIGATION, CASES AND MATERIALS (1977); M. METSNER & P. SHRAG, PUBLIC INTEREST ADVOCACY: MATERIALS FOR CLINICAL LEGAL EDUCATION 77-124 (1974) (comments on planning test litigation); LaFrance, *Constitutional Law for the Poor:* Boddie v. Connecticut, 1971 DUKE L.J. 487, 492-97.

180. 9 RACE REL. L. REP. 1911 (FEPC Ill. 1964).

181. A study made by the publisher of the Wonderlic test after *Griggs* had been decided in the district court concluded that this test has an adverse impact on blacks. A Study of 38,452 Job Applicants for Affirmative Action Programs 2-4 (1972) (copy on file at the *Vanderbilt Law Review).*

record upon which the case was built presented a sympathetic case for plaintiffs. First, there was no evidence that blacks at the Duke Power plant were scoring less well on the tests than whites.[182] Second, the tests had not been chosen arbitrarily; they had been adopted on the recommendation of a professional psychologist. Third, the immediate impact of the court of appeals decision affected only four blacks, and the company was willing to waive the test requirements if these blacks obtained a high school diploma or its equivalent. Fourth, Duke Power's announced intentions to install nuclear power equipment made the jobs appear to require some degree of sophistication.[183] Fifth, the high school diploma requirement could be viewed as a benign requirement to encourage children to stay in school. Duke Power also had a policy to subsidize certain employees who sought diplomas through adult education.[184] Sixth, other cases such as *Albemarle Paper Co. v. Moody*[185] and *Hicks v. Crown Zellerbach Corp.*[186] were being developed in pretrial proceedings to present more appealing records to raise the testing issues.[187]

The third consideration was whether the interests of the plaintiffs were compatible with the interests of all others who would benefit from a successful resolution of the issue. An affirmance by the Supreme Court would have affected not only the four blacks who did not have a high school education but also millions of other blacks. A reversal could have had the same result. These risks had to be weighed against the Legal Defense Fund's concern for an institutional programmatic development of Title VII law.

One consideration weighing heavily in favor of attempting to obtain a writ of certiorari was the powerful dissent by Judge Sobeloff, one of the most respected federal judges in civil rights litigation. Judge Sobeloff set the tone for the discussion of review in the Supreme Court by stating:

> The decision we make today is likely to be as pervasive in its effect as any we have been called upon to make in recent years. . . .
>
> . . . .
>
> The case presents the broad question of the use of allegedly objective employment criteria resulting in the denial to Negroes of jobs for which they are potentially qualified. . . . On this issue hangs the vitality of the employment provisions (Title VII) of the 1964 Civil Rights Act: whether the Act shall

182. *See* text accompanying note 161 *supra*.

183. Record at 93a, Griggs v. Duke Power Co., 401 U.S. 424 (1971).

184. *Id.* at 91a, 104a.

185. 422 U.S. 405 (1975).

186. 319 F. Supp. 314 (E.D. La. 1970).

187. A letter setting forth the reasons review should not be sought before the Supreme Court, as drafted by one of counsel for petitioners, is found in G. COOPER & H. RABB, EQUAL EMPLOYMENT LAW AND LITIGATION 497 (1972).

> remain a potent tool for equalization of employment opportunity or shall be reduced to mellifluous but hollow rhetoric.[188]

Moreover, the reality of chance was an ever-present consideration. Much that occurs in the courts is not subject to control, such as the chance occurrences of any lawsuit, the defection of the plaintiffs or capitulation of defendants, disagreement among counsel, unanticipated precedents, and the effect of public sentiment and political currents on adjudication. The EEOC and Department of Justice argued strenuously against obtaining a writ of certiorari. They believed that *Griggs* was an aberrant decision whose record was weaker than other cases pending in the lower courts.

A decision was made to seek review, and the petition for a writ of certiorari was filed on April 9, 1970. The question raised in the petition was whether the use of psychological tests and related formal education requirements as employment criteria violated the race discrimination prohibition of Title VII if they are not related to job performance and disqualify many blacks but few whites. The Supreme Court granted review on June 29, 1970, and arguments were heard on December 19, 1970.

On March 31, 1971, the Supreme Court rendered its opinion.[189] In an opinion written by Chief Justice Burger, a unanimous Court, with Justice Brennan not participating, reversed the court of appeals. *Griggs* firmly established the principle that although subjective motivation, when shown, will establish the requisite intent to establish a violation of the Act, intent under Title VII does not require a showing of subjective motivation.[190] A cornerstone of *Griggs* is its holding that "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."[191] Thus, when a plaintiff can demonstrate that an employment practice has a disparate impact or effect upon a protected group of which he or she is a member, a prima facie violation is established, and the plaintiff is entitled to relief unless the defendant can show business necessity.[192]

The issue in *Griggs* was the legality of a testing practice, but the legal theory enunciated has been applied to a wide range of employment practices such as recruitment, assignment, seniority and promotion practices, and supervisory selection procedures.[193]

188. 420 F.2d 1225, 1237-38 (4th Cir. 1971) (Sobeloff, J., dissenting).

189. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

190. "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Id.* at 431.

191. *Id.* at 432 (emphasis by the Court).

192. *Id.* at 431. ("The touchstone is business necessity.").

193. *See* Belton, *supra* note 12, at 246 nn.135-41.

Griggs also laid the foundation for other principles of Title VII law that have been more fully developed in subsequent Supreme Court and lower federal court decisions. Other post-*Griggs* Title VII principles include the use of statistical evidence to establish a prima facie case,[194] the order and allocation of the burdens of proof,[195] the doctrine of business necessity,[196] the standard of job relatedness,[197] and the deference to be accorded to EEOC guidelines.[198]

Before *Griggs* the lower federal courts had enunciated a legal theory primarily applicable to the seniority discrimination cases. Seniority practices affected adversely blacks and females who were employed before 1965. In many of the seniority discrimination cases, employers had engaged in overt hiring discrimination before the effective date of Title VII. Although the overt discrimination had ceased before 1965, collective bargaining agreements containing facially neutral seniority systems, which determined the order and preference of job movement, perpetuated the effects of the pre-Act discrimination. In these cases the issue was whether section 703(h),[199] which provides that it is not unlawful to apply different terms or conditions of employment pursuant to a bona fide seniority system as long as no intention to discriminate exists, protects a seniority system that perpetuates pre-Act discrimination. *Quarles v. Philip Morris, Inc.*,[200] the seminal Title VII seniority discrimination case, which developed out of charges filed with the EEOC through the Legal Defense Fund summer project, held that on the above facts a violation can be established under a perpetuation or "freeze" theory. *Quarles* presented the first opportunity to test the potential precedential impact of *Whitfield v. Steelworkers Local 2708*.[201] Judge Butzner rejected defendants' invitation to dispose of *Quarles* on the *Whitfield v. Steelworkers Local 2708* rationale. Judge Butzner held that the proper construction of section 703(h) and its legislative history made it apparent that "Congress did not intend to freeze an entire generation of Negro employees into dis-

194. *See, e.g.*, Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 225 n.34 (5th Cir. 1974).

195. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Plaintiff has the burden of demonstrating a prima facie violation; defendant has burden of proving business necessity, a legitimate nondiscrimination reason, a bona fide occupational qualification, or undue hardship.

196. *See, e.g.*, Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

197. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

198. *Id.*

199. 42 U.S.C. § 2000e-2(h) (1970).

200. 279 F. Supp. 505 (E.D. Va. 1968).

201. 263 F.2d 546 (5th Cir.), *cert. denied*, 360 U.S. 902 (1959).

criminatory patterns that existed before the act."[202] Judge Butzner ruled that "[p]resent discrimination may be found in contractual provisions that appear fair upon their face, but which operate unfairly because of the historical discrimination that undergirds them."[203] The critical holding in *Quarles* was that a seniority system that has its genesis in discrimination is not bona fide according to section 703(h).[204]

The *Quarles* theory was developed more fully in *Local 189, United Papermakers & Paperworkers v. United States.*[205] *Local 189* began with federal efforts to enforce Executive Order 11,246. After a federal district court had entered a preliminary injunction[206] restraining federal officers from imposing sanctions on a federal contractor for failing to revise its seniority practices to assure equal opportunity for black employees, the United States filed a pattern or practice suit against the company and unions. At the time the pattern or practice action was filed, several private Title VII actions were pending in the same court against some of the defendants.[207]

Robinson v. Lorillard Corp.,[208] another Legal Defense Fund case involving seniority discrimination, formulated a three-part business necessity test that a defendant must satisfy to rebut a prima facie Title VII violation established under either the *Griggs* effect theory or the *Quarles-Local 189* perpetuation theory. The business necessity test is not found in the statutory language of Title VII. Although a business necessity rationale was applied by the Supreme Court in *Griggs* and by the Fifth Circuit in *Local 189,* neither case formulated in any detail the parameters of the test. The business necessity test, as formulated in *Robinson,* requires the defendant to show that his interests in continuing the challenged practice are "sufficiently compelling" to justify the adverse impact on the employment opportunities of a protected class, that it effectively carries out the business purpose that it is alleged to serve, and that "no acceptable alternative policies or practices" that would equally serve the business purpose with less adverse impact[209] on the protected class exist.

202. 279 F. Supp. at 516.

203. *Id.* at 518.

204. *Id.* at 517.

205. 416 F.2d 980 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970).

206. Crown Zellerbach Corp. v. Wirtz, 281 F. Supp. 337 (D.D.C. 1968). For a summary of the peculiar circumstances out of which *Local 189* arose, see Cooper & Sobol, *supra* note 123, at 1620 n.82.

207. *See, e.g.,* Hill v. Crown Zellerbach Corp., No. 67-286 (E.D. La., filed March 1, 1967). *Local 189* was filed on January 30, 1968.

208. 444 F.2d 791 (4th Cir.), *cert. dismissed,* 404 U.S. 1006 (1971).

209. 444 F.2d at 798.

The impact of the business necessity test on employment discrimination law is perhaps as profound as the *Griggs* effect test; both are equalizing factors in the David-Goliath confrontation.

In *McDonnell Douglas Corp. v. Green,*[210] a private non-class action case, the Supreme Court held that an individual plaintiff can establish a prima facie violation of Title VII by showing that he is a member of a class protected by the Act, that he applied and was qualified for a vacancy, that he was rejected, and that after the rejection the employer continued to look for applicants with qualifications similar to those of the plaintiff. Absent rebuttal evidence or a showing by the defendant of a legitimate, nondiscriminatory business purpose, the plaintiff is entitled to relief. *McDonnell Douglas* established the "black letter law" on the order and allocation of proof in Title VII litigation, gave substantive content to *Griggs,* and implied approval of *Quarles.*[211]

The legal principles enunciated in *Griggs, McDonnell Douglas, Quarles, Local 189, Robinson,* and subsequent decisions established a substantial body of substantive Title VII law.[212] These substantive developments on liability set the stage for concentration on devising appropriate remedial measures. The courts were receptive to expansive and liberal construction of the remedial authority provided in section 706(g) of the Act. This section provides that, upon a finding of liability, "the court may enjoin the respondent from engaging in such unlawful practice, and order such affirmative action as may be appropriate . . . ."[213] The courts held that section 703(j),[214] the so-called antipreferential treatment provision, does not preclude the imposition of quotas, goals, or timetables, as long as they are imposed to correct present effects of past discrimination or current unlawful employment practices.[215] Appropriate seniority adjustments under a "rightful place" theory were ordered to remedy both the pre-Act and post-Act discriminatory effects of facially neutral seniority practices.[216] Recruitment and training programs were ordered,[217] and objective selection criteria were required to replace

210. 411 U.S. 792 (1973).

211. *See* Jones, *supra* note 15, at 8-9.

212. *See generally* Belton, *supra* note 12.

213. 42 U.S.C. § 2000e-5(g) (Supp. V 1975).

214. 42 U.S.C. § 2000e-2(j) (1970).

215. For cases on this point, see those collected in Rios v. Steamfitters Local 638, 501 F.2d 622, 631 (2d Cir. 1974).

216. *See, e.g.,* Franks v. Bowman Transp. Co., 424 U.S. 747 (1976); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 247-49 (5th Cir. 1974).

217. *See, e.g.,* EEOC v. Detroit Edison Co., 365 F. Supp. 87, 120-21 (E.D. Mich. 1973), *aff'd in part, rev'd in part,* 515 F.2d 301 (6th Cir. 1975), *vacated and remanded,* 431 U.S. 951 (1977).

subjective criteria.[218]

The concept of affirmative action and the back pay award are two critical developments in the remedial provisions of Title VII. These developments offer an interesting comparison of congruence and contrast between public and private enforcement efforts. The notion of affirmative action was introduced first in the effort to eliminate employment discrimination when President Kennedy issued Executive Order 10,925. This order required the inclusion of the following clause in all contracts with the federal government: "The contractor will take *affirmative action* to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin."[219] No explanation of the term affirmative action was included in Executive Order 10,925. The requirement of affirmative action was retained in Executive Order 11,246,[220] issued by President Johnson in September 1965, and the subsequent executive order[221] that created the Office of Federal Contracts Compliance within the Department of Labor, but neither order provided any details about the remedial measures that affirmative action should include. Section 706(g) of Title VII provides that a district court may "order such *affirmative action* as may be appropriate"[222] to remedy a violation of the Act. References are made to hiring, reinstatement, and back pay in this section, but like the executive orders, section 706(g) makes no reference to what remedial measures affirmative action should include. In November 1967 a Title VII private action was filed involving nepotistic union referral practices in *Vogler v. McCarty*.[223] A month later the Department of Justice filed a pattern or practice suit against the defendants in *Vogler*. On May 31, 1967, the district court held that plaintiffs were entitled to relief and subsequently entered an injunction requiring future referrals of blacks on an alternating, one-for-one, basis with whites.[224] The court relied on the authority of section 706(g) to order affirmative action without specific reference to section 703(j). *Vogler* was the first in-

218. *See, e.g.*, Rowe v. General Motors Corp., 457 F.2d 348, 358-59 (5th Cir. 1972).

219. Exec. Order No. 10,925, 3 C.F.R. 448, 450 (1959-1963 Compilation) (emphasis added). Executive Order 11,375, which became effective in October 1968, amended Executive Order 11,246 by forbidding discrimination on the basis of sex by federal contractors. 3 C.F.R. 684 (1966-1970 Compilation).

220. 3 C.F.R. 339-410 (1964-1965 Compilation).

221. Exec. Order No. 11,478, 3 C.F.R. 803 (1966-1970 Compilation).

222. 42 U.S.C. § 2000e-5(g) (Supp. V 1975) (emphasis added).

223. 294 F. Supp. 368 (E.D. La. 1967), *aff'd sub nom.* Local 53, Int'l Ass'n of Heat & Frost Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

224. 294 F. Supp. 368 (E.D. La. 1967). The district court also required this formula in its final grant of relief. Vogler v. McCarty, 62 Lab. Cas. 6611 (E.D. La. 1970).

stance of judicial imposition of relief in the nature of a quota based solely upon race. Other district courts followed the one-for-one formula.[225]

Carter v. Gallagher,[226] a private class action case based upon sections 1981 and 1983 and the equal protection clause of the fourteenth amendment, sought relief from employment discrimination in the Minneapolis Fire Department. Finding that plaintiffs were entitled to relief, the district court ordered the immediate certification of twenty qualified minority applicants. The Eighth Circuit reversed the lower court's holding because the appellate court viewed the specific number of job slots allocated to minority persons as an absolute preference that would infringe upon the employment opportunities of nonminorities. Nevertheless, the Eighth Circuit adopted a one-for-two formula resulting in the certification of twenty qualified minority applicants.[227] *Carter* represents a major step in the development of the idea that affirmative action, in appropriate circumstances, can justify numerical goals or quotas.

The concept of affirmative action began to develop meaning in an administrative context in May 1968 when the Department of Labor issued regulations on Executive Order 11,246.[228] These regulations required nonexempt government contractors with more than fifty employees and contracts in excess of a certain dollar amount to develop affirmative action plans for each of its establishments. The affirmative action plans had to include an identification and analysis of minority employment "problem areas." Employers were required to establish goals and timetables to correct the deficiencies. Two years later in 1970, the Department of Labor issued a second set of regulations,[229] which provided some interpretative guidelines to many of the terms used in the earlier regulations. The later regulations provided that an affirmative action plan under Executive Order 11,246 must include:

> an analysis of areas within which the contractor is deficient in the utilization of minority groups and women, and further, goals and timetables to which the contractor's good faith efforts must be directed to correct the deficiencies and, thus to achieve prompt and full utilization of minorities and women, at all levels and in all segments of his work force where deficiencies exist.[230]

225. *See, e.g.*, United States v. Local 86, Int'l Ass'n of Ironworkers, 315 F. Supp. 1202 (W.D. Wash. 1970), *aff'd*, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); United States v. Central Motor Lines, Inc., 325 F. Supp. 478 (W.D.N.C. 1970).

226. 3 Empl. Prac. Dec. ¶ 8205 (D. Minn.), *aff'd in part, rev'd in part*, 452 F.2d 315 (8th Cir. 1971), *modified*, 452 F.2d 315, 327-32 (8th Cir.), *cert. denied*, 406 U.S. 950 (1972).

227. 452 F.2d at 327-32.

228. 41 C.F.R. § 60-1 (1977).

229. 41 C.F.R. § 60-2.10 (1977).

230. *Id.*

The following statement of affirmative action was included:

> An affirmative action program is a set of specific and result-oriented procedures to which a contractor commits himself to apply every good faith effort. The objective of those procedures plus such efforts is equal employment opportunity. Procedures without effort to make them work are meaningless; and effort, undirected by specific and meaningful procedures, is inadequate.[231]

The legality of Executive Order 11,246 and its regulations was attacked in *Contractors Association of Eastern Pennsylvania v. Secretary of Labor.*[232] Plaintiffs argued that neither the "bona fide seniority system" language in section 703(h) nor the antipreferential treatment provision in section 703(j) protected the affirmative action plan at issue, the Philadelphia Plan, which required specific quotas of minority manpower. The court did not reach plaintiffs' argument based upon section 703(j). Relying upon the developing Title VII law to support the remedial measures used by the Department of Labor to implement the executive order, the court held that nothing in section 703(h) prohibits the imposition of quotas under the executive orders.[233] Both the public and private enforcement efforts were seeking simultaneously to establish as appropriate within the concept of affirmative action relief similar to quotas.

Section 706(g)[234] of Title VII provides that a court may award back pay as part of the affirmative relief to which a victim of employment discrimination is entitled. Nothing in the statute precludes the Department of Justice from seeking back pay relief in pattern or practice litigation. The Department of Justice, however, initially took the position that it would not seek back pay in pattern or practice cases.[235] Private enforcement developed the back pay remedy. Private plaintiffs urged the courts to adopt a standard for the award of back pay similar to the standard that the Supreme Court had established for the award of attorneys fees in cases arising under the public accommodations section of the Civil Rights Act of 1964.[236] The Supreme Court had held that a prevailing plaintiff should be denied attorneys fees only if special circumstances rendered this award unjust. Generally, lower courts agreed that this was an appropriate back pay relief standard.[237] The Supreme Court,

231. *Id.*

232. 442 F.2d 159 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971).

233. The court cited with approval *Griggs, Local 189, Vogler,* and *Quarles.* 442 F.2d at 172 n.46.

234. 42 U.S.C. § 2000e-5(g) (Supp. V 1975).

235. *Compare* United States v. Central Motor Lines, Inc., 338 F. Supp. 532, 561 (W.D.N.C. 1971) *with* United States v. Allegheny-Ludlum Indus., 517 F.2d 826 (5th Cir. 1975), *cert. denied,* 425 U.S. 944 (1976).

236. Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968).

237. *E.g.,* Baxter v. Savannah Sugar Refining Corp., 495 F.2d 437, 442-43 (5th Cir.),

however, refused to apply the statutory attorneys fees standard to back pay awards. In *Albemarle Paper Co. v. Moody*, the Court held that "[b]ackpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."[238] Private plaintiffs also developed the theory of front pay.[239] According to this theory, victims of employment discrimination are entitled to monetary compensation until they reach positions that they would have occupied if it were not for the unlawful discrimination. By the time the Department of Justice decided to seek back pay in its pattern or practice cases, the law on back pay substantially had been developed.

The emergence of a coherent body of employment discrimination law provided the necessary background for meaningful implementation of the national policy against employment discrimination. Cases such as *Griggs v. Duke Power Co.* and *Albemarle Paper Co. v. Moody* provided the parameters of a litmus test to determine Title VII liability. These cases also made "good faith" efforts to render employment discrimination meaningless if the litmus showed prima facie liability, unless some visible manifestations also were demonstrated. The potential of multi-million dollar awards for unlawful employment discrimination emphasized that failure to comply with Title VII exposed respondents to substantial financial liability.

This coherent body of law made it possible for the federal government to negotiate settlements with AT&T,[240] as well as nationwide settlements with the trucking[241] and basic steel industries.[242]

---

cert. denied, 419 U.S. 1003 (1974); Head v. Timken Roller Bearing Co., 486 F.2d 870, 876 (6th Cir. 1973).

238. 422 U.S. 405, 421 (1975).

239. *See, e.g.*, Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976); Bush v. Lone Star Steel Co., 373 F. Supp. 526, 558 (E.D. Tex. 1974); Note, *Front Pay—Prophylactic Relief Under Title VII of the Civil Rights Act of 1964*, 29 VAND. L. REV. 211 (1976).

240. *See* 8 EEOC ANN. REP. 25-26 (1973); EEOC v. American Tel. & Tel. Co., 365 F. Supp. 1105 (E.D. Pa. 1973), *aff'd*, 506 F.2d 735 (3d Cir. 1974). The agreement settled a complaint brought under § 707 of Title VII as well as charges of employment discrimination that the EEOC had filed with the FCC in opposing AT&T's request for approval of rate increases. Under this settlement AT&T agreed to pay back pay of up to $15 million to 1500 women and minority employees. *See also* EQUAL EMPLOYMENT OPPORTUNITY AND THE AT&T CASE (P. Wallace ed. 1976) (decree included as Appendix A at 283). Under a similar agreement in 1974, AT&T agreed to pay $7 million to management level employees and an additional $23 million in wage adjustments. 8 EEOC ANN. REP. 25 (1973).

241. *In re* Trucking Industry Employment Practice Litigation, 384 F. Supp. 614 (Judicial Panel on Multidistrict Litigation 1974).

242. United States v. Allegheny-Ludlum Indus., 517 F.2d 826 (5th Cir. 1975), *cert.*

Other employers and unions became more amenable to voluntary compliance agreements with the EEOC and private plaintiffs to remedy individual claims of employment discrimination and to take steps to revise employment policies to assure that similar claims would not arise in the future.[243] Even though the EEOC did not have enforcement power prior to 1974 and the Department of Justice was not as supportive of the EEOC as Congress had envisioned, the threat of private enforcement helped restore some of the credibility and effectiveness that the EEOC had lost because of its earlier organizational and staffing deficiencies.

Because civil rights litigation has been unattractive to the private bar,[244] civil rights laws, such as school desegregation, voting rights, and jury discrimination, historically have been enforced by private law reform organizations such as the Legal Defense Fund.[245] The development of employment discrimination law reduced the unpopular status of employment discrimination cases and encouraged attorneys who were not associated with law reform organizations to represent Title VII plaintiffs. By funding law school clinical courses and other programs, the EEOC provided incentive for the private bar to engage in widespread enforcement of Title VII.[246] Although the most active Title VII attorneys have been a small group, generally associated with law reform organizations and have become specialists in this area of the law, an increasing number of noninstitutional lawyers have begun to represent Title VII plaintiffs in the "one-on-one" individual non-class action cases.[247] This development is underscored by the increase in the number of Title VII cases filed between 1970 and 1976. In 1970 when the Administrative Office of the United States Courts began to keep statistics on cases by classification, 344 Title VII cases were filed. By 1976 the volume of Title VII litigation had increased to 5321, 35.4 percent greater than the preceding year and 1447 percent greater than 1970.[248] Employment discrimination cases represented 43 percent of all civil rights cases filed in 1975.[249] This development has been described as

denied, 425 U.S. 944 (1976). A back pay fund of approximately $31 million was established. 9 EEOC ANN. REP. 1-2 (1974).

243. *See, e.g.*, [1978] 2 EMPL. PRAC. GUIDE (CCH) ¶ 5350 (law firm recruiting and hiring conciliation agreement).

244. *See* note 53 *supra* and accompanying text.

245. *See* Rabin, *supra* note 102, at 214-18.

246. *See* Report by EEOC Chairman Perry to Senate Labor Committee on Commission's Current Status and Projected Improvements, *reprinted in* 1975 FAIR EMPL. PRAC. (BNA PUBLICATION No. 279, pt. 2 at 25 (Spec. Supp.)).

247. *See* Maslow, *The Bonhomie of the Plaintiffs' Bar*, JURIS DOCTOR, Sept. 1974, at 31.

248. 1976 U.S. ADMINISTRATIVE OFFICE OF THE U.S. COURTS ANN. REP. 204.

249. *Id.* at 129.

"staggering."[250] The possibility of obtaining attorneys fees[251] was, no doubt, an incentive to the private plaintiffs' bar as enticing as the coherent body of law.

The first decade of enforcement under Title VII spawned three generations of issues. Each did not develop in distinct periods, but analytical distinctions are discernable. The first generation embraced procedural problems about the relationship between the administrative process and judicial enforcement. Some of these issues involved the federal effort, but the majority involved the private enforcement effort. The second generation of issues dealt with the definition and proof of discrimination. Here, too, private enforcement efforts shouldered the major responsibility. The third generation presented issues of fashioning appropriate affirmative relief and implementation. Private enforcement made a substantial contribution to the development of appropriate affirmative relief, but large-scale implementation required resources available only to federal agencies. In considering these three sets of issues the federal courts broadly construed Title VII to provide effective enforcement of the national policy against employment discrimination.

V. THE NEXT DECADE: A POTENT TOOL OR MELLIFLUOUS RHETORIC

Since the beginning of the second decade of Title VII enforcement new issues have surfaced that threaten the vitality of the limited progress made during the first decade. The major issue to surface in recent years, "reverse discrimination," concerns what appears to be a countermovement to the overall enforcement effort. This countermovement appears in many forms, but its principal thrust is expressed frequently in charges of "reverse discrimination" against whites, especially white males. The proponents of this countermovement emphasize the conflict between the obligations of "affirmative action" and claims of "reverse discrimination." The terms "affirmative action" and "reverse discrimination" present difficult conceptual problems.[252] A reading of the cases[253] and commentary[254] in this area suggests that the same conduct falls under

250. *Id.* at 204. The Department of Justice transferred 94 pattern or practice cases to the EEOC in 1974. 9 EEOC ANN. REP. 7 (1974). The EEOC filed 93 cases in fiscal 1974, *id.* at 7, and had 180 cases on its docket in fiscal 1975.

251. 42 U.S.C. § 2000e-5(k) (1970).

252. *Compare* Rios v. Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974) *with* Kirkland v. Department of Correctional Servs., 520 F.2d 420 (2d Cir. 1975).

253. *See, e.g.*, McAleer v. American Tel. & Tel. Co., 416 F. Supp. 435 (D.D.C. 1976); Weber v. Kaiser Aluminum & Chem. Corp., 415 F. Supp. 761 (E.D. La. 1976), *aff'd*, 563 F.2d 216 (5th Cir. 1977); Cramer v. Virginia Commonwealth Univ., 415 F. Supp. 673 (E.D. Va. 1976).

254. *See, e.g.*, REVERSE DISCRIMINATION (B. Gross ed. 1977).

both labels, yet there appears to be a belief that the terms describe different phenomena. The national debate generated by claims of "reverse discrimination" centers around the issue whether remedial measures described as "quotas," "preferential treatment," "goals and timetables," or "mathematical ratios" are legally permissible in the national effort to eliminate the present and continuing effects of discrimination.[255] This debate has divided many old friends within the traditional civil rights coalition.[256] The Supreme Court contributed to the affirmative action/reverse discrimination debate with its decision in *McDonald v. Santa Fe Trail Transportation Co.*[257] In *McDonald* the Court held that Title VII and section 1981 are available to both black and white persons to redress employment discrimination. The decision seems correct on the Title VII aspect, but it seems questionable as to section 1981, which provides that all persons shall be guaranteed the right to make and enforce contracts "as is enjoyed by white citizens." The right guaranteed in section 1981 is to be measured by the treatment given to "white citizens." The effect of the *McDonald* decision is to eliminate the "white citizen" statutory standard.

A clear statement of policy on the affirmative action/reverse discrimination debate has yet to emerge in the federal enforcement effort. The EEOC has demonstrated some initiative by proposing the adoption of guidelines on affirmative action.[258] These proposed guidelines purport to offer defendants who attempt to comply with Title VII without administrative or judicial involvement the protection afforded by section 713(b) of Title VII.[259] This section provides a complete defense to defendants who prove that they in good faith conformed with a written EEOC interpretation or opinion.

The concept of affirmative action had a ring of optimism about it in the early enforcement efforts of Title VII and related laws and orders. Then it was generally thought to be a new and innovative approach to end discrimination, with an emphasis on the inclusion of disadvantaged classes of blacks, other minorities, and women. But the concept now connotes discrimination against white males. The affirmative action/reverse discrimination debate is a profound

255. The national debate has crystalized around the case of Bakke v. Regents of Univ. of California, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *aff'd in part, rev'd in part*, 98 S. Ct. 2733 (1978).

256. *Compare* Bell, Book Review, 25 EMORY L.J. 879 (1976) *with* Glazer, Author's Reply, 26 EMORY L.J. 399 (1977). *See also* N.Y. Times, Sept. 20, 1977, § 1, at 34, col. 1.

257. 427 U.S. 273 (1976).

258. EEOC Proposed Guidelines on Remedial and/or Affirmative Action, 42 Fed. Reg. 64,826 (1977).

259. 42 U.S.C. § 2000e-12(b) (1970).

challenge to the efficacy of the *Griggs* concept of discrimination. The ultimate resolution of this issue will determine in substantial part the level and intensity of public and private enforcement efforts in Title VII's second decade.[260]

All of the Title VII cases heard by the Supreme Court during the first decade of enforcement were the result of private enforcement efforts; the government was a party in none of these cases. The Supreme Court's 1976 Term was its most active in the area of employment discrimination.[261] Analyzing the Title VII cases decided by the Court during this Term, Professor Harry T. Edwards noted that

> the Court manage[d] to limit the meanings of "sex discrimination" and "religious discrimination" under Title VII; broaden the meaning of the "bona fide seniority system" exception under Title VII; define the burdens of proof in "pattern and practice" cases; explain the evidentiary weight to be given to statistical evidence and proofs concerning "relevant labor markets" in employment discrimination cases; and decide a number of miscellaneous issues having to do with class actions suits, statute of limitations matters and questions of appropriate remedies.[262]

The 1976-1977 decisions strongly suggest that the three generations of issues spawned during the first decade of Title VII must be substantially reexamined.[263]

In *International Brotherhood of Teamsters v. United States*,[264] the Court held that a facially neutral seniority system that perpetuates into the post-Act period the effects of pre-Act discrimination is protected as bona fide under section 703(h) unless plaintiffs can demonstrate that the system had its genesis in unlawful discrimination.[265] The Court recognized that, but for section 703(h), such a

260. *See* Address by Drew S. Days, III, Assistant Attorney General, Civil Rights Division, Department of Justice, at Yale Law School (March 1, 1978) (copy on file at the *Vanderbilt Law Review*).

261. The Supreme Court decided ten Title VII cases during the 1976-1977 Term. Cases not discussed in the text are: United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977) (punitive class member may file timely petition for intervention to seek appellate review of district court denial of class certification); Occidental Life Ins. Co. v. EEOC, 432 U.S. 355 (1977) (EEOC not limited in filing suit by the 180-day requirement in section 706(b)(1)); East Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395 (1977) (failure to qualify for class certification under Rule 23 of the Federal Rules of Civil Procedure precludes class relief); Electrical Workers Local 790 v. Robbins & Myers, Inc., 429 U.S. 229 (1976) (filing grievance pursuant to collective bargaining agreement does not toll period within which charge must he filed with the EEOC).

262. Address by Harry T. Edwards, ABA Lahor Relations Section Annual Convention (Aug. 22, 1977), *reprinted in* 95 LAB. REL. REP. (BNA) 329-30 (1977).

263. *See generally* Belton, *supra* note 12.

264. 431 U.S. 324 (1977).

265. The Court recognized that its decision was contrary to the *Quarles* line of cases.

> Concededly, the view that § 703(h) does not immunize seniority systems that perpetuate the effects of prior discrimination has much support. It was apparently first adopted in *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968). The court

system would be unlawful according to the *Griggs* concept of discrimination. The Court construed section 703(h) to require pre-Act discriminatees to demonstrate purposeful discrimination by defendants to lock-in or freeze blacks into their pre-Act status. The *Teamsters* purposeful discrimination standard is analogous to the standard enunciated by the Court for employment discrimination claims based upon constitutional grounds. In *Washington v. Davis*[266] the Court held that the *Griggs* effect test is inapplicable to constitutional claims, requiring instead a showing of purposeful discrimination. The lower courts had construed the term "intent" used in the various sections of Title VII as a unitary concept.[267] *Teamsters* holds that this construction is erroneous in so far as facially neutral seniority systems are involved. Both *Griggs* and *Teamsters* involved an interpretation of section 703(h). The testing proviso and the bona fide seniority system proviso in this section were the subject of much congressional debate,[268] and both provide a limited exemption if the discrimination is not the result of an intention to discriminate on prohibited grounds. It thus seems ironic that the same section would yield different interpretations on the two subjects.

The decision in *United Air Lines, Inc. v. Evans*[269] could compound the adverse ramifications of the *Teamsters* decision. Plaintiff in *Evans* was forced to resign from her job in 1968 because of a company rule that prohibited female flight attendants to be married. Plaintiff was rehired in 1972 and thereafter brought a Title VII action for restoration of the seniority that she had forfeited because of her forced resignation. The Court held that plaintiff's claim was time-barred because she had failed to file with the EEOC a charge within ninety days after her forced resignation.[270] The Court relied on *Teamsters* to hold also that section 703(h) protects both pre-Act

there held that "a departmental seniority system *that has its genesis in racial discrimination* is not a *bona fide* seniority system." . . . The *Quarles* view has since enjoyed wholesale adoption in the Courts of Appeals. . . . Insofar as the result in *Quarles* and in the cases that followed it depended upon findings that the seniority systems were themselves "racially discriminatory" or had their "genesis in racial discrimination," . . . the decisions can be viewed as resting upon the proposition that a seniority system that perpetuates the effects of pre-Act discrimination cannot be bona fide if an intent to discriminate entered into its very adoption.

431 U.S. at 346 n.28 (emphasis by the Court).

266. 426 U.S. 229 (1976).

267. The terms "to discriminate," "intended," and "intentionally" are used repeatedly throughout Title VII. A statutory definition of these terms, however, is not included. *See, e.g.*, 42 U.S.C. §§ 2000e-2(a), (b), (e), (h) (1970 & Supp. V 1975); 2000e-3(a) (Supp. V 1975); 2000e-5(g) (Supp. V 1975).

268. *See generally* Cooper & Sobol, *supra* note 123.

269. 431 U.S. 553 (1977).

270. 431 U.S. at 558.

and post-Act facially neutral seniority systems. Holding that the plaintiff's filing had been timely, the lower court relied upon the well-established continuing violation theory developed in the seniority discrimination cases.[271] Under this theory the time to file a charge with the EEOC begins anew each day that the discriminatory seniority system is operative. Although not directly addressing the validity of the continuing violation theory, *Evans* implies that this theory, once thought firmly established, is open to further examination.

Sections 701(j)[272] and 703(a)[273] make it unlawful for an employer to fail to undertake reasonable efforts to accommodate the religious beliefs of an employee. In *Trans World Airlines, Inc. v. Hardison,*[274] the Court narrowly construed the religious accommodation obligation. The Court held that Title VII does not require an employer to attempt to accommodate if it would defeat the seniority expectancies of other employees or obligate an employer to incur more than de minimis costs. The dissent noted that the decision "deals a fatal blow to all efforts under Title VII to accommodate work requirements to religious practices."[275] The *Teamster-Evans-Hardison* trilogy has reopened the subject of seniority discrimination under Title VII.[276] The major impact of these cases will fall upon black pre-Act discriminatees who seek post-Act seniority relief under Title VII.

In *General Electric Co. v. Gilbert,*[277] the Court held that the exclusion of pregnancy-related disabilities from a disability plan is not unlawful sex discrimination under Title VII. Justice Rehnquist, who wrote the majority opinion, hinted that a showing of purposeful discrimination might be required,[278] but then examined plaintiff's claim in conformity with the *Griggs* effect test. He found that the disability plan was lawful because neither sex was protected from a risk from which the other sex was not protected. This evenhanded inclusion of risks resulted in a "presumed parity of the benefits"[279] that could not be destroyed by failure to compensate women for an additional benefit.

---

271. *See, e.g.,* Gates v. Georgia-Pacific Corp., 492 F.2d 292, 294 (9th Cir. 1974); Macklin v. Spector Freight Sys., Inc., 478 F.2d 979, 987 (D.C. Cir. 1973).

272. 42 U.S.C. § 2000e-(j) (Supp. V 1975).

273. 42 U.S.C. § 2000e-2(a) (1970 & Supp. V 1975).

274. 432 U.S. 63 (1977).

275. *Id.* at 86 (Marshall, J., dissenting).

276. For a discussion of the meaning of a "bona fide" seniority system after *Teamsters* and *Evans*, see Recent Development, 31 VAND. L. REV. 151 (1978).

277. 429 U.S. 125 (1976).

278. *Id.* at 133-36.

279. *Id.* at 139.

In September 1977 the Senate passed legislation[280] designed to overrule *Gilbert*. *Gilbert*, however, raised questions beyond the pregnancy context that may not be covered by the congressional action. The case raises difficult questions concerning Title VII's impact on fringe benefit plans. Before *Gilbert*, many of these plans did not survive the lower court's application of the liberal *Griggs* effect test.[281] Although *Teamsters* established a stringent test for seniority discrimination cases, the test can be met. *Gilbert*, however, may completely exempt an entire category of sex discrimination from the strictures of Title VII.

Another sex discrimination case decided during the 1976 term had mixed results. In *Dothard v. Rawlinson*[282] the Court held that the bona fide occupational qualification exception must be construed very narrowly. This case offered the Court an opportunity to enunciate the appropriate standard for the application of this limited exception, but it declined to do so.[283] The Court found that on the facts presented this exception was available to exclude females from contact positions in the Alabama maximum security prison system. The Court's acceptance in *Dothard* of the bona fide occupational qualification exception may be of limited importance because of the unique facts of the case. The Court's reaffirmance of the *Griggs* effect test,[284] however, is important because it militates against the potential frontal attack that lurked in *Gilbert*.

Much of the law on employment discrimination was ready to be classified as "black letter" law, but the major Title VII cases decided by the Supreme Court during the 1976 term place important areas of Title VII law in the same position that it occupied at the beginning of the first decade of Title VII's enforcement. Consequently, at the beginning of the second decade of enforcement public and private enforcement instrumentalities are again presented with a unique opportunity. This second decade of enforcement will test the depth of the sincerity of the national commitment to equal employment.

The federal government is the nation's largest employer. Overt discrimination was the accepted practice in federal employment well into the administration of President Franklin D. Roosevelt. An official policy against discrimination in federal employment was not

280. S. 995, 95th Cong., 1st Sess. 123, 123 CONG. REC. 15,059 (daily ed. Sept. 16, 1977).

281. *See, e.g.*, Rosen v. Public Serv. Elec. Co., 477 F.2d 90 (3d Cir. 1973); Bartmess v. Drewrys, U.S.A., Inc., 444 F.2d 1186 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971).

282. 433 U.S. 321 (1977).

283. *Id.* at 333.

284. *Id.* at 321.

announced until the late 1940's.[285] Although discrimination on the basis of race, color, or national origin by the federal government is unconstitutional, presidential executive orders and congressional legislation only recently have been employed to remedy discrimination at this level. Until 1972 the Civil Service Commission had almost exclusive responsibility for the enforcement of laws prohibiting discrimination in federal employment. The pattern of enforcement by the Civil Service Commission substantially paralleled the enforcement records of state FEP commissions. Its enforcement efforts failed to remedy significantly the subtle, pervasive, and institutional forms of employment discrimination.[286]

With the 1972 amendments to Title VII, Congress extended the provisions of the Act to federal, state, and local governments.[287] Administrative enforcement over state and local governments was given to the EEOC, and judicial enforcement was given to the Department of Justice,[288] but administrative enforcement over federal employment was left with the Civil Service Commission.[289] For the first time, however, federal employees were given the right to seek judicial enforcement to remedy employment discrimination in federal employment after exhaustion of administrative remedies before the Civil Service Commission. It is now established public policy that federal employees have the same judicial right to challenge and correct employment discrimination as do all other employees.

Unlike other enforcement efforts in which there is at least the potential for joint public and private participation, judicial enforcement of the national policy against employment discrimination in federal employment tends to rest primarily on the shoulders of private enforcement efforts. In many cases involving private respondents and defendants, state and local governments, the Department of Justice, and private plaintiffs have engaged in some coordinated efforts; however, in the federal government discrimination cases, private plaintiffs must face the awesome power and resources of the federal government because the Department of Justice acts as the lawyer for the federal defendants.

The first round of litigation in the federal employment litigation suggests that private plaintiffs will again face the issues spawned in the cases against the private sector.[290] The Department

285. 1971 FEDERAL EFFORT, *supra* note 14, at 19.

286. *Id.* at 21.

287. 42 U.S.C. § 2000e-(a) (Supp. V 1975).

288. 42 U.S.C. § 2000e-5(f)(1) (Supp. V 1975).

289. 42 U.S.C. § 2000e-16 (Supp. V 1975).

290. *See* Ralston, *The Federal Government as Employer: Problems and Issues in Enforcing the Anti-Discrimination Laws*, 10 GA. L. REV. 717 (1976).

of Justice supported private plaintiffs on these issues during the first decade of Title VII's enforcement. The next decade of enforcement will present a clear opportunity to test the commitment of the federal government to the national policy against employment discrimination in the federal employment cases.

The characterization of the EEOC as a "poor, enfeebled thing"[291] proved to be a fairly accurate description in 1966. Congress amended Title VII in 1972 to give the EEOC the authority to seek judicial enforcement. This amendment provided the EEOC with an opportunity to substantially improve its effectiveness through a revitalized and proper use of its authority. Until 1977, however, the EEOC continued to operate under enforcement programs and procedures designed when it had no enforcement authority.[292] Many of the organizational and staffing problems that plagued the agency in its formative years continued to hamper its ability to take appropriate initiative. The EEOC filed only one pattern or practice suit in 1974, the year it obtained exclusive authority under section 707 to seek judicial enforcement against private employers.[293]

In 1977 the EEOC initiated major organizational, staffing, and procedural revisions.[294] These undertakings are an attempt to establish more firmly the EEOC's role as the primary enforcer of the national policy against employment discrimination. It is too early to assess the impact of these revisions. Future assessments of the EEOC's enforcement efforts should consider the following observations. First, the EEOC has stated often that since 1974 a major reason for its dismal record in using its new enforcement authority is that institutional lawyers who represent private plaintiffs selected the most promising cases, leaving the EEOC with cases that develop the law only marginally. This suggests a certain degree of paranoia by the EEOC, which no doubt has been generated by widespread and persistent criticism of its litigation record. Comparing the backlog of cases with the number of cases handled through private enforcement demonstrates that the above explanation is unfounded.[295] Nevertheless, a number of the policymakers at the EEOC share this

291. SOVERN, *supra* note 21, at 205.

292. See Peck, *The Equal Employment Opportunity Commission: Developments in the Administrative Process 1965-1975*, 51 WASH. L. REV. 831, 848-52, 858-61 (1976).

293. 9 EEOC ANN. REP. 7 (1974).

294. *See* Statement by Chairman of EEOC Before House Subcomm. on Employment Opportunities, July 27, 1977, *reprinted in Mission*, a newsletter published by the EEOC, vol. 5, no. 5, at 3.

295. At the end of fiscal 1973, the EEOC reported that it bad filed 116 lawsuits and estimated that private parties had filed over 800. 8 EEOC ANN. REP. 19 (1973). At this time the EEOC had a backlog of over 70,000 cases.

concern. This may explain the new procedural regulations that seem to be contrary to well-established legal rules, which EEOC once supported. Second, to reduce the backlog of cases, the EEOC has adopted a policy to investigate charges narrowly.[296] This new policy is contrary to the "like and related"[297] doctrine adopted by the courts. The policy appears to have been adopted in response to criticism that the EEOC was treating too many charges as class actions, but this fails to accommodate judicial and congressional recognition that discrimination is by definition class discrimination. By issuing a statement disclaiming any intention to preclude the application of the "like and related" doctrine, the EEOC recognized the potential negative impact of this new procedure on the private enforcement effort.[298] On July 20, 1977, the EEOC adopted a resolution establishing a new and more stringent standard to determine reasonable cause. The new standard requires "a determination that the claim has sufficient merit to warrant litigation if the matter is not thereafter conciliated by the Commission or the charging party."[299] The new standard obliterates the distinction between the

296. This new system utilizes a positive management approach to the backlog. It involves grouping files by respondent and selecting those with the largest number of charges for first review. A special management review team in eacb district office will oversee the endeavor . . . . After special referral of cases with litigation potential, we will inquire of every cbarging party concerning his or ber desire to proceed with the case. Some cbarges will be closed at this point. We will then contact by phone or visit every respondent to encourage it to engage in no-fault settlement discussions. If settlement fails, investigative interrogatories will be sent immediately with mandated follow-up to conclude the case as quickly as possible.

Tbese cases will be processed under current Commission policies and procedures except that we will limit the scope of the case to individual matters unless we make a conscious decision that a systemic approach is required.

Statement of Chairman of EEOC Before the House Subcomm. on Employment Opportunities, July 27, 1977, *reprinted in Mission,* a newsletter published by the EEOC, vol. 5, no. 5, at 6.

297. *See, e.g.,* Tipler v. E.I. duPont deNemours & Co., 443 F.2d 125, 131 (6th Cir. 1971); Sancbez v. Standard Brands, Inc., 431 F.2d 455, 466 (5th Cir. 1970).

298. Notice is hereby given that tbe decision of the Equal Employment Opportunity Commission ordinarily to limit investigations of cbarges of employment discrimination to allegations of violations which directly affect the cbarging party (see Statement of Eleanor Holmes Norton, Cbair, EEOC, 42 FR 42034) is based on the necessity of allocating limited Commission resources. Accordingly, tbe fact of a narrow commission investigation does not reflect the scope of the Commission investigation which might reasonably have grown out of a charge. Therefore the decision to limit investigations is not intended to, and should not, affect the charging party's right to seek relief in a private suit for all discriminatory practices like or related to those alleged in the charge which might have been uncovered if the Commission had sufficient resources to investigate all cbarges more extensively. See *McBride v. Delta Airlines,* 551 F.2d 113 (6th Cir. 1977).

42 Fed. Reg. 54,595 (1977).

299. EEOC COMPL. MAN. (CCH) ¶ 1014 (1977).

concept of reasonable cause and the judicial standard of preponderance of the evidence. With this new policy many charges that might have been concluded in the administrative process under a reasonable cause standard are now likely to be dismissed because the investigation fails to disclose evidence sufficient to meet the preponderance of the evidence standard. Narrowly construing charges and applying the preponderance of the evidence standard will deny many charging parties access to the only forum available because of the dearth of lawyers who are willing to represent employment discrimination claimants. Moreover, these new procedural regulations are likely to generate more, not less, litigation through private enforcement efforts, placing private plaintiffs and the federal government on opposite sides of the court room.

VI. Conclusion

An assessment of the effort to enforce the national policy against discrimination that does no more than simply acknowledge that private enforcement effort has played *some* role in the campaign to eliminate discrimination in employment is myopic. Much of the published literature has done no more than that. The important and substantial role of private enforcement in the development of employment discrimination law can be understood only within a historical context that must go back at least to 1941. Discrimination in employment is not a contemporary phenomenon. A threatened march on Washington in 1941 gave rise to the first national expression of concern about the problem. More than twenty years passed before a clear national policy against employment discrimination was expressed in Title VII. The federal machinery in existence at that time, such as the Department of Justice and the Civil Service Commission, and the machinery established by Title VII—the EEOC—for a number of reasons proved unable to establish the doctrinal foundations necessary for effective implementation of the national policy. Private enforcement played a critical role in filling the void created by the absence of effective federal enforcement. Recent judicial and administrative developments tend to undercut and limit the vital contribution that the private enforcement efforts have made to the implementation of the national policy against discrimination. The federal enforcement programs have yet to demonstrate a capacity to be as effective as their potential. Until that potential has been realized, private enforcement must be encouraged, supported, and recognized without either deliberate or unintended impediments.