SENIORITY AND THE BLACK WORKER: REFLECTIONS ON *QUARLES* AND ITS IMPLICATIONS

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Professor Gould analyzes discrimination in seniority arrangements with a thorough examination of the first judicial discussion of this matter after the passage of Title VII of the Civil Rights Act of 1964. Professor Gould finds some benefit but much detriment in the recent judicial pronouncements on discriminatory hiring, transfer, and promotion practices.

I. INTRODUCTION

Although the problems of minority group unemployment and nondiscriminatory hiring are presently the crux of the black worker's struggle for economic equity,[1] seniority arrangements negotiated between unions and employers—which, in part, determine the "competitive status" seniority of bargaining unit workers[2] for the purpose of promotion and lay-off—have been the focal point for most discussion concerning the basis upon which Negro workers shall escape segregated

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1 *See* 1968 COUNCIL OF ECON. ADVISERS ANN. REP. 52; *cf.* N.Y. Times, May 16, 1968, at 46, col. 1; *id.*, Mar. 21, 1968, at 46, col. 1; *id.*, Feb. 27, 1968, at 22, col. 2; *id.*, Feb. 25, 1968, at 1, col. 1; *id.*, Feb. 3, 1968, at 19, col. 1; *id.*, Jan. 24 ,1968, at 1, col. 3.

But the hiring of the disadvantaged and the current spectre of unemployment in the automobile industry have triggered seniority problems. The United Automobile Workers has proposed that senior workers be permitted to take a layoff voluntarily and thus enjoy supplemental unemployment compensation benefits. Thus junior black workers who are new employees could be retained and, simultaneously, accumulate the seniority credits needed for the above-noted benefits. *See* Auto Workers Proposal for Inverted Seniority, 70 L.R.R.M. 313 (1969); Dietsch, *Hardcore Blacks and the Shiny Auto*, THE NEW REPUBLIC, Mar. 1, 1969, at 10; Wall St. J., Mar. 21, 1969, at 10, col. 2; *Bannon Urges Change in Seniority Rules Governing Ford Layoffs*, UAW NEWS RELEASE (Mar. 7, 1969).

2 *See* NATIONAL ACADEMY OF ARBITRATORS, ARBITRATION TODAY 128-37 (1955); S. SLICHTER, J. HEALY, & E. LIVERNASH, THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT (1960); Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532 (1962); Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151, 161-63 (1957); Gould, *Employment Security, Seniority and Race: The Role of Title VII of the Civil Rights Act of 1964*, 13 How. L.J. 1 (1967); Kahn, *Seniority Problems in Business Mergers*, 8 IND. & LAB. REL. REV. 361 (1955); Mater & Mangum, *The Integration of Seniority Lists in Transportation Mergers*, 16 IND. & LAB. REL. REV. 343 (1963).

The concept of seniority is contractual. Charland v. Norge Division, Borg-Warner Corp., 70 L.R.R.M. 2705 (6th Cir. 1969); Local 1251, UAW v. Robertshaw Control Co., 68 L.R.R.M. 2671 (2d Cir. 1968). But seniority may be altered by both statute and the parties to the agreement. *See* notes 104 and 119 *infra*. *Compare* Humphrey v. Moore, 375 U.S. 335 (1965) *and* Ford Motor Co. v. Huffman, 345 U.S. 330 (1953), *with* Truck Drivers and Helpers Local 568 v. NLRB, 379 F.2d 137 (D.C. Cir. 1967). *See also* Aeronautical Lodge v. Campbell, 337 U.S. 521 (1949); Schick v. NLRB, Daily Labor Rep. No. 69 E-1 (7th Cir. 1969); Hardcastle v. Western Greyhound Lines, 303 F.2d 182 (9th Cir. 1962).

confinement from low paying undesirable jobs.[3] Portions of the controversy arising out of the use of seniority to thwart the Negro advance have already come under the scrutiny of the judiciary.[4] When one couples the likelihood that all workers are generally less timid about pressing complaints after they have been hired[5] with the conservative response of unions to white rank and file racism[6]—especially in the hotly contested terrain of seniority[7]—it becomes apparent that the inevitable clash between Negro and white workers over who is to be promoted first or laid off last could prove to be a lively one.

The impetus for the controversy, is, of course, the black worker's recognition of the importance of employment and employment *status*

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[3] *See* Gould, *supra* note 2. *See also* M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT (1966); Aaron, *The Union's Duty of Fair Representation under the Railway Labor and National Labor Relations Acts,* 34 J. AIR L. & COM. 167 (1968); Doeringer, *Discriminatory Promotion Systems,* 90 MONTHLY LABOR REV. 27 (1967); Gould, *The Negro Revolution and the Law of Collective Bargaining,* 34 FORDHAM L. REV. 207, 260-65 (1965); Hill, *The Role of Law in Securing Equal Employment Opportunity: Legal Power and Social Change,* 7 B.C. IND. & COM. L. REV. 625 (1966); Jenkins, *Study of Federal Effort to End Job Bias: A History, a Status Report, and a Prognosis,* 14 HOW. L.J. 259 (1968); Murray, *The Right to Equal Opportunity in Employment,* 33 CALIF. L. REV. 388 (1945); Rosen, *The Law and Racial Discrimination in Employment,* 53 CALIF. L. REV. 729 (1965); Sovern, *The National Labor Relations Act and Racial Discrimination,* 62 COLUM. L. REV. 563 (1962); Winter, *Improving the Economic Status of Negroes Through Laws Against Discrimination: A Reply to Professor Sovern,* 34 U. CHI. L. REV. 817 (1967); Note, *Title VII, Seniority Discrimination and the Incumbent Negro,* 80 HARV. L. REV. 1260 (1967).

[4] United States v. Local 38, IBEW, 70 L.R.R.M. 3019 (N.D. Ohio 1969); United States v. United Papermakers Local 189, 282 F. Supp. 39 (E.D. La. 1968); Hicks v. Crown-Zellerbach Corp., 69 L.R.R.M. 2005 (E.D. La. 1968); United States v. Sheet Metal Workers Int'l Ass'n, 280 F. Supp. 719 (E.D. Mo. 1968); Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968); Bing v. Roadway Express, Inc., 70 L.R.R.M. 3043 (N.D. Ga. 1968); United States v. Hayes Int'l Corp., 70 L.R.R.M. 2926 (N.D. Ala. 1968); United Packinghouse Food and Allied Workers Int'l Union, AFL-CIO v. NLRB, 70 L.R.R.M. 2489 (D.C. Cir. 1969); Culpepper v. Reynolds Metals Co., 70 L.R.R.M. 2360 (N.D. Ga. 1968); Hicks v. Crown-Zellerbach Corp., 70 L.R.R.M. 2223 (E.D. La. 1968); United States v. H.K. Porter Co., 70 L.R.R.M. 2131 (N.D. Ala. 1968); Dobbins v. Local 212, IBEW, 69 L.R.R.M. 2313 (S.D. Ohio 1968); Maremont Corp., 1949 NLRB 482 (1964); Lewis v. Ironworkers Local 86, Daily Labor Rep. No. 55 D-1 (Washington State Board Against Discrimination 1969); *cf.* United Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966), *cert. denied,* 389 U.S. 837 (1967); Thompson v. Brotherhood of Sleeping Car Porters, 316 F.2d 191 (4th Cir. 1963); Whitfield v. United Steelworkers of America, 263 F.2d 546 (5th Cir.), *cert. denied,* 360 U.S. 902 (1959); Central R.R. v. Jones 229 F.2d 648 (5th Cir. 1955), *cert. denied,* 352 U.S. 848 (1956); Daye v. Tobacco Workers, 234 F. Supp. 815 (D.D.C. 1964); Ferguson v. Knott Hotels Corp., 19 Race Rel. L. Rep. 1016 (N.Y. State Commission for Human Rights 1964); Jones v. Distillery Workers, 5 Race Rel. L. Rep. 503 (E.D. La. 1958); Butler v. Celotex, 3 Race Rel. L. Rep. 503 (E.D. La. 1958). For a discussion of seniority disputes involving an interpretation of a collective bargaining agreement, see Glover v. St. Louis-San Francisco Ry., 37 U.S.L.W. 4084 (U.S. Jan. 14, 1969).

[5] "Employed persons are more likely to use the complaint process to protest unfair treatment on the job than to protest refusals to hire in the first instance." Blumrosen, *The Duty of Fair Recruitment under the Civil Rights Act of 1964,* 22 RUTGERS L. REV. 465, 467 (1968).

[6] *See* Gould, *Labor Law and the Negro,* THE NEW LEADER, Oct. 12, 1964, at 10; Jacobs, *The Negro Worker Asserts His Rights,* THE REPORTER, Jul. 23, 1959, at 16; Gould, BOOK REVIEW, THE NEW LEADER, Jul. 5, 1965, at 20; N.Y. Times, Dec. 13, 1967, at 19, col. 1; *id.,* June 25, 1968, at 29, col. 7.

[7] *See* Gould, *Discrimination and the Unions,* DISSENT, Sept.-Oct. 1967, at 564, reprinted in POVERTY: VIEWS FROM THE LEFT 160-83 (Larner & Howe ed. 1968); Wall St. J., Jan. 5, 1967, at 1.

as a means to erase the badge of servility.[8] Enactment of Title VII of the Civil Rights Act of 1964[9] and other governmental action[10] has placed the subject of racial discrimination in employment in the hands of both the courts and the Equal Employment Opportunity Commission. Whether one worker stands ahead of another for promotion, transfer, and layoff purposes is a political and volatile issue even without the racial factor.[11] There is nothing improper about a labor contract that requires a worker who transfers between jobs or departments to relinquish date of entry, plant, or employment seniority and to start anew at the bottom of the seniority ladder in the new job or department. Title VII of the Civil Rights Act of 1964, however, points to the conclusion that the rules governing this issue—rules involving practices which are legally permissible in the absence of job segregation—must be altered when segregation has been practiced by unions and employers.[12]

While the elimination of racial discrimination in employment was the primary purpose behind Title VII, Congress did not want to unnecessarily disturb seniority arrangements; the Act affects only those

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8 For historical background, see F. MARSHALL, THE NEGRO AND ORGANIZED LABOR (1965); H. NORTHRUP, ORGANIZED LABOR AND THE NEGRO (1944); S. SPERO & A. HARRIS, THE BLACK WORKERS (1966); THE NEGRO AND THE AMERICAN LABOR MOVEMENT (Jacobsen ed. 1968).

9 Civil Rights Act of 1964, § 703, 42 U.S.C. § 2000e-2 (1964).

10 Most other governmental action has been conducted under Exec. Order 11,246 or the National Labor Relations Act. *See* Exec. Order No. 11,246, 3 C.F.R. § 579, 42 U.S.C. § 2000e (Supp. III, 1967); United Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir.), *cert. denied*, 389 U.S. 837 (1966); *cf.* Gould, *supra* note 3.

A new avenue for attack on discriminatory seniority systems may be found in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). The 1866 Civil Rights Act addresses itself to labor contracts as well as housing. *See* Kimmerling, Memorandum on Jones v. Alfred H. Mayer Co. (on file at Columbia Law School Library); *cf.* Hodges v. United States, 203 U.S. 1 (1906).

Speaking of the prohibition against racial discrimination in housing articulated in *Jones* and in the 1968 Civil Rights Act, the Court has stated: "The 1968 Civil Rights Act specifically preserves and defers to local fair housing law, and the 1866 Civil Rights Act considered in *Jones* should be read together with the later statute on the same subject . . . so as not to pre-empt the local legislation which the far more detailed Act of 1968 so explicitly preserves." Hunter v. Erickson, 393 U.S. 385 (1969). *Compare* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) *with* Colorado Anti-Discrimination Comm'n v. Continental Air Lines, 372 U.S. 714 (1963). In Dobbins v. Local 212, IBEW, 69 L.R.R.M. 2313, 2336 (S.D. Ohio 1968), the court relies on state law for procedural matters such as statute of limitations. *See* UAW v. Hosier Cardinal Corp., 383 U.S. 696 (1966); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). In holding that *Jones* applies to labor contract discrimination as well as housing *Dobbins* states that "[g]overnmental sanction is no longer a necessary factor" in a suit alleging racial discrimination in employment. 69 L.R.R.M. at 2335; *cf.* Ethridge v. Rhodes, 268 F. Supp. 83 (S.D. Ohio 1967); Todd v. Joint Apprenticeship Comm. of the Steel Workers, 223 F. Supp. 12 (N.D. Ill. 1963), *vacated as moot*, 332 F.2d 243 (7th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965); Gaynor v. Rockefeller, 15 N.Y.2d 120, 204 N.E.2d 627, 256 N.Y.S.2d 584 (1965).

11 *See* S. SLICHTER, J. HEALY & E. LIVERNASH, *supra* note 2; Aaron, *supra* note 2; Mater & Mangum, *supra* note 2; *cf.* BUREAU OF NATIONAL AFFAIRS, BASIC PATTERNS IN UNION CONTRACTS, §§ 75, 1-11 (1965).

12 *See* Civil Rights Act of 1964 §§ 703(c)(1),(2),(3), 42 U.S.C. §§ 2000e-2(c)(1),(2),(3) (1964); *cf.* Gould, *supra* note 2; Note, *supra* note 3.

seniority systems that create differences in workers' status based on an "intention to discriminate."[13] Moreover, Congress was anxious to make Title VII apply prospectively, and the legislative history did not specifically discuss whether new seniority agreements had to provide Negro employees with seniority credits that they might have obtained in a white department but for past discriminatory hiring and transfer practices. If Congress intended to bring into being an integrated work force, however, and not merely to create a paper plan meaningless to Negro workers, the only acceptable legislative intent on past discrimination is one that requires unions and employers to root out the past discrimination embodied in presently nondiscriminatory seniority arrangements so that black and white workers have equal job advancement rights. If this was *not* the congressional intent, questions concerning the constitutionality of Title VII are raised.[14]

Specifically, the Supreme Court—its patience worn thin by discriminatory evasion—has insisted that new schemes designed to correct fourteenth amendment racial discrimination—at least with respect to voting,[15] education,[16] and juries[17]—must not only be nondiscriminatory on their face, but also must not so embody the vestiges of past discrimination that the proposed remedy is worthless. This requirement can be seen most clearly in the cases that have struck down the "freezing out" of Negro voters under new standards.[18] Secondly, the Court has required that remedial schemes be designed to accomplish their stated objectives. Thus since *Brown v. Board of Education*[19] and its ilk have made clear that integration of the races, and not mere nondiscrimination is the mandate of the fourteenth amendment, the government is constitutionally obligated to take whatever affirmative action necessary to achieve that goal.

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13 *See* Civil Rights Act of 1964, §§ 703(h), 42 U.S.C. & 2000e-2(h) (1964); 110 CONG. REC. 11,463 (1964) (remarks of Senator Humphrey); 110 CONG. REC. 6329 (daily ed. Mar. 30, 1964) (remarks of Senator Clark); U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLES VII AND XI OF THE CIVIL RIGHTS ACT OF 1964 3242-46. *See also* Quarles v. Phillip Morris, Inc., 279 F. Supp. 505, 515-17 (E.D. Va. 1968); Gould, *supra* note 3.

14 Louisiana v. United States, 380 U.S. 145 (1965); *cf.* South Carolina v. Katzenbach, 383 U.S. 301, 334-35 (1966); United States v. Duke, 332 F.2d 759, 770 (5th Cir. 1964).

15 Louisiana v. United States, 380 U.S. 145, 154 (1965).

16 Monroe v. Board of Comm'rs, 391 U.S. 450 (1968); Raney v. Board of Educ., 391 U.S. 443 (1968); Green v. County School Bd., 391 U.S. 430 (1968); *cf.* United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966); *aff'd*, 380 F.2d 385 (5th Cir. 1967), *cert. denied*, 389 U.S. 840 (1967).

17 Hernandez v. Texas, 347 U.S. 475 (1954); Cassell v. Texas, 339 U.S. 282 (1950); Akins v. Texas, 325 U.S. 398 (1945); Hill v. Texas, 316 U.S. 400 (1942); Norris v. Alabama, 294 U.S. 587 (1935); *cf.* Brooks v. Beto, 366 F.2d 1 (5th Cir. 1966); Collins v. Walker, 335 F.2d 417 (5th Cir. 1964). *But see* Swain v. Alabama, 380 U.S. 202 (1965), and see especially the dissenting opinion of Mr. Justice Goldberg, 380 U.S. at 228.

18 Brown v. Board of Educ., 347 U.S. 483 (1954); *see* note 15 *supra*.

19 347 U.S. 483 (1954).

Quarles v. Philip Morris[20] is the first judicial discussion of discriminatory seniority arrangements after passage of Title VII. Although its most basic assumptions are left unarticulated, and some of the dicta will prove mischievous in more important seniority disputes, it would appear to be a good beginning in terms of its treatment of the past discrimination problem.

II. THE QUARLES DECISION

Before dealing with the facts of *Quarles,* it is important to understand *Whitfield v. United Steelworkers.*[21] In *Whitfield* Negro workers challenged a plan negotiated through collective bargaining, which purported to eliminate segregated "lines of progression" in a steel mill. Each line of progression was a "distinct operation" in the plant and was "composed of a series of interrelated jobs."[22] Knowledge acquired on one job was a prerequisite to effective handling of the next job in the progression. The skilled jobs, reserved for whites, were in the number 1 line, and the unskilled jobs, reserved for Negroes, were in the number 2 line. The revision of past practices which was under challenge in *Whitfield* permitted Negro workers to bid in at the bottom of the number 1 line—but only at a price.

In the first place, a new qualifications test was imposed—a test that the white incumbents had not been required to take; white workers on line 1 had been previously subjected only to company "screen-

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20 279 F. Supp. 505 (E.D. Va. 1968); *see* United States v. United Paper Makers Local 189, 282 F. Supp. 39 (E.D. La. 1968); Hicks v. Zellerback Corp., 69 L.R.R.M. 2005 (E.D. La. 1968). While *Quarles* is the first court test of seniority and Title VII, the Equal Employment Opportunity Commission has made pronouncements on the matter: In the case of race, it is assumed that separate seniority lists and lines of promotion can be merged on some equitable basis, and that the ability of an employee to perform a particular job depends only on his skill and training. 1966 EQUAL EMPLOYMENT OPPORTUNITY COMM'N ANN. REP. 41.

1. A seniority system which has the intent or effect of perpetuating past discrimination is not a bona fide seniority system within the meaning of Section 703(h) of Title VII.
2. The fact that a seniority system is the product of collective bargaining does not compel the conclusion that it is a bona fide system.
3. Seniority systems adopted prior to July 2, 1965 (the effective date of the Act), may be found to be discriminatory where the evidence shows that such systems are rooted in practices of discrimination and have the present effect of denying classes of persons protected by the statute equal employment opportunities.
4. No seniority system, whether based on plant-wide, departmental, on-the-job seniority, or otherwise is, *per se,* lawful or unlawful under the Act. The critical factor in analyzing a particular system is the effect of such a system upon the competitive opportunities of employees. Accordingly, the question of whether any given seniority system conforms to the requirements of the Act will be resolved in light of the particular facts and circumstances of the case in which the issue arises.

1967 EQUAL EMPLOYMENT OPPORTUNITY COMM'N ANN. REP. 43-44.

21 263 F.2d 546 (5th Cir.), *cert. denied,* 360 U.S. 962 (1959).

22 *Id.* at 548.

ing" and a probationary period. Secondly, black workers, while given "preferential" rights to fill number 1 vacancies, had to take a pay cut in taking the bottom job on the number 1 line. Because the Negro workers regarded these features of the plan as inequitable, they argued that the union had violated its duty of fair representation under the National Labor Relations Act,[23] which obligates the union as exclusive bargaining agent to treat all bargaining unit members fairly.[24]

Stating that "[i]f there is racial discrimination under the new contract, it is discrimination in favor of Negroes,"[25] the Fifth Circuit held that neither the qualifications test nor the bottom job entry requirement violated the law. The court notes that the line of progression structure was "conceived out of business, not out of racial discrimination."[26] Therefore, comparing the case favorably to the discrimination engaged in *Steele v. Louisville and Nashville Railroad*,[27] in which Negro workers were ousted from their jobs and thus deprived of fair representation by the union, it was held that lower pay on the bottom job coupled with preferential transfer rights could not constitute racial discrimination.

The prime significance of *Whitfield* for Title VII seniority disputes, however, is the Fifth Circuit's refusal to acknowledge a duty of fair representation to eliminate past discrimination and the competitive disadvantage that the court's ruling imposes on Negro workers. The duty, said the court, might be discharged without coping with "the product of the past."[28] This is contrary to what is said about Title VII in *Quarles*: "Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act."[29]

In both *Quarles* and *Whitfield*, unions represented employees in segregated departments that contained departmental seniority rosters. In *Quarles*, the Company operated cigarette and tobacco manufacturing facilities that were divided into four general departments: (1) green

23 National Labor Relations Act, 29 U.S.C. §§ 151-58, 159-66 (1964).

24 263 F.2d at 550-51. *See* Vaca v. Sipes, 386 U.S. 171 (1967); Humphrey v. Moore, 375 U.S. 335 (1964); Conley v. Gibson, 355 U.S. 41 (1957); Syres v. Oil Workers, 350 U.S. 892 (1955); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Graham v. Brotherhood of Locomotive Firemen, 338 U.S. 232 (1949); Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210 (1944); Steele v. Louisville & N.R.R., 323 U.S. 192 (1944). The doctrine has been articulated administratively by the National Labor Relations Board. *See* Metalworkers Local 1, 147 N.L.R.B. 1573 (1964); Miranda Fuel Co., 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (3d Cir. 1963).

25 263 F.2d at 549.

26 *Id.* at 550.

27 323 U.S. 192 (1944).

28 263 F.2d at 551.

29 279 F. Supp. at 516.

leaf stemmery, (2) prefabrication, (3) fabrication, and (4) warehouse shipping and receiving. Prior to 1955, Negroes were confined to jobs in the stemmery and prefabrication departments with a "few" working in the "predominantly white" warehouse shipping and receiving department.[30]

At no time was there more than a very small number of black personnel in supervisory positions. Prior to the passage of Title VII, what the court characterized as "token hiring" of Negroes took place in fabrication.[31] In 1966 and 1967, however, the Negro percentage of new hires jumped astronomically.[32] Most important, however, for many years interdepartmental transfers were prohibited. As a result, black workers could not advance through promotion into better paying jobs and thus did not accumulate seniority credits in fabrication and the warehouse departments. A few years before 1961, transfers from prefabrication to both fabrication and the warehouse department were permitted on a limited basis as the result of pressure by the federal government. In the event of a business decline, some black employees could bump back and return to their prior department with seniority unimpaired, but others did not have this right.[33]

The district court in *Quarles,* like the Fifth Circuit in *Whitfield,* deals with a departmental structure that served "many legitimate management functions . . . [one that] promotes efficiency, encourages junior employees to remain with the company because of the prospects of advancement and limits the amount of retraining that would be necessary without departmental organization."[34] Thus "legitimate management functions" are at stake in *Quarles* just as "efficient management" problems were presented in *Whitfield.* But unlike *Whitfield, Quarles* holds that, at least as related to the facts of that case, the present consequences of past discrimination, *i.e.* the lack of accumulated seniority credits in the "white" fabrication department, can be remedied by Title VII. In arriving at this conclusion, the court notes that plaintiffs did not seek to "oust white employees with less employment seniority from their jobs, but they do seek to be trained and promoted to fill vacancies on the same basis as white employees with equal ability and employment seniority."[35]

In dealing with the legislative history of Title VII, the court

30 *Id.* at 508.
31 *Id.*
32 *Id.*
33 *Id.* at 512.
34 *Id.* at 513.
35 *Id.* at 514.

correctly notes that Congress, to the extent that it was bent upon preserving the seniority rights of white employees, was speaking of employment seniority generally and not of departmental seniority disputes of the type involved in the case. What the *Quarles* opinion is obviously driving at (but does not clearly articulate) is that Congress was against what it regarded as "reverse discrimination" emanating from the preferment of Negro workers "off the street" who have had no prior contact with the employing enterprise over white employees with employment seniority.[36]

The second question considered by the court is whether the seniority system under consideration was "bona fide" within the meaning of Title VII and therefore exempt from coverage.[37] While the new system negotiated by the parties eliminated all former barriers to interdepartmental transfers, it nonetheless embodied the past discrimination since it conditioned transfer on relinquishment of date-of-entry seniority rights. The court's conclusion, which is bottomed upon the valid assumption that any exceptions to Title VII's general prohibition of racial discrimination have to be explicitly spelled out in the statute, seems eminently sensible:

> Obviously one characteristic of a *bona fide* seniority system must be lack of discrimination. Nothing in § 703(h), or in its legislative history, suggests that a racially discriminatory seniority system established before the act is a *bona fide* seniority system under the act. . . . The court holds that a department seniority system that has its genesis in racial discrimination is not a *bona fide* seniority system.[38]

Quarles not only considers past discrimination in determining whether the present status of the plaintiff employees reflected discrimination, but it also devises a remedy that reaches back prior to the effective date of Title VII. Members of the class, those Negro workers hired before January 1, 1966, may be allowed, if qualified, to fill vacancies in other departments with their employment seniority remaining intact for competitive status purposes. This remedy, of course, flies in the face of the *Whitfield* admonition against such intervention by the judiciary: "This is a product of the past. We cannot turn back the clock."[39] *Quarles* would then seem to be more akin to the fourteenth amendment cases, which deal with past discrimination in other areas.

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36 *See* Gould, *supra* note 3, at 257-65.
37 279 F. Supp. at 517.
38 *Id.*
39 263 F.2d at 551.

Certainly, much of the language in the opinion is indicative of a judicial willingness to take the high ground in employment discrimination, as well as in schools, juries, voting, and housing.[40]

Yet, *Quarles* has its limitations, and these limitations can prove to be fundamentally troublesome unless corrected in future cases. In the first place, the court finds active discrimination by the company, through its hiring policies, during the time in which the statute had become operative—from July 2, 1965, through January 1, 1966. But what if no discrimination independent of pre-July 2, 1965, conduct can be found? Is hiring the only discrimination that the court finds—or is it transfer discrimination as well? Apparently, hiring is the focus of attention because shortly after January 1, 1966, the evidence establishes that the hiring policy had changed, and the court could not find discrimination subsequent to that date. But regardless of whether the court's focus is hiring or transfers, the mere absence of discriminatory hiring or transfers subsequent to the effective date of the statute ought not to be read as excising past discrimination embodied in the present system. Future lack of work opportunities in a departmental seniority system of the type contained in *Quarles* embodies within it the same discriminatory taint, as is present in the hiring and transfer policies, since the present system had its genesis in what was admittedly discriminatory in the past.[41] But if this past discrimination is now retained, *Quarles* is not at all clear about telling us why the time at which hiring discrimination ceased should be the time at which liability should be tolled. Even the elimination of transfer barriers, which was not undertaken by the parties at any time in *Quarles,* should not pretermit a finding of discriminatory conduct subsequent to July 2, 1965, inasmuch as discrimination still exists in the form of denied employment seniority credits.

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40 *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

41 The theory with regard to past discrimination rests on two propositions. First, while past discrimination may not have been unlawful when engaged in, the practices subsequent to July 2, 1965, reflecting such past discrimination bring it within the statute's operative date and subject present and past discrimination to the remedial authority of Title VII. In essence, this theory rests on the proposition that the past and present are inextricable. *cf.* Note, *supra* note 3, at 1269-70. Secondly, racial discrimination has always been unlawful when trade unions have failed to represent bargaining unit members fairly. *See* Steele v. Louisville & N.R.R., 323 U.S. 192 (1944). The National Labor Relations Act and the Railway Labor Act complement Title VII. *See* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957); *cf.* Gould, *supra* note 2. It is now possible that race discrimination in employment has been unlawful since the Civil Rights Act of 1866. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Dobbins v. Local 212, IBEW, 69 L.R.R.M. 2313 (S.D. Ohio 1968).

But a second limitation in *Quarles* could thwart the effectiveness of Title VII to a significant degree. For *Quarles* does not purport to ignore *Whitfield* as bad law. Instead, it attempts to distinguish *Whitfield* as another type of case. As we shall soon see, the logic of this distinction as well as the confusion about hiring and transfer discrimination and the relevance of each to seniority discrimination is, at best, highly suspect.

The *Quarles* opinion states that *Whitfield* is not "directly on point"[42] and "does not stand for the proposition that present discrimination can be justified simply because it was caused by conditions in the past."[43] *Whitfield,* says the court, allowed "[p]resent discrimination . . . only because it was rooted in the Negro employees' lack of ability and training to take skilled jobs on the same basis as white employees."[44] In *Whitfield,* business necessity says the *Quarles* court (using the language of *Whitfield* itself), "dictated the limited transfer of privileges under the contract."[45]

Preliminarily, it is important to understand two assumptions that appear to underlie this analysis of *Whitfield.* The first is that "present discrimination" in fact existed in the earlier case. But *Quarles* seems to say that when there is a lack of "ability and training," which would necessitate a relatively costly and inconvenient remedy, the remedy for past discrimination cannot be imposed, and statutory discrimination cannot be found. More specifically, *Quarles* negates the proposition that the parties must do something more for the victims of discrimination than it does for white workers in that the training is available to the discriminatee and nondiscriminatee alike. Yet *Quarles* acknowledges that there was discrimination in *Whitfield.* The financial burden of training which is of a more substantial nature than the on-the-job variety presented in *Quarles* produces this non sequitur: that a violation was absent in *Whitfield* in light of the remedy's alleged impracticality.

Quarles analogizes *Whitfield*'s concern about slotting unskilled workers into skilled jobs with the former opinion's refusal to characterize a failure to hire or promote Negroes to supervisory positions as discrimination. Apparently, the *Quarles* opinion's use of the words, "past discrimination," in the context of supervisory positions and its discussion of *Whitfield* has no legal import. Because of this "past dis-

42 279 Supp. at 518.
43 *Id.*
44 *Id.*
45 *Id.*

crimination," the failure to promote Negroes to supervisory positions, *Quarles* says, "[m]any Negroes, regardless of seniority, are not qualified for supervisory positions. The company cannot be required to promote them to supervision to lessen the disproportion in the numbers of white and Negro persons holding these positions."[46]

In light of the above, can *Quarles* be read to say that Title VII does not reach discrimination when the costs of training are too burdensome? Is this a result with a logical basis? Upon whom is the burden to be imposed? The objects of discrimination? Can the result in *Quarles* be garnered from any legislative intent? And if its basis is practical rather than logical, is it not the type of compromise that unduly qualifies the rights of those for whom the statute is intended to eliminate obstacles? After all, the costs of training and lack of present ability have nothing to do with what even *Quarles* admits to be "past discrimination" embodied in the present system. If there is a connection between the two, it is that the Negro worker's failure to acquire skills is in part directly attributable to the segregated practices of which he complains. These past practices arbitrarily limit the Negro worker's potential for promotion. The segregated work place has much the same kind of dampening impact upon aspiration for advancement as the segregated school has upon the child's ability to learn and to compete effectively with white counterparts.[47]

It is also possible that *Quarles* represents a rather confused misreading of *Whitfield*. The *Whitfield* opinion and the union and employer involved in that case assume that a transfer between the number 1 and number 2 lines should be provided. The failure to permit a transfer is what is referred to in that case as the past discrimination that cannot be cured. What is at issue in *Whitfield* is the rung of the

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[46] *Id.*

[47] *cf.* Thompson v. Moore Drydock Co., 27 Cal. 2d 595, 165 P.2d 901 (1946); Williams v. Int'l Bhd. of Boilermakers, 27 Cal. 2d 586, 165 P.2d 903 (1946); James v. Marineship Corp., 25 Cal. 2d 721, 155 P.2d 329 (1944); Betts v. Easley, 161 Kan. 459, 169 P.2d 831 (1946). *Contra,* Davis v. Brotherhood of Ry. Carmen, 272 S.W.2d 147 (Tex. Civ. App.—Galveston 1954, no writ). *But see* United Packinghouse, Food and Allied Workers Int'l Union, AFL-CIO v. NLRB, 70 L.R.R.M. 2489 (D.C. Cir. 1969), which extends Brown v. Board of Educ., 347 U.S. 483 (1954) to the employment area; United Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966), in which the Board and the Fifth Circuit have attempted to eliminate segregation in all plant conditions as well as jobs.

For excellent discussions of the effect of school segregation upon the achievement of Negro children, see Clark & Burns, *The Realpolitik of Racial Segregation in Northern Public Schools: Some Pragmatic Approaches,* 14 How. L.J. 217 (1968); Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts,* 78 HARV. L. REV. 564 (1965); Wright, *Public School Desegregation: Legal Remedies for De Facto Segregation,* 40 N.Y.U.L. REV. 285 (1965). For application of the Brown v. Board of Education Doctrine to other areas of "state action" see Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 279 U.S. 184 (1964); Watson v. Memphis, 373 U.S. 526 (1963); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967).

job ladder at which the black worker enters. Built into consideration of this question, one finds the seniority credit issue. For presumably the Negro workers wants to use the plant or employment seniority credit to obtain a higher level entry job.

In dealing with promotions to supervisors, *Quarles* attempts to undermine the proposition that a *no-transfer policy itself* is discriminatory when training is necessary to qualify the disadvantaged group, *i.e.* Negro workers. Thus it is difficult to see how *Whitfield* is "applicable" to the supervisory question in *Quarles,* inasmuch as the failure to transfer is acknowledged by the Fifth Circuit in *Whitfield* to be discriminatory. The dispute in *Whitfield* is the *basis* under which promotions are to take place. Preliminarily, the supervisory dispute in *Quarles* is the question of whether or not the failure to promote to supervisory positions in and of itself is discriminatory. In part, this issue must be resolved through an examination of the relationship between supervision and nonsupervisory jobs and whether the skills involved in each are so disparate as to negate any inference of discrimination in a no-transfer policy.

Of course, it may be that the absence of an *affirmative* no-transfer policy, and the lack of applicants is a factor that assists the court to conclude that there is no discrimination concerning supervisory positions in *Quarles.* The union and employer had negotiated a prohibition of *interdepartmental transfers* thus precluding an equitable Negro advance to the better paying fabrication and warehouse jobs. Apparently there were no union negotiations in the case of nonbargaining unit[48] supervisory positions for which the union had no negotiating responsibility.[49] This makes the supervisory situation distinguishable from a bargaining unit job. But such a distinction is not clearly articulated in *Quarles,* and it hardly makes *Whitfield* applicable.

Another flaw in the treatment *Quarles* accords *Whitfield* lies in the court's failure to see the latter case as one involving questions of management's right to test[50] and of which job on the line of progression

48 *See* Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968). National Labor Relations Act §§ 2(11), 9, 29 U.S.C. §§ 152 (11), 159 (1964) excludes supervisory personnel from the coverage of the statute and establishes the union as exclusive bargaining representative for employees within an appropriate unit.

49 *But see* Brotherhood of R.R. Trainmen v. Howard, 343 U.S. 768 (1952); Rumbaugh v. Winifrede R.R., 331 F.2d 530 (4th Cir.), *cert. denied,* 379 U.S. 929 (1964).

50 Testing, while extremely important to seniority problems, is beyond the scope of this article. *See generally* Guidelines on Employment Testing Procedures, LRX LAB. REL. REP. 2051 (1966). For discussions of the problems of employment and testing, see Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education,* 68 COLUM. L. REV. 691 (1968); Note, *The Use of Tests in Promotions Under Seniority Provisions,* 21 VAND. L. REV. 100 (1967). The Equal Employment Opportunity Commission

is appropriate for the Negro transferee. Had a line of progression and/or wage cut been inherent in the *Quarles* transfer, the case would have been more closely akin to *Whitfield*. The controversy in *Quarles*, however, centers around the future movement of Negro workers based upon the amount of accumulated seniority that they could exercise on their own behalf. Essentially, the questions presented in *Whitfield* relate to the entry job and the basis of entry. These issues are not at the heart of the *Quarles* controversy regarding supervisors.

III. The Meaning of Discrimination under Title VII

A. Evidentiary Problems

Quarles concludes that the racially segregated departments in that case constitute discrimination within the meaning of the Civil Rights Act of 1964. Aside from references to discriminatory company hiring policies, however, no clear rationale is articulated as a basis for either the violation, or the remedy which *Quarles* imposes. For one must equate the award of past seniority with a finding of discriminatory transfers as well as hiring practices. It is the discriminatory transfer prohibition that causes a piling up of seniority credits in the segregated departments. One finds no reasoning in the court's opinion that appears to support a finding of *transfer* discrimination as distinguished from hiring discrimination. Indeed, the court's statement that "restrictions upon the present opportunity for Negroes result from the company's employment practices prior to January 1, 1966"[51] indicates that the discrimination which is remedied in *Quarles* is attributed by the court to the hiring policies of the employer.

But how then may transfer practices be altered by court decree? How may a union be a co-defendant when it is involved only through the collective bargaining agreement and not with hiring practices followed by the employer? Is not the only appropriate remedy a form of nondiscriminatory hiring rather than reform of the collectively

states that Title VII provides that a "professionally developed ability test" is protected under the statute unless it is "designed, intended or used to discriminate because of race." Guidelines on Employment Testing Procedures, *supra* at 2051. The Commission interprets "professionally developed ability tests" to mean a "test which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs." *Id. But see* United States v. H.K. Porter Co., 70 L.R.R.M. 2131, 2155-66 (N.D. Ala. 1968); Griggs v. Duke Power Co., 69 L.R.R.M. 2389 (M.D.N.C. 1968). A problem in the line of progression cases is that the employer may test for the top job in the progression. In the steel industry employees "freeze" themselves into a job on the line because they cannot proceed further. Management may "freeze" an employee depending upon an evaluation of ability.

[51] 279 F. Supp. at 513.

negotiated transfer provisions? All that *Quarles* says is that departmental organization has thwarted the advance of black workers on their own merits. Should this "effect" have been enough to establish discriminatory intent under the statute? All of this is complicated by the fact that the interdepartmental transfer restrictions serve "legitimate management functions." One searches through the *Quarles* opinion in vain for any answers to these questions.

Although *Quarles* does not seem to rely upon this factor, "[r]acially segregated local unions formerly were bargaining agents for the employees"[52] in that case. It is possible, however, that this background coupled with a finding of discriminatory wage rates may have influenced the court's thinking. But, as the court notes, the "present bargaining committee includes both white and Negro employees."[53]

Nevertheless, the entire pattern contrasts with the facts contained in *Whitfield*. There the Fifth Circuit, while noting overwhelming Negro opposition to the negotiated plan,[54] seems to lean heavily on these findings: "The Union has always been integrated. Negro members hold office in the Union, particularly the key office of Plant Grievance Chairman, and have always participated actively and responsibly in all features of the collective bargaining process."[55] But it is exceedingly short-sighted to consider involvement relevant to the issue of racial discrimination and not the opposition of the affected group. For in these and most cases, Negro workers are a minority, and their involvement may not have any impact on the dominant "white caucus" viewpoints.[56]

On the other hand, when the collective agreement of the type portrayed in *Quarles* and *Whitfield* has been negotiated by a segregated union,[57] one can properly infer that the union is involved in unlawful discrimination. Even when past discriminatory admission policies have been corrected, it seems unrealistic to permit the merger of "dual locals" to vitiate this presumption when the merger produces

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52 *Id.* at 509.

53 *Id.*

54 263 F.2d at 548 n.3.

55 *Id.* at 547-48.

56 This is not intended to equate the views of the Negro minority with what is lawful and permissible. I have warned against the dangers implicit in this approach relating to the conciliation process engaged in by the Equal Employment Opportunity Commission. *See* Gould, *supra* note 2, at 33-34.

57 The Fifth Circuit has sanctioned remedies against a segregated union that roots out the present consequences of past discrimination. *See* Heat & Frost Insulators Local 53 v. Vogler, 70 L.R.R.M. 2257 (5th Cir. 1969).

the same "lily white" leadership, which had injured the interests of black workers previously.[58]

But the more difficult case is like *Whitfield* when one is confronted with the "integrated" union. What evidence does one look to in attempting to find discriminatory transfer provisions in the labor contract? One starting point in this analysis is, of course, the existence of the segregated departments and the denial of promotional opportunities in the past. In a series of cases interpreting the National Labor Relations Act, the Supreme Court has established the rule that discriminatory intent can be inferred from conduct in which unions and employees are found to be engaged.[59] Using the jury cases as precedent,[60] the preponderance of Negroes in lower-paying and inferior jobs, while white workers have the better work, ought to establish a prima facie case for a Title VII violation. Department and seniority practices which are perfectly lawful and, indeed, meritorious *in vacuo,* are tainted with racial discrimination in this factual context.

There are three basic fact patterns in which seniority discrimination may exist. The first is the situation in which Negro workers are performing the same work as or are acting as "helpers" to white employees. Very often such "helpers" fill in in the white job classification during absences and vacation periods in order to secure advancement in the jobs previously reserved to whites. The second is essentially *Quarles*—in which there is some functional relationship between the jobs in the separate departments and in which on-the-job training already offered to whites will suffice to supply skills that the Negro employee may not possess at the time of promotion for transfer. In this case, the parties are, by the nature of the enterprise, not obligated to

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58 *See* Musicians Local 10 v. American Fed'n of Musicians, 57 L.R.R.M. 2227 (N.D. Ill. 1964).

59 *See* NLRB v. Fleetwood Trailer, 389 U.S. 375 (1967); NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967); American Shipbuilding Co. v. NLRB, 380 U.S. 300 (1965); NLRB v. Brown, 380 U.S. 278 (1965); NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963); Teamsters Local 357 v. NLRB, 365 U.S. 667 (1961); NLRB v. Truck Drivers Local 449, 353 U.S. 87 (1957); Radio Officers Union v. NLRB, 347 U.S. 17 (1954); Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945); NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938); *cf.* Christensen & Svanoe, *Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality,* 77 YALE L.J. 1269 (1968); Getman, *Section 8(a)(3) of the NLRA and the Effort to Insulate Free Employee Choice,* 32 U. CHI. L. REV. 735 (1965); Gould, *The Question of Union Activity on Company Property,* 18 VAND. L. REV. 73 (1964). An amendment to the Civil Rights Act by Senator McClellan to make only that discrimination violative of the Act that was "solely" predicated upon race and other prohibited considerations was defeated. 110 CONG. REC. 13,837-38 (1964). Remarks of Senator Humphrey make it clear that intent under the statute can be established by way of inference from conduct. 110 CONG. REC. 14,270 (1964).

60 Note 17 *supra.*

provide more training to Negro employees than is accorded to whites. The third case is one that may resemble *Whitfield* insofar as the "white" jobs require demonstrably superior skills, which cannot be obtained by most Negro workers who have been held back by segregation without an expenditure of funds for training. This is the hard case in which *Quarles* would exonerate what the opinion says is "discrimination" committed by the union and employer.

While Title VII does not per se require that all employers adopt a policy of promoting all employees, one can assume that some workers certainly can acquire the skills previously denied through segregated department lines. There are, of course, extreme situations involving job classifications like those of janitor and airline pilot in which a transfer prohibition even in the face of hiring segregation is reasonable.[61] In such a situation the presumption is against promotion, and therefore a transfer prohibition is nondiscriminatory. Nonetheless, the representation of workers by the exclusive bargaining agent in one bargaining unit and the "community of interest" of all such employees[62] ought to buttress the conclusion that the possibility of transfer at least within the bargaining unit is not unreasonable or outlandish. When the prima facie case has been established through a pattern of segregation in this context, it ill behooves a law intended to eliminate race discrimination to assume that the discriminatee class is nonpromotable.

Of course, this conclusion does not detract from the concern for "business necessity" exhibited in *Whitfield*. For the *Quarles* opinion highlights the fact that most labor contracts use seniority along with "qualifications" to determine job advancement.[63] Seniority is only one consideration in the process. Since Title VII says that, on finding discrimination, the courts are to take "affirmative action" in devising remedies, it seems consistent with the purpose of Title VII to impose a statutory definition of "qualifications." "Qualifications" means the capacity to perform, rather than to require the possession of immediately marketable skills and thus indirectly undermine the goal of equal employment opportunity. This is not to say that unskilled workers should be slotted in "willy-nilly" to any job in the line of progression when they do not possess present and adequate skills. But the

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61 *See* Gould, *supra* note 2, at 10-12.

62 National Labor Relations Act § 9, 29 U.S.C. § 159 (1964); *see* cases cited note 49 *supra*.

63 *See* BUREAU OF NATIONAL AFFAIRS, BASIC PATTERNS IN UNION CONTRACTS §§ 75:1-11 (1965).

employers and unions that rely upon relatively unskilled Negro labor in this context are part and parcel of the discriminatory scheme, which debilitates the black worker and his aspirations. While such unions and employees are not the initial cause of the inequity that impels a training remedy, they maintain and perpetuate the system.[64] Surely, then, some remedy more drastic than that imposed in *Quarles* is compatible with the statutory scheme.

Recently, however, in *United States v. H. K. Porter*[65] the Attorney General alleged a "pattern or practice" of discrimination under Section 707 of the Civil Rights Act.[66] The court, in dealing with a steel plant in which "the jobs within each department require skills and ability which differ from one department to another and . . . each department has a specific function . . . in the over-all operations of the plant . . . ,"[67] has dismissed most of the complaint on the theory that elimination of interdepartmental transfer prohibitions in 1962 and the negotiation of bump-back rights[68] for transferees block out prior discrimination. In *H. K. Porter,* as in *Quarles,* federal[69] intervention prompted the union and employer to permit transfers from the segregated Negro line of progression. Moreover, these transfer rights appear to have been a bit more generous than the limited variety provided prior to the Civil Rights Act in *Quarles.* The parties in *H. K. Porter* attempted to encourage transfers by allowing transferees to "return [to their old department] and regain their accumulated seniority if they wished to do so or if they needed to do so because of a reduction in force."[70] This was not done for all employees in *Quarles.*

In holding that there is no "pattern or practice" of discrimination within the meaning of Section 707 of the Civil Rights Act, *H. K. Porter* concludes that: (1) "[s]ignificant differences in the skills and abilities required between the departments" and the fact the prevalence of departmental seniority exists in other plants without racial problems, undercut the Attorney General's argument that plant-wide seniority

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64 *See* Jackson v. Pasadena City School Dist., 59 Cal. 2d 876, 382 P.2d 878, 31 Cal. Rptr. 606 (1963); cases cited notes 100 & 101 *infra.*

65 70 L.R.R.M. 2131 (N.D. Ala. 1968).

66 Civil Rights Act of 1964, § 707, 42 U.S.C. § 2000e-6(b) (1964).

67 70 L.R.R.M. at 2137.

68 *See* S. SLICHTER, J. HEALY, & E. LIVERNASH, *supra* note 2, at 158-61; *cf. In re* Darin & Armstrong, 13 Lab. Arb. 843 (1950).

69 In 1962, the President's Committee for Equal Employment Opportunity had jurisdiction over the administration of the Executive Order. Currently, the Office of Federal Contract Compliance is responsible for formulating "affirmative action" policies under the Executive Order. *See* Exec. Order No. 11,246, 3 C.F.R. § 579, 42 U.S.C. § 2000e (Supp. III, 1967).

70 70 L.R.R.M. at 2142.

should be used for competitive status purposes, and (2) the Attorney General's proposal would be unfair to "white employees who, having worked their way up to their positions in the line of progression, would be subject to being in effect frozen there while employees from other departments bid in for the jobs above them in the progression lines."[71]

The second point echoes the same solicitude for white incumbents who have had a "leg up" the promotional ladder because of segregation, which is exhibited in *Whitfield.* Indeed, *H. K. Porter* specifically relies upon that case. One wonders whether the court's opinion would have been the same if the court had known that two weeks later the Fifth Circuit would cast doubt on the viability of the past discriminatory pronouncements of *Whitfield* in the Title VII context. For in *Heat and Frost Insulators Local 53 v. Vogeler,*[72] that court, while specifically reserving opinion on the relationship between "referral" seniority and pre-Act discrimination,[73] said the following with regard to the authority of Title VII and discriminatory union admission policies: "Where necessary to insure compliance with the Act, the District Court was fully empowered to eliminate the present effects of past discrimination."[74] For this proposition, it is interesting to note that the Fifth Circuit cites *Quarles* and *United States v. United Paper Makers Local 189,* another seniority case.[75]

It is to be recalled, however, that a major defect in *Quarles* is its dicta, which indicate that when Negro workers do not affirmatively evidence existing skills and ability necessary to perform a job, Title VII discrimination cannot be found. Thus in *H. K. Porter,* the court distinguishes *Quarles* on this point, stating that in the former case,

> the requisite skills and abilities differ in substantial measure from department to department, that satisfactory job performance in one department is not an accurate predictor of satisfactory job performance in another department, and that the departmental structure of this plant is in fact based on

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71 *Id.* at 2150.

72 70 L.R.R.M. 2257 (5th Cir. 1969). *See also* Central R.R. v. Jones, 229 F.2d 648 (5th Cir.), *cert. denied,* 352 U.S. 847 (1956).

73 We express no opinion as to whether the elimination of either the referral seniority systems in Sheet Metal Workers would constitute an abuse of discretion by retroactively penalizing pre-Act discrimination by destroying "vested" seniority rights or by giving preferential treatment to negroes [*sic*] or whether either's use constituted a pattern or practice of discrimination violative of the Act.
70 L.R.R.M. at 2261 n.18. *See* Gould, *The Negro Revolution and Trade Unionism,* 114 CONG. REC. 7226-28 (daily ed. Aug. 1, 1968); *cf.* NLRB v. Local 269, IBEW, 357 F.2d 51 (3d Cir. 1966).

74 70 L.R.R.M. at 2260.

75 282 F. Supp. 39 (E.D. La. 1968).

> the particular and distinctive type of work performed by each of the departments.[76]

But while reliance upon the *Quarles* invitation to distinguish cases when skill requirements vary with the department might be expected, the first basis for distinction that *H. K. Porter* urges is something of a surprise. The court states that in *Quarles* the black workers could not obtain upward mobility inside the departments in which they had traditionally worked whereas, in *H. K. Porter,* Negroes enjoyed substantial mobility.[77]

What the *H. K. Porter* opinion fails to mention is that Negro workers in *Quarles* had also made some past gains, although they were perhaps not so "substantial" as in *H. K. Porter.* Moreover, the critical issue is whether there are jobs and departments from which Negroes have been precluded because of race. So anxious is the court in *H. K. Porter* to bury any mention of past discrimination that it reaches out to grasp all the features of *Quarles* which are neither essential to nor part of the holding in that case. The position of the defendant in *H. K. Porter* is not more meritorious because Negroes could move up in their own departments without transfers. If anything, these "gains" establish discriminatory intent more clearly than in *Quarles.* For in *H. K. Porter,* unlike *Quarles,* departmental structure predicated upon business efficiency does not always coincide with past (pre-1962) race segregation.

Thus the element of valid business purpose contained in *Quarles,* when considering a departmental transfer scheme, is not available here to defend all past practices of the parties. The court erroneously believes that the above-noted belated corrections make the *H. K. Porter* conduct less discriminatory than in *Quarles.* Because there were "legitimate management prerogatives" that, to some degree, supported the interdepartmental structure in *Quarles,* the exact opposite is true. There is no evidence that is set forth in the *H. K. Porter* opinion that indicates there is any rational basis for segregation inside the department in that case. And since the court avoids holding that past discrimination incorporated in present employment status is lawful,[78] it

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[76] 70 L.R.R.M. at 2148.

[77] *Id.* at 2145.

[78] On this question, however, the opinion in *H.K. Porter* equivocates. The court, questioning whether legislative intent precludes consideration of past discrimination, states that it has "reached the firm conviction that the dogmatic approach of attempting to fit a case into the confines of one or the other theoretical concept is not the answer." 70 L.R.R.M. at 2144. The court concludes that the union-employer practices do not constitute discrimination. The court appears to say that even if past discrimination is to be relied upon, there is no discrimination in this case. *But see id.* at 2143-44 n.12 in which the following is stated:

> The Attorney General relies also on Justice Black's statement, in writing for the

is left dependent upon its mistaken view of what constitutes discrimination in the past.

Further, the existence of segregated jobs is condemned by the Act whether they exist inside or outside of a given department. The departmental factor, unlike actual job content, should matter little to the court in a Title VII case.

Finally, the court in *H. K. Porter* attempts to refute the Attorney General's argument that statistics prove that racial discrimination continues in the present as well as the past by pointing out that some Negro workers have not applied for transfers and have voluntarily frozen themselves into the jobs that they now hold.[79] But, although the opinion notes that the company has made some offers of training for "higher rated jobs" which were refused, there is no indication that across-the-board training offers were made to all Negroes who have been held back in the past. The objective of such training would be the adjustment of the transferee to the new departmental and job requirements. This aspect of the case, coupled with the court's approval of the bump-back seniority rights to the old department without the transferring of seniority credits to the formerly white department, as sufficient for Title VII purposes, make the *H. K. Porter* opinion less than persuasive.[80]

Another recent opinion, *United States v. Sheet Metal Workers International Association*,[81] contains language that is seemingly contrary to both *Quarles* and, to some extent, *H. K. Porter*. In *Sheet Metal Workers* the Attorney General brought suit against two craft unions under the Civil Rights Act of 1964.[82] Both unions had an all white

Court in Louisiana v. United States, 380 U.S. 145 (1965), that "the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." However, the Court was there concerned with past conduct which was unlawful at the time it was committed rather than with the situation here present of the theory that a decree should be entered to compensate for a past situation which was not proscribed by statute at the time.

See note 41 *supra*. The court concludes that the remedy requesting some form of plant-wide seniority would constitute unlawful preferential treatment:

> [I]t is difficult indeed to escape the conclusion that in seeking the abolition of departmental seniority and creation of the unrestricted plant-wide seniority and bidding plan for the stated purpose of compensation for the years prior to 1962 and to achieve a racial balance, the Attorney General is asking the court not only to disregard the facts of the case, but further to decree, not remedial relief, but the preferential treatment and racial balance which the principle sponsors of the legislation carefully explained was not the way the title was to be construed.

70 L.R.R.M. at 2149.

79 *Id.* at 2147. *See* note 50 *supra*.

80 The court relys upon Whitfield v. United Steelworkers, 263 F.2d 546 (5th Cir.), *cert denied*, 360 U.S. 902 (1959).

81 280 F. Supp. 719 (E.D. Mo. 1968).

82 Civil Rights Act of 1964, § 703(c), 42 U.S.C. § 2000e-2(c) (1964).

membership, and both had an extremely small percentage of Negro apprentices. The Attorney General contended that the unions had violated the Act "by failing to admit Negroes into Local 1 and Local 36 on a non-discriminatory basis, and by failing to operate their respective hiring or referral systems on a non-discriminatory basis. . . ."[83] The Government also alleged that "nepotism is a policy and practice of both unions and that the unions have failed to inform Negroes of the opportunities to become members of the unions, and that they have failed to organize employers who employ Negroes."[84] The court held that there was no "pattern or practice" of discrimination within the meaning of the Act on the basis of the evidence submitted.

In *Dobbins v. Local 212, IBEW*,[85] a suit by the Attorney General and individuals, the court found union discrimination with respect to membership, apprenticeship, training, and referrals by its exclusive hiring hall. But both *Dobbins* and *Sheet Metal Workers* differ from the conclusions reached in *Quarles* in a number of important respects.

Unlike *H. K. Porter*, both cases state categorically that discriminatory conduct prior to the effective date of Title VII cannot be remedied.[86] The court in *Sheet Metal Workers* is even opposed to the use of pre-statute discrimination as evidence to shed light on the question of post-statute discrimination,[87] and, in large part, this accounts for the fact that there was a dismissal in that case. The opposite conclusion in *Dobbins* on this point assists the court to find a violation there. For obscure reasons both cases state the use of past discrimination in *Sheet Metal Workers* for purpose of finding a violation and in *Dobbins* to fashion an appropriate remedy would constitute "preferential treatment" of Negro workers. (Title VII specifically precludes preferential treatment.)[88] Here one again finds remnants of the *Whitfield* rationale for protecting white incumbents.

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83 280 F. Supp. at 721.

84 *Id.* *See also* Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947), and especially the dissenting opinion of Mr. Justice Rutledge, 330 U.S. at 564.

85 69 L.R.R.M. 2313 (S.D. Ohio 1968).

86 [A] post-Act practice or pattern may furnish the basis for a Title VII claim . . . in our view affirmative post-Act action directed toward a group to correct pre-Act discrimination against that group constitutes the granting of preferential treatment of that group and on that subject Congress has specifically stated that Title VII shall not be construed so as to require a labor union to grant preferential treatment to any group based on race or color.

Id. at 2336. "[E]vidence shows that prior to 1964 both defendants excluded Negroes. The Civil Rights Act of 1964 was not intended to penalize unions or others for their sins prior to the effective date of the act." 280 F. Supp. at 730.

87 "[E]vidence of conduct pre-Act is competent and relevant for a number of purposes." 69 L.R.R.M. at 2346. *cf.* United States v. Local 38, IBEW, 70 L.R.R.M. 3019 (N.D. Ohio 1969).

88 Civil Rights Act of 1964, § 703(j), 42 U.S.C. § 2000e-2(j) (1964): "Nothing contained in

Secondly, *Dobbins* and *Sheet Metal Workers* indicate that, when the defendant's conduct evidences an "economic purpose," statutory discrimination is absent.[89] Thus in *Dobbins,* the court states the following:

> The limitation of either union or apprenticeship membership to a number far below the number necessary for the particular trade would be a discriminatory practice and pattern in context involving an all W [white] union membership with a previous history of discrimination. *Louisiana v. United States,* 380 U.S. 145 (1965). However, on a showing by a defendant that the limitation has nothing to do with any discriminatory intention but is related to a reasonable economic purpose, the limitation in number is not unlawful.[90]

National labor law provides unions and employers with a wide degree of latitude in dealing with economic problems.[91] In the instant case, limitations on apprentices and members are presumably formulated with regard to the impact that supply of available labor will have on the wage and fringe benefit package agreed to at the bargaining table as well as the number of unemployed union members. Thus the court's presentation of its own formula (*i.e.* discrimination when limitations are "far below" what makes sense economically) is a wise choice of language. The flexibility given the parties by national labor policy[92] is also essentially responsible for the kind of approach taken in *H. K. Porter* in which plant-wide seniority credits are denied because the departmental system is a valid one, *i.e.* it exists elsewhere when there are no allegations of discrimination.

But the formula itself is legally questionable. For the union-employer practice may have the soundest economic purpose and yet still mirror the effects of past segregation. Even *Quarles* supports this proposition by devising a remedy at variance with a system that, as the court states, is grounded upon "legitimate management prerogatives." There are two distinctions, however, between *Quarles* and

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this title shall be interpreted to require . . . special treatment . . . on account of an imbalance which may exist with respect to the total number of percentage of persons of any race . . . in comparison with the total number of percentage of persons of such race . . . ."

89 In *Sheet Metal Workers* the court stated that the Civil Rights Act was not "passed to destroy seniority rights in unions or in business." 280 F. Supp. at 730.

90 69 L.R.R.M. at 2338.

91 *See* NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477 (1960); NLRB v. Gamble Enterprises, Inc., 345 U.S. 117 (1953); American Newspaper Publishers Ass'n v. NLRB, 345 U.S. 100 (1953); NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952).

92 *See* NLRB v. Gamble Enterprises, Inc., 345 U.S. 117 (1953); American Newspaper Publishers Ass'n v. NLRB, 345 U.S. 100 (1953). *But see* Meat Cutters Local 189 v. Jewel Tea Co., 381 U.S. 676 (1965); UMW v. Pennington, 381 U.S. 657 (1965).

Dobbins which are immediately apparent: (1) the relative unavailability of an objective substitute for union practices in *Dobbins* unlike in *Quarles* in which past seniority credits were used to remedy plaintiff's injuries; and (2) the fact that *Quarles,* unlike *Dobbins,* involves a temporary revision of the system for a group of identifiable discriminatees. The seniority system previously negotiated by the parties can be applied to new employees who are not discriminatorily prohibited from transfer.

Lack of an identifiable class of discriminatees is an important theme in both *Sheet Metal Workers* and *Dobbins.* In *Sheet Metal Workers* the court distinguishes the jury cases in this manner:

> [M]ere absence of Negroes in a particular group [cannot] constitute proof of a pattern of discrimination in the absence of some showing that the group should represent a cross-section of a community in which there is a substantial proportion of Negroes, such as was the situation in the jury discrimination cases which establish the so-called "exclusion principle."[93]

Dobbins emphasized the skills of the craft, *i.e.* electricians, in dealing with the prima facie "exclusion principle":

> In some fields a prima facie case of pattern and practice is made out on a showing that given privileges are exercised only, or for the greater extent, by W's [whites] and that there is in the area a substantial N [Negro] population and that there have been repeated attempts by N's [Negroes] to exercise such rights. Such is certainly true in the education and voting fields. However, we deal here with a "craft" union. It is one thing to presume or assume, prima facie—wise or otherwise, that a significant number of a group have the qualifications for schooling or voting, or jury service. It is another thing to assume, prima facie—wise or otherwise, that because a certain number of people exist, be they W [white] or N [Negro], that any siguificant number of them are lawyers, or doctors, or merchants, or chiefs, or to be concrete, are competent plumbers or electricians, or carpenters. . . .
>
> To make out a prima facie case for class purposes, as distinguished from individual purposes, the plaintiff has the burden of showing the existence of a significant number of members of the group possessing the basic skill of the particular trade involved. The plaintiffs have shown the existence of some members of the class who are skilled and who have applied and, as to those, it has established a case. We cannot

[93] 280 F. Supp. at 728.

> assume and do not assume from that, that there are other members of the group similarly qualified. . . .[94]

In *Dobbins,* as distinguished from *Sheet Metal Workers,* one finds applicants who were discriminated against. Yet, in both cases, it is assumed that a remedy that would alter the structure of union practices is unwarranted because of the unavailability of skilled labor in the Negro community. And both cases, as well as *Quarles, Whitfield,* and *H. K. Porter,* reject the notion that extraordinary remedies, which involve some tinkering with traditional union practices, can be imposed through antidiscrimination legislation. Thus, to some extent, the craft union cases suffer from the same defect displayed in those involving seniority, *i.e.* the assumption that failure to show existing skills requisite to the job negates the imposing of a remedy (as well as a finding of discrimination), which both compensates for past discrimination and utilizes the capabilities that an employee possesses.

In the jury cases, however, the Court has proclaimed an unflagging hostility to the refusal to *search out* qualified jurors when statistics show a pattern of exclusion or "token" inclusion.[95] The jury cases are analogous to seniority disputes because in both one deals with an identifiable class of discriminatees who must be assumed to possess basic capabilities unless there is evidence that proves otherwise. Therefore it would seem impossible for either unions or employers which are parties to past promotion and transfer discrimination as in *Quarles, Whitfield,* or *H. K. Porter* to exculpate themselves without determining whether discriminatees have the ability, *i.e.* whether they would be capable of performing the job assignments involved. Such capabilities could be ascertained through two processes, which need not be mutually exclusive: (1) qualification tests that meet the standards of Title VII,[96] and (2) training programs through which the discriminatee's potential, or lack thereof, can be realized.

The retort to all of this is that, more often than not, educational deficiencies of the class undermine both a finding of discrimination and a training remedy because the schools and other cultural factors are responsible for the deficiencies that necessitate training, rather than

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94 69 L.R.R.M. at 2337.

95 *See* Swain v. Alabama, 380 U.S. 202, 228 (1965) (dissenting opinion of Mr. Justice Goldberg).

96 Note 50 *supra. See also* Blumrosen, *supra* note 5, at 506-07. Professor Blumrosen points out that, in many instances, tests are imposed that improperly test the minority group worker for qualifications above those of the entry level job that he seeks. In the first place, promotions ought to be nearly automatic in order for tests which evaluate future performance in higher rated jobs to be valid ones. Secondly, Professor Blumrosen points out that "experience may improve ability to perform on higher jobs. . . ." *Id.* at 507.

the parties to the collective agreement that simply prohibit transfers in light of these educational facts of life. Moreover, it is argued that this background makes the training burden an exceedingly heavy one.

Some of these problems are raised in *Griggs v. Duke Power Company*[97] when the employer permitted only those employees who had a high school education to transfer into the formely "white" department. Since white workers *without* high school education could be promoted into the jobs barred to Negroes with the same schooling, the *Griggs* opinion's failure to find Title VII discrimination is highly questionable. But *Griggs* is important to this discussion because the recently revised high school requirements involved in the case illustrate the nexus between employer and educational programs whose purpose in effect combined to create the maintaining of a racial "under class."[98] When a union and employer formalize the departmental or job structure transfer prohibition—either tacitly or in the collective agreement itself—they also become a party to this discriminatory pattern. For the parties to a collective agreement thus rigidify the lines of segregation which have been demarcated earlier.

Although the inequities are initially caused by the pre-employment educational deficiencies and other environmental factors such as poor housing and unstable family life,[99] the unions and employers become a party to this pattern through the consigument of Negro workers to restricted employment opportunities, and they have some responsibility to remedy the discrimination. When population shifts are initially responsible for segregated education, one cannot say that school boards are absolved of any constitutional obligation to remedy the discriminatory pattern—*even though the school board and the educational arm of the state are not the forces that have first set into motion the pattern of discrimination*[100]—and certainly the school board has such a con-

97 69 L.R.R.M. 2389 (M.D.N.C. 1968).

98 *See* G. MYRDAL, THE CHALLENGE TO AFFLUENCE (1965).

99 *See* D. MOYNIHAN, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (1965). *But see* 1 EQUAL EMPLOYMENT OPPORTUNITY COMM'N REP. (1969), which indicates that educational deficiencies of minority group workers are not the primary cause of job discrimination in the United States.

100 *See* Barksdale v. Springfield School Comm., 237 F. Supp. 543 (D. Mass. 1965); Blocker v. Board of Educ., 226 F. Supp. 208 (E.D.N.Y. 1964); Branche v. Board of Educ., 204 F. Supp. 150 (E.D.N.Y. 1962); Jackson v. Pasadena City School Dist., 31 Cal. Rptr. 606, 59 Cal. 2d 876, 382 P.2d 878 (1963). *Contra,* Downs v. Board of Educ., 336 F.2d 988 (10th Cir. 1964), *cert. denied,* 380 U.S. 914 (1965); Bell v. Schools, 324 F.2d 209 (7th Cir. 1963), *cert. denied,* 377 U.S. 924 (1964).

> The touchstone in determining equal protection of the laws in public education is equal education opportunity, not race. If classification by race is used to achieve the invidious discrimination, the constitutional insult is exacerbated. But the focus must remain on the result achieved. If the untoward result derives from racial classification, such classification is, *per se,* unconstitutional. When the result

stitutional liability when it formalizes the segregated structure through conduct of its own such as gerrymandering.[101]

Of course, unions and employers, like, perhaps, school boards, cannot completely compensate the discriminatee for wrongs that other parties have committed. At least the burden cannot be carried by business and labor alone. That is why Judge Wright's conclusion in *Hobson v. Hansen*[102] that the fifth amendment obligates the District of Columbia to provide culturally deprived children with compensatory educational programs is a salutory one. As a matter of policy, Congress and the states should fund training programs. Moreover, if civil rights legislation is vigorously enforced in the employment field, unions and employers will be forced to put more pressure on the schools to improve the skills of disadvantaged students.[103]

> is segregation and therefore unequal educational opportunity, the classification used, whatever it is, is constitutionally suspect and a heavy burden is placed on the school board and the state to show, not only innocent intent, but also lack of a suitable alternative. In short, since segregation in public schools and unequal educational opportunity are two sides of the same coin, the state, in order to provide equal educational opportunity, *has the affirmative constitutional obligation to eliminate segregation however it arises.*

Wright, *Public School Desegregation: Legal Remedies for De Facto Segregation*, 40 N.Y.U.L. REV. 285, 301-02 (1965) (emphasis added).

One recognizes that the process of ascertaining intent in a constitutional provision and a statute are two different tests. Consider the Court's statement in Brown v. Board of Education, 347 U.S. 483 (1954), when it is found that the legislative history regarding the fourteenth amendment's application to public education was "inconclusive":

> In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined that segregation in public schools deprives these plaintiffs of the equal protection of the laws.

347 U.S. at 492-93.

101 Taylor v. Board of Educ., 294 F.2d 36 (2d Cir.), *cert. denied*, 368 U.S. 940 (1961); *cf.* Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967); Evans v. Buchanan, 207 F. Supp. 820 (D. Del. 1962). Compare the strong emphasis that the Court places upon the "purpose" of what is alleged to be discriminatory as gerrymandering, in Gomillion v. Lightfoot, 364 U.S. 339 (1960), with the discarding of such an approach for fourteenth amendment purposes in Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Lucas v. Forty-fourth Gen. Assembly, 377 U.S. 713 (1964); Reyonds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964); Gray v. Sanders, 372 U.S. 368 (1963); Baker v. Carr, 369 U.S. 186 (1962); Griffin v. Illinois, 351 U.S. 12 (1956); *see* Wright, *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Judicial Restraint?*, 54 CORNELL L. REV. 1 (1968).

One can see the strain developing between the present Court's adherence to an interpretation of the fourteenth amendment which is concerned with the "effect" of state conduct rather than its "purpose" as in Terry v. Adams, 345 U.S. 461 (1953). Compare the opinion of the court written by Mr. Justice Black, in which Mr. Justice Douglas and Mr. Justice Burton join, with the concurring opinion of Mr. Justice Frankfurter. Consider the Court's approach to the fourteenth amendment cases in connection with Title VII of the Civil Rights Act and the seniority problem. *See* Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964). *See also* Horowitz, *Unseparate but Unequal: The Emerging Fourteenth Amendment Issues in Public Education*, 13 U.C.L.A.L. REV. 1147 (1966).

102 269 F. Supp. 401 (D.D.C. 1967).

103 For a discussion of training proposals and existing legislation, see Doeringer, *Pro-*

Finally, one must deal with the *Sheet Metal Workers'* argument that a finding of discrimination when there is no evidence that Negro workers have the necessary skills will somehow produce a preferential treatment, which is condemned by the Act. In the seniority cases, however, the Negro workers simply seek the date of employment seniority—the same seniority measurement used for whites who are in competition with them.[104] Even if the problem is complicated, as in *H. K. Porter,* through the limited promotion of some Negroes in the past, the same basic rules apply to all workers. The white worker should not be given an extra advantage over blacks which is gained through the windfall of past discrimination.[105] Training is a proper requirement because it serves as a remedy for discrimination *against blacks*; their discriminatory separation from the skills and knowledge available for whites entitles them to the remedy. Of course, there is no reason why whites could not make use of the program also; but, presumably, they would not have as much use for it because the need for the training remedy follows a finding that the Negro group is discriminated against. Whether whites are part of the program or not, however, the issue of

motion Systems and Equal Employment Opportunity, PROCEEDINGS OF THE NINETEENTH ANNUAL WINTER MEETING INDUSTRIAL RELATIONS RESEARCH ASSOCIATION (1966).

[104] The National Labor Relations Board, in holding that supervisors cannot be deprived of seniority upon return to the bargaining unit for failure to pay dues while outside the bargaining unit in supervisory positions, has stated the following:

> The seniority rights, created by contract in the present case, are a condition of employment. Agreements affecting seniority rights are, consequently, subject to the limitation affecting any agreement dealing with conditions of employment; namely, that such agreement does not violate the Act. It has been held, however, that agreements or actions conditioning relative seniority standing upon length of union membership or the payment of union dues violate Section 8(a)(3). 1) It cannot be, and in fact is not, denied that Section 13G of the agreement here involved conditions relative seniority standing, as between supervisors making application to return to the bargaining unit, upon the quantum of payment of the equivalent of union dues. As these supervisors are, at the time of their application for re-employment within the unit, employees within the meaning of the Act, 2) this dues-equivalent requirement is plainly an unlawful discrimination to encourage membership in Respondent Unions in violation of Section 8(a)(3) of the Act. Furthermore, Section 13G unlawfully conditions seniority rights of employees returning from supervisory positions upon their payment of dues during the period when such employees were outside the bargaining unit. 3) Inasmuch as Respondents have permitted other supervisors to transfer back into the unit with full accumulated seniority, we shall, to undo the effects of the discrimination against Dewey [charging party] order Respondents to withdraw their objection to crediting Dewey with seniority on a basis equal to that by which seniority has been accorded other supervisory personnel who have been transferred back into the bargaining unit, and affirmatively to request the employer to credit Dewey with such seniority.

Columbia Steel & Shafting Co., 171 N.L.R.B. 126 (1968). *See* Woodlawn Farm Dairy Co., Division of Dolly Madison Foods, Inc., 162 N.L.R.B. 48 (1966); Local 545, AFL-CIO, 161 N.L.R.B. 1114 (1966); Kaiser Steel Corp., 125 N.L.R.B. 1039 (1959); Haffenreffer & Co., 101 N.L.R.B. 905 (1952); *cf.* NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963).

[105] Neither *H.K. Porter* nor *Whitfield* address themselves to this question and indeed seem peculiarly insensitive to it. A discussion of the problem is contained in Gould, *supra* note 2.

preferential treatment would seem to be a false one. As former Secretary of Labor Wirtz has said in a case requiring "affirmative action" under the President's Executive Order because of past racial discrimination, "it is ridiculous to misinterpret as 'preferential treatment' the requirement that the inequity which has developed with respect to them [Negroes] be corrected."[106]

B. Remedial Problems

In the complex area of seniority arrangements an infinite variety of judicially acceptable remedies exist.[107] But the central remedial theme should be the "affirmative action" necessitated by Title VII.[108] When the problem involves the denial of accumulated seniority credits, the remedy must broaden the seniority district at least temporarily for the class of Negro workers discriminated against.

Whitfield and *H. K. Porter* represent a most difficult situation in which experience acquired on one job prepares the worker for successful performance in the next job in a "line of progression sequence." Assuming the line of progression is a valid expression of the above-stated business objectives, the remedy should not permit the discriminatees to transfer to any job in the progression. In the absence of a showing that the worker possesses the ability to perform the job at that time, the entry job is an appropriate beginning for any worker, thereby safeguarding the "business necessity factor" which is emphasized in both *Whitfield* and *H. K. Porter*.

Thus, in the line of progression context, equity for the Negro

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106 *In re* Alan Bradley Co., OFCC Docket No. 101-68, Executive Order 11,246, Decision of the Secretary of Labor at 6 (Jan. 17, 1969).

107 *See* Gould, *supra* note 2, at 34-50. In *Dobbins* the court expressed the view that it had the power to "effectively erase the entire union referral system." 69 L.R.R.M. at 2342.

108 The Civil Rights Act of 1964, § 769(g), 42 U.S.C. § 2000e-5(g) (1964), authorizes the court to issue an injunction and to "order such affirmative relief as may be appropriate, which may include reinstatement or hiring of employees with or without back pay . . . ." The Civil Rights Act thus mirrors the "affirmative action" language of the National Labor Relations Act § 10(c), 29 U.S.C. § 160(c) (1964). For examples of the broad interpretation given to the authority of the National Labor Relations Board under the Act, see NLRB v. Strong, 393 U.S. 357 (1969); Virginia Elec. & Power Co. v. NLRB, 319 U.S. 533 (1943); Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941). A remedy under the Act may be concerned with the "dissipation" of the "consequences of a [statutory] violation." Carpenter's Local 60 v. NLRB, 365 U.S. 651, 655 (1961); NLRB v. UMW District 50, 355 U.S. 453, 459 (1958); Consolidated Edison Co. v. NLRB, 305 U.S. 197, 236 (1938). *See* St. Antoine, *A Touchstone for Labor Board Remedies*, 14 WAYNE L. REV. 1039 (1968); Note, *The Need for Creative Orders under Section 10(c) of the National Labor Relations Act*, 112 U. PA. L. REV. 69 (1963).

For authorization of racially conscious remedies, in addition to the seniority cases noted previously, *see* Jackson v. Godwin, 400 F.2d 529 (5th Cir. 1968); Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir., 1968); *cf.* Baker v. St. Petersburg, 400 F.2d 294 (5th Cir. 1968); Cypress v. Newport News Hosp., 375 F.2d 648 (5th Cir. 1967). *See also* Tancil v. Woolls, 379 U.S. 19, *aff'g* Hamm v. Virginia Bd. of Elections, 230 F. Supp. 156 (E.D. Va. 1964); Anderson v. Martin, 375 U.S. 399 (1964).

worker who has been discriminated against should not be normally translated into the *place* of transfer but rather the basis for transfer and future promotional opportunities. The inadequacy of what was done in *Whitfield* is to be found in the wage cut that some Negro workers were required to accept and the deprivation of seniority credits accumulated in the all-black line for competitive status purposes while moving up the line of progression. Even here, it is possible to temper an absolute application of the employment date seniority principle through "residency," the acquisition of such seniority rights after a certain period of time has elapsed.[109] The period of time to be used as "residency" would depend upon the average time that it takes a promoted employee to learn his job and to be ready for the next one. This would then eliminate some of the fears expressed in *H. K. Porter* concerning the unsatisfactory job performance that might be turned in by a worker from another department or line of progression who does not possess adequate on-the-job training for the skilled job into which he seeks promotion.[110] In this way, the obviously legitimate management interest in protecting the firm against inexperienced and unprepared workers would be upheld.

To some extent, *United States v. Hayes International Corporation*[111] sanctions this kind of approach and highlights the latitude available to courts in some Title VII cases to take into account the reasonable expectations of white incumbents as well as business efficiency needs of the employer. In *Hayes,* Negro workers, transferring to relatively skilled jobs previously reserved to whites, obtained plant-wide seniority through the negotiated settlement for purposes of promotion

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109 The concept of "residency" imposes a penalty upon the employee absent from his seniority district for a certain period of time. The rationale for residency is not solely out of penalty. Presumably, the absent employee does not have skills and experience comparable to those who have remained in the district. "Once residence has been acquired, however, the employee's seniority in the department is reckoned from his permanent service date, rather than the date on which residence is acquired." *In re* Wagner Electric Corp., 21 Lab. Arb. 524 (1953).

110 under the unrestricted plant-wide transfer and bidding system which the Attorney General has proposed, an employee who has been working in another department in a totally unrelated job and has absolutely no training, experience or familiarity with the . . . operation [which would entitle him] to claim the . . . job in accordance with his length of service with the Company.
70 L.R.R.M. at 2148.

the abolition of this [line of progression promotions] would advance employees who might have the least training for the next job. This is a result which requires the assumption that with less than the amount of on-the-job training now acquired by reason of the progression procedure, employees could move into the jobs in the progression lines and perform those jobs satisfactorily and—more importantly—without danger of physical injury to themselves and their fellow employees and that is not a permissible assumption on the record in this case.
70 L.R.R.M. at 2168.

111 70 L.R.R.M. 2926 (N.D. Ala. 1968).

and layoff at the end of twenty-four weeks on the job. At this time they were to receive an automatic promotion up the line of progression. Noting that there was no evidence to support speculation that a layoff might occur within the twenty-four week period, *Hayes* finds the claim of discrimination to be without substance. If black workers are permitted to bump-back into previously all-Negro departments or lines when there is a reduction in work force, the residency provision upheld in *Hayes* as well as its approval of bump-back rights within the "white department" for white incumbents seems to be a reasonable compromise when there is little chance that the discriminatees will be injured through layoffs. One cannot lose sight of the fact that there are many interests and factors involved in seniority disputes—what the *Hayes* opinion refers to as the "triangular" relationship.[112]

Moreover, since the Civil Rights Act of 1964 seems to frown on the displacement of white incumbents, seniority could be used as vacancies occur in the future.[113] While this would not salve the wounds of white workers who have built up promotion expectations predicated upon segregation, the application of the rule to future vacancies will probably make the plant community more congenial than it would be in the cases of discharges of white incumbents.

The Title VII requirement of training (and indeed remedies generally) raises some of the very same considerations discussed above relating to a finding of transfer discrimination when the departments or jobs are racially structured. A reasonable relationship should exist between the segregated jobs or departments. That is to say, the courts cannot find discrimination intended in a transfer prohibition simply because all janitors are black, and all airline pilots are white. To some degree, *Dobbins* and *Sheet Metal Workers* attempt to say the same thing. Relating the holding of those cases to seniority, one may say that, when the skill requires years of formal preparation involving a special expertise, segregation in hiring is not to be automatically equated to transfer discrimination. There should be some limitation upon the nexus (the existence of a similarity in skill and ability) con-

112 The provisions of Title VII, as any student of the legislative history will discover, are the product of an extended and careful consideration of the rights not only of Negroes but of other employees in the light of the complex realities of industrial life. The statute was not intended to accord privileges to Negro employees in blind disregard of the seniority rights of others, and it was not intended to be administered in disregard of the interest of employers in efficiency and ability. 70 L.R.R.M. at 2930.

113 A more severe remedy, such as the displacement of white incumbents from their jobs, might be unlawfully retroactive under Title VII. *See* Note, *supra* note 3, at 1274.

necting reasonably related jobs and departments, and the inference created by such a nexus that transfer discrimination exists.

Although Title VII should be read to obligate the parties to provide more than the same on-the-job training received by *all* employees in *Quarles,* in the seniority dispute context, one cannot require unions and employers to provide the equivalent of apprenticeship programs or upper level educations. But the courts can require the parties to engage in remedial programs, just as the schools may be under a constitutional duty to provide the same under similar circumstances.[114] The school boards, however, do not appear to be obligated to assure law school entrance for the disadvantaged youngster, and one must assume that there are reasonable limitations on the length and amount of funds to be expended in the training program.

Thus there is no statutory obligation to make janitors into plumbers or airline pilots. But the burden is on the parties to segregated arrangements to establish the unreasonableness inherent in the relationship between the jobs. The *presumption* must be that workers are promotable from inferior jobs and departments. But one way to establish this unreasonableness is through evidence indicating that the training program would be sufficiently lengthy, perhaps more than one year or so, lending substance to the arguments of a burdensome remedy. This, of course, is a difficult line to draw. But it cannot be avoided if Title VII is to be made effective.

One way to avoid the entire problem of "business necessity" and white workers' expectations is through an award of damages to black workers for lost opportunity.[115] This would be extremely unsatisfactory since it would leave intact the very segregated conditions for which the law imposes liability upon unions and employers. This is the status of "separate but unequal"[116] for the Negro worker which inculcates in him attitudes of inferiority. Damages would leave the Negro worker "outside the mainstream of the employment relationship. Only through job advancement can the badge of servility be erased and only through this erasure can other Negroes be encouraged to take advantage of new opportunities."[117]

Should the courts ask unions and employers to negotiate new

114 *See* Cooper v. Aaron, 358 U.S. 1 (1958); *cf.* Brown v. Board of Educ., 349 U.S. 294, 300 (1955): "[I]t should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them."

115 Doeringer, *supra* note 103.

116 Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967).

117 Gould, *supra* note 2, at 38.

seniority and training plans to be reviewed by the judiciary as was done in the education field?[118] Or should the courts, while listening carefully to the proposals of the parties, as in *Quarles,* formulate the decree without resort to the collective bargaining process? At one time I advocated the former approach, but the unyielding hostility of the parties, particularly the unions, to any compromise of the "vested rights"[119] of white workers has encouraged me to reconsider my views.[120] Moreover, Mr. Justice Black has recently expressed the view that the implementation of the desegregation mandate in *Brown v. Board of Education* was so cautious as to make the articulated principles difficult to enforce.[121] We cannot wait until fifteen years after the Civil Rights Act of 1964 to make the same discovery in employment.

Therefore, when the parties have run afoul of the prohibitions of Title VII, one ought not to permit the collective bargaining process to work before the decree unless there are strong indications that affirmative action eliminating racism is already underway. In the *Quarles* case, this might mean a plan that results in the election of Negro leadership in the merged local.[122] For, after all, when the locals have been segregated or when a large Negro minority is unable to elect a racially balanced executive board because whites will not vote for blacks,[123] one is dealing with a body that, if not malapportioned, is surely unrepresentative.[124] In this and in most cases, only the most drastic affirmative action should permit collective bargaining to play a role in the formulation of the remedy.

C. *Constitutional Problems*

If Congress can be read to have legitimatized the present effects of past discrimination through passing Title VII, certain constitutional problems arise. For if one can assume that this is the Congressional intent, governmental authority sanctions racial discrimination. The Supreme Court has gone to great lengths in declaring such involvement by the state to be unconstitutional.[125]

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118 Brown v. Board of Educ., 349 U.S. 294 (1955).

119 Such rights are not "vested" in the sense that they cannot be altered by the parties themselves. *See* Humphrey v. Moore, 375 U.S. 335 (1964); Ford v. Huffman, 345 U.S. 330, 338 (1953). They are also not immune from legal attack. *See* Accardi v. Pennsylvania R.R., 383 U.S. 225 (1966).

120 *See* N.Y. Times, June 25, 1968, at 29, col. 7.

121 *Id.* Dec. 4, 1968, at 1, col. 2.

122 *See* note 58 *supra.*

123 *Id.*

124 *See* Note, *supra* note 3, at 1280.

125 *See* United States v. Guest, 383 U.S. 745 (1966); Evans v. Newton, 382 U.S. 296 (1966); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Shelley v. Kraemer, 334 U.S.

In *Steele v. Louisville and Nashville Railroad*,[126] the Court was concerned with the constitutional implications that would ensue if the Railway Labor Act was to be interpreted to permit racial discrimination by the union. Even without specific legislative history, the Court concluded that a duty of fair representation was the logical consequence of the bargaining authority that the statute bestowed upon the union. Addressing itself to the possibility that such a duty might *not* be inferred from legislative intent, the Court said the following:

> If, as the state court has held, the Act confers this power on the bargaining representative of a craft or class of employees without any commensurate statutory duty toward its members, constitutional questions arise. For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy, or discriminate against the rights of those for whom it legislates and which is also under an *affirmative* constitutional duty equally to protect those rights. If the Railway Labor Act purports to impose on petitioner and the other Negro members of the craft the legal duty to comply with the terms of a contract whereby the representative has discriminatorily restricted their employment for the benefit and advancement of the Brotherhood's own members, we must decide the constitutional questions which petitioner raises in his pleading [emphasis added].[127]

Can the kind of state action in Title VII be equated with that which was present in *Steele*? In both instances, Congress has passed legislation under the commerce clause, and in *Steele* the Court was poised to render the above-referred-to application of the Railway Labor Act unconstitutional. The conclusion should be that Congress cannot diminish standards of constitutional protection by statute.[128]

In *Steele* the statute bestowed upon the union a right to bargain for all members of the appropriate unit. In light of this grant of authority, the Supreme Court assumed that Congress did not intend that it be used discriminatorily. Is this kind of *quid pro quo* approach

1 (1948); Black, *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967); *cf.* Oliphant v. Brotherhood of Firemen & Enginemen, 156 F. Supp. 89 (N.D. Ohio), *cert. denied*, 355 U.S. 893 (1957), *aff'd*, 262 F.2d 359 (6th Cir. 1958), *cert. denied*, 359 U.S. 935 (1959). *See also* Steele v. Louisville & N.R.R., 323 U.S. 192, 208 (1944) (opinion of Mr. Justice Murphy); Weiss, *Federal Remedies for Racial Discrimination by Labor Unions*, 50 GEO. L.J. 457 (1962); Wellington, *The Constitution, The Labor Union, and "Governmental Action,"* 70 YALE L.J. 345 (1961).

126 323 U.S. 192 (1944).

127 *Id.* at 198-99.

128 *Cf.* Simpkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964).

(*i.e.* exclusive bargaining rights for a duty of fair representation obligation) relevant to Title VII? Title VII is involved essentially with the *regulation* of unions as well as employers and does not purport to establish new union rights. A distinction between Title VII and the Railway Labor Act on this basis would be necessarily short-sighted because it would analyze a portion of national labor law without reference to any other segment. For the most part, the unions involved in Title VII cases operate under labor laws providing exclusive bargaining status for the majority representative. It appears that the failure of Title VII to provide any type of bargaining rights for unions makes any attempt to distinguish *Steele* an artificial one.

Moreover, in *Reitman v. Mulkey*[129] and *Hunter v. Erikson*,[130] the Supreme Court has held that state and local repeal of fair housing legislation that takes a form of constitutional and city charter prohibitions and that can only be superseded by the majority of voters is unconstitutional state action under the equal protection clause. The theme of both cases is that state involvement, while nondiscriminatory on its face, is most heavily weighted against the minority race and unconstitutionally tips the scales so as to produce a state-sponsored encouragement of racial discrimination. As the Court says in *Hunter* about a city charter requirement for a referendum on fair housing:

> [A]lthough the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that. Like the law requiring specification of candidates' race on the ballot, *Anderson v. Martin* [citation], §137 places special burdens on racial minorities within the governmental process. This is no more permissible than denying them the vote, on an equal basis with others. . . .[131]

In the case of Title VII, it is the minority position of the Negro worker and his consequent inability to produce equitable reform in the collective bargaining arena that prompted Congress to intervene in the employment area in 1964. Since national labor law articulates the principle of majority rule, the effect of a restrictive interpretation of the seniority question is to make it virtually impossible for Negro workers, as a class, to escape the limitations of their discrimination.

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129 387 U.S. 369 (1967).
130 393 U.S. 385 (1969).
131 *Id.* at 392.

While it may be reasonable for Congress to make fair employment practice legislation prospective, it does not seem to be constitutionally permissible to saction discrimination that has its origin prior to the statute but continues to affect the worker's employment status subsequent to the statute's operative date. Congress, itself, has assumed that the minority race cannot obtain an equitable resolution of racial issue through majority rule. This is made clear by the passage of Title VII. Just as the state unconstitutionally intervenes in *Reitman* and *Hunter* to make the elimination of race discrimination more burdensome, so also here Congress might be weighting the balance in favor of the deprivation of black workers' seniority rights.

But is this the kind of discrimination which is constitutionally prohibited? *Steele* is concerned with the hostile discrimination that ousted Negro workers from their jobs. In a sense, the issue is raised in *H. K. Porter*[132] in which the defendant compromised and permitted some transfers to take place. But both *Steele* and its progeny indicate that much more is meant by the doctrine of the duty of fair representation. "Hostile" discrimination—if that term has any significance—means to "deny, restrict, destroy or discriminate."[133]

Further, as noted previously, the Court listens carefully to statistics in the jury cases,[134] and the results that school integration plans actually achieve.[135] Mr. Justice Black speaking for the Court in *Louisiana v. United States*,[136] stated the following about past discrimination in the voting cases:

> We bear in mind that the court has *not merely the power but the duty* to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.[137]

Thus it is quite possible that the sanctioning of past discrimination, transfer, and seniority denials by Congress would be unconstitutional. As in voting, the sanctioned discrimination frustrates the courts' ability to enforce Title VII effectively inasmuch as the past wrongdoing remains embodied in the present system. Certainly, the Court

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132 70 L.R.R.M. 2131 (N.D. Ala. 1968).

133 323 U.S. at 198.

134 "In the problem of racial discrimination, statistics often tell much, and the courts listen." Alabama v. United States, 304 F.2d 583, 586 (5th Cir.), *aff'd per curiam*, 371 U.S. 37 (1962).

135 *See* United States v. Jefferson County Bd. of Educ., 372 F.2d 386 (5th Cir. 1966), *aff'd*, 380 F.2d 385 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967).

136 380 U.S. 145 (1965).

137 *Id.* at 154 (emphasis added).

could avoid the constitutional issue in Title VII much more easily than it did in *Steele* in which Congress had made no commitment to abolish racial discrimination. The legislative history of Title VII does not deal directly with the seniority dispute under discussion. Thus the general prohibition in the statute against discriminatory conduct provides the Court with a firmer rationale through which to avoid constitutional issues than was the case in *Steele*.

IV. CONCLUSION

When legitimate racial grievances have been met by promises that produce certain expectations, and when these promises and expectations are unrealized, the result will be disillusionment, despair, and violence. Of course, one should neither exaggerate the significance of promotions and job security as compared to hiring nor stress unduly the importance of employment as compared to education. It is interesting, however, to note that a principal factor in the average Negro child's comparatively poor educational achievement is a feeling of hopelessness or inability to control his own fate.[138] Segregated job patterns may be presumed to be a factor in the development of such attitudes.

Congress had decided that unions and employers are to abolish racial discrimination in employment. Congress has not restrained the courts from eliminating the present consequences of past discrimination while achieving this goal. While *Quarles* refuses to freeze some of this generation's black workers into discriminatory patterns, it is more harmful than helpful. Its principal defect is to be found in the opinion's adherence to *Whitfield* and a refusal to apply the decision's rationale to discrimination involving skilled jobs. And we should understand clearly the nature of the harm. For if this generation is deprived of equity under the guise of civil rights legislation, the bitterness of their children will know no bounds.

138 *See* J. COLEMAN, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966).