# TITLE VII OF THE CIVIL RIGHTS ACT OF 1964: FROM PROHIBITING TO REQUIRING RACIAL DISCRIMINATION IN EMPLOYMENT

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The modern law of racial discrimination began with the Supreme Court's decision in *Brown v. Board of Education of Topeka*,[1] which prohibited compulsory racial segregation in public schools. It soon became clear that *Brown* stood for the principle that all racial discrimination by government is unconstitutional.[2] The principle that government should not discriminate on the basis of race—a principle strengthened by the Hitler experience—proved so appealing as to be irresistible. It led, against all odds, to a civil rights revolution, and to the enactment of the Civil Rights Act of 1964,[3] the greatest civil rights legislation in our history. In the 1964 Act, Congress adopted and ratified the *Brown* nondiscrimination principle and extended it to almost all areas of public life, including discrimination by private persons in places of public accommodation[4] and employment.[5]

The history of the law of racial discrimination since the 1964 Act, however, is the history of a Supreme Court-led counterrevolution. The Court has converted the *Brown* nondiscrimination principle and the various provisions of the Act that embodied it into essentially their opposites: authorizations or even requirements of racial discrimination. The Court has never admitted (indeed, it has always denied) that it was mak-

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1. 347 U.S. 483 (1954) (*Brown I*).

2. *See* Bolling v. Sharpe, 347 U.S. 497 (1954) (racial discrimination in public schools by the federal government violates the Due Process Clause of the Fifth Amendment). *See also* Holmes v. City of Atlanta, 223 F.2d 93 (5th Cir.), *rev'd per curiam*, 350 U.S. 879 (1955) (municipal golf courses); Mayor and City Council of Baltimore v. Dawson, 220 F.2d 386 (4th Cir.), *aff'd per curiam*, 350 U.S. 877 (1955) (public beaches and bath houses); Gayle v. Browder, 142 F. Supp. 707 (M.D. Ala.), *aff'd per curiam*, 352 U.S. 903 (1956) (buses).

3. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C.).

4. *See* 42 U.S.C. § 2000a (1988) (Title II).

5. *See id.* § 2000e (Title VII).

ing such a change, always insisting that it was merely continuing to enforce the *Brown* principle. The result is that a regime of permissible or compulsory racial discrimination has been established by the Court in the name of enforcing constitutional and statutory prohibitions against such discrimination, a judicial feat without parallel in the history of law.[6]

Like the revolution itself, the civil rights counterrevolution began with the schools. With the 1964 Act, the era of "all deliberate speed"[7] was over. Compulsory school segregation quickly came to an end throughout the South and compliance with *Brown* was finally achieved. The end of compulsory racial segregation in the schools did not result, however, in a high degree of racial integration in the schools. Residential racial concentration meant that racial separation in the schools would continue to exist in the South as it had always existed in the North—one-race neighborhoods necessarily produce one-race neighborhood schools.[8] The triumph of *Brown*, therefore, was found dissatisfying, and the Supreme Court—widely perceived more as a moral leader than as a Court, as a result of *Brown*—succumbed to the urgings of many that it undertake a new crusade. The crucial move from prohibiting segregation to requiring integration—compulsory racial discrimination in the name of enforcing a prohibition against racial discrimination—was made in the 1968 case of *Green v. County School Board of New Kent County*.[9] The Court held that the complete elimination of racial discrimination from the operation of a school system no longer constituted compliance with *Brown* when all-white and, more significantly, all-black schools continued to exist. *Brown*, it appeared, was now to be understood not as prohibiting, but as *requiring* racial discrimination by government when necessary to achieve a high (though undefined) degree of school racial integration or "balance."

The Court's new requirement was not identified and justified as a requirement of integration for its own sake, however, which would have been applicable everywhere, but as a require-

6. *See* Graglia, *The "Remedy" Rationale for Requiring or Permitting Otherwise Prohibited Discrimination: How the Court Overcame the Constitution and the 1964 Civil Rights Act*, 22 SUFFOLK U.L. REV. 569 (1988).

7. Brown v. Board of Educ. of Topeka, 349 U.S. 294, 301 (1955) (*Brown II*).

8. *See* Bickel, *The Decade of School Desegregation: Progress and Prospects*, 64 COLUM. L. REV. 193 (1964).

9. 391 U.S. 430 (1968).

ment of "desegregation," which would presumably be applicable only in the South.[10] This enabled the Court to avoid the politically impossible task of qualifying *Brown* as prohibiting official racial discrimination only when it is used to separate the races, not when used to mix them. It also enabled the Court to avoid having to justify a constitutional requirement of integration in terms of expected benefits; the Court's justification—inaccurate as a matter of fact and senseless as a matter of policy—was, instead, that it was merely "remedying" (undoing) the compulsory segregation that was prohibited by *Brown*.

Three years later, the Court carried *Green* to its logical conclusion in *Swann v. Charlotte-Mecklenburg Board of Education*.[11] In *Swann*, the Court held, incredibly, that "desegregation" requires that public school children be excluded from their neighborhood schools because of their race and transported across large school districts to achieve a near-perfect racial balance. Title IV of the 1964 Act, however, defines "desegregation" as "the assignment of students to public schools . . . without regard to their race," and adds (just to be doubly sure) that desegregation "shall not mean the assignment of students to public schools in order to overcome racial imbalance."[12] The Act goes on to insist, still again, that it does not authorize federal courts to order the transportation of students for racial balance.[13] Despite these caveats, in *Swann*, a unanimous Supreme Court held that court-ordered assignment and transportation of children to schools by race to increase racial balance were not inconsistent with the Act. "Congress," the Court said, without citation and without the slightest basis in fact, "was concerned that the Act might be read as creating a right of action under the Fourteenth Amendment in the situation of so-called 'de facto segregation' . . . ."[14] If this brazen defiance of congressional intent did not constitute an impeachable offense—as indicated by the fact that the protests of Senator Sam Ervin and other representatives of the South got nowhere in Congress[15]—then the Court had nothing to fear as it turned its

10. *See* L. GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS (1976).

11. 402 U.S. 1 (1971).

12. 42 U.S.C. § 2000c (1988).

13. *See id.* § 2000c-6.

14. *Swann*, 402 U.S. at 17.

15. *See* L. GRAGLIA, *supra* note 10, at 307 n.51.

attention to the Act's other titles. On moral crusades, morality is often the first casualty.

The Court then did to Title VI of the 1964 Act what it had done to Title IV in *Green* and *Swann*. In *Regents of the University of California v. Bakke*,[16] the Court held that Title VI's requirement that "no person" be discriminated against on grounds of race by institutions receiving federal funds did not apply to discrimination against whites. The Court similarly perverted Title VII in *Griggs v. Duke Power Co.*[17] and *United Steelworkers v. Weber*.[18] In *Griggs*, the Court held that Title VII's prohibition of racial discrimination in employment does not mean that employers must ignore race in setting employment qualifications, but that they must take race into account, and that they may be required to eliminate standard employment criteria that blacks as a group find difficult to meet, even though sufficient numbers of whites meeting the criteria are available. In *Weber*, the Court carried this "affirmative action" approach to its logical conclusion by holding that Title VII does not prohibit racial discrimination against whites.[19] In the tradition of *Swann* and *Bakke*, Justice Brennan explained for the Court that a ruling in direct conflict with the plain terms of the Act may nonetheless be required by its "spirit."[20]

*Griggs* established the "adverse impact" or "effects" test for prohibited racial discrimination, disallowing the use of employment criteria that proportionately more blacks than whites cannot meet, unless the employer can prove to the satisfaction of various administrative agencies and the courts that the criteria are "job-related."[21] Opponents of *Griggs* contend that racial discrimination cannot properly be found on the basis of the use of nonracial criteria unless a finding of a "racially discriminatory intent" is made. The distinction between the effects test and the intent test is not, however, as clear as it might seem at first glance.

A racially discriminatory act is, quite simply, an action taken on the basis of race. Racial discrimination is, of course, most easily found when it is explicit, that is, when the challenged act

16. 438 U.S. 265 (1978).
17. 401 U.S. 424 (1971).
18. 443 U.S. 193 (1979).
19. *See Weber*, 443 U.S. at 208.
20. *Id.* at 201.
21. *Griggs*, 401 U.S. at 431.

is based on a rule or requirement that "on its face" classifies on the basis of race. It is not reasonable to insist, however, that racial discrimination can properly be found only where it is explicit. An employer could not, for example, without good reason, refuse to hire all applicants living in a defined residential area that happened to be all black, even though the explicit discrimination would be solely in terms of geography. In such a case, an effects theorist would find prohibited racial discrimination on the basis of unjustified disparate impact. An intent theorist would undoubtedly also find racial discrimination, but only after first finding a racially discriminatory intent. That intent, however, could and should be found on the basis that the geographic discrimination has a disparate racial impact and apparently cannot be justified as a criterion for employment. This is, of course, the same as the effects test.

Purporting to make the legal consequences of acts turn on the actor's purpose or intent is, in this area as elsewhere, highly problematic. The issue is not whether the actor meant to do what he did (the setting of employment qualifications is always deliberate), but rather why he did what he clearly meant to do. The search is for the "subjective intent" or state of mind. This search raises serious questions about exactly what is being looked for, how to go about looking, and what the purpose of the search is. Modern psychology teaches that it is often difficult to know one's own motives, much less those of another individual or, even worse, of a group. The fact that the "philosophy of mind" is a major branch of philosophical study may be taken as a sufficient indication that it is a mysterious subject involving a possibly nonexistent entity.[22]

The law usually handles supposed issues of subjective intent by stating that rational adults are presumed to intend the natural and foreseeable consequences of their acts (indeed, in what sense can one be said not to intend consequences one knowingly brings about?). But this, of course, is to introduce the issue of intent only to eliminate it, to make legal consequences in fact turn only on conduct. *Personnel Administrator v. Feeney*[23] illustrates this difficulty. In *Feeney*, the Court attempted to give meaning to a supposed requirement of "discriminatory purpose" by stating that it "implies more than intent as volition or

22. *See, e.g.*, G. RYLE, THE CONCEPT OF MIND (1949).
23. 442 U.S. 256 (1979).

intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' and not merely 'in spite of,' its adverse effects upon an identifiable group."[24] In other words, the issue is not whether the actor deliberately brought about a particular result, but whether he desired or deplored (though obviously not enough to refrain from the act) the result that he caused. But why should a state of mind, whatever that may be, be determinative? The law has enough to do in regulating conduct on the basis of its objective effects without also seeking to regulate on the basis of "mental states." Why should an employer's use of an educational qualification that works to upgrade the work force, but also to exclude blacks disproportionately, be legal if the employer is a member of the NAACP, but not if he is a member of the Ku Klux Klan?

The true difference between an effects test and an intent test is the different level of justification proponents of the tests typically demand for employment criteria having disparate racial impact. The effects theorist would require justification of such criteria by the employer, and make justification difficult or virtually impossible. The intent theorist would find standard employment criteria presumptively valid, requiring no justification. Those who seek to expand employer liability under Title VII by expanding the definition of racial discrimination to include "unjustified disparate impact" will necessarily adopt a very restrictive view of justification. It is an inherent drawback of civil rights legislation that those who will want to enforce it will also want to expand its coverage, with the virtually invariable result that a needed social reform becomes a socially destructive force.[25]

The tragedy of the Civil Rights Act of 1964 is that it fell into the hands of bureaucrats and judges who saw the total aboli-

24. *Feeney*, 442 U.S. at 279.

25. *See* Glazer, *Is Busing Necessary?*, COMMENTARY, Mar. 1972, at 39, 39:

> It is the fate of any social reform in the United States—perhaps anywhere—that, instituted by enthusiasts, men of vision, politicians, statesmen, it is soon put into the keeping of full-time professionals. This has two consequences. On the one hand, the job is done well. The enthusiasts move on to new causes while the professionals continue working in the area of reform left behind by public attention. But there is a second consequence. The professionals, concentrating exclusively on their area of reform, may become more and more remote from public opinion, and indeed from common sense. They end up at a point that seems perfectly logical and necessary to them—but which seems perfectly outrageous to almost everyone else.

tion of racial discrimination by government and business as much too limited a goal, and saw proportional representation by race in all institutions and activities as a more desirable objective. One example of this attitude can be seen in the actions of the Equal Employment Opportunity Commission (EEOC), which is, among other government entities, responsible for administering Title VII. For some years, the EEOC was directed by Eleanor Holmes Norton, to whom attempts to justify employment criteria disparately impacting blacks were little more than devices by which employers sought to circumvent *Griggs* and deny blacks employment.[26] Unfortunately, the continued objective of the civil rights bureaucracy, aided and abetted by judges equally eager to improve on the work of Congress, is to make justification so difficult and expensive as not to be feasible or worthwhile, and to give employers no realistic choice except to hire a minimum quota of blacks in all positions. The objective, in other words, is not to *prevent*, as authorized by law, but to *require* the practice of racial discrimination.

On the other hand, intent theorists who are genuinely interested in preventing racial discrimination would hold that standard employment criteria, such as literacy, verbal and arithmetical skills, educational qualifications, and absence of a record of criminal convictions, are ordinarily so obviously justified as to require no further justification. There can be no doubt that employers reasonably may and usually will prefer literate to illiterate employees, for example, regardless of the duties of a particular job, and totally apart from any consideration of race. Literate employees may reasonably be assumed to

26. *See* Lerner, *Employment Discrimination: Adverse Impact, Validity, and Equality*, 1979 SUP. CT. REV. 17, 40 n.62 (quoting Eleanor Holmes Norton at an EEOC meeting on December 22, 1977):

> "It is clear that the employers around the country are increasingly sophisticated in the validation of tests. . . . We do not see, however, comparable evidence that validated tests have in fact gotten black and brown bodies, or for that matter, females into places as result of the validation of those tests. . . . So if the commission, in effect, says to employers, as long as you validate your tests we're really not concerned about you anymore, I believe, in effect, it is saying that the presence of real people who are not in the work force, is not as important as making sure that the tests have been validated. Therefore, I see some very positive advantages, I must say, in encouraging an employer to look at what the ultimate goal is. That is to say, did your work force have some minorities and females before the test was validated or does it have any appreciable number now that the test has been validated? And if you really don't want to go through that, but you are interested in getting excluded people in your work force, we would encourage you to do so."

be better employees, regardless of their particular positions, because, for example, it may make them eligible for advancement to higher positions. Such employment criteria, therefore, can never properly be held to constitute racial discrimination. A judge who holds otherwise is simply usurping the employer's power to set employment qualifications, and making a policy judgment that the employer's interest in efficiency should be sacrificed in the interest of increased employment opportunities for blacks. The *Griggs* decision permitting such a holding is the result not of a good faith effort to enforce Title VII, but of the determination of the Justices to convert Title VII into what Congress had explicitly assured the country it would not be, a requirement of racial preferences in employment.[27]

Although *Griggs* converts Title VII from a nondiscrimination to a compulsory discrimination measure, Congress has not acted to disavow that result. Instead, following the Court's lead, Congress in 1977 enacted for the first time an "affirmative action" racial quota measure of its own, requiring racial preferences in awarding federally funded public works projects.[28] Racial preferences, therefore, can no longer be condemned simply as the product of judicial misbehavior—although they almost surely would not exist except for judicial misbehavior, as in *Bakke*—they must be considered on their own merits.

America can be said to have been born not only in glory as a land of freedom, but also in sin as a land of slavery. Racial prejudice remains our most serious and intractable domestic problem, an ominous cloud overhanging American freedom and prosperity. Our peace and security, to say nothing of our ideals, require that we act to improve the situation of the black underclass. Doing so requires finding a means to improve their employment opportunities, because both blacks and whites must be given the opportunity to prosper. The granting of racial preferences in employment, however, will almost certainly hinder rather than advance that objective. Racial preferences necessarily make our industries less competitive in an increasingly competitive world. Increased employment opportunities for those at the bottom of the economic ladder require that we

27. *See* Cooper, Wards Cove Packing Co. v. Atonio*: A Step Toward Eliminating Quotas in the American Workplace*, 14 HARV. J.L. & PUB. POL'Y 84 (1991).

28. *See* Public Works Employment Act of 1977, 42 U.S.C. §§ 6701, 6705-6708, 6710 (1988). The Act was held to be constitutional in Fullilove v. Kluztnick, 448 U.S. 448 (1980).

remain competitive. More important, what blacks in lower economic classes require most, like everyone else, is respect: both self-respect and the respect of others. Granting racial preferences undermines the ability of blacks to attain such respect.

Perhaps the most serious consequence of racial preferences, however, is that their justification requires continuing insistence that America is a racist nation, and that blacks cannot expect or be expected to succeed on their own merits. This is not only untrue but is also the worst message society could convey. It teaches that ambition, self-discipline, responsibility, and effort are not relevant to black success, that the most important studies for blacks are studies insisting on their victimization, and that the skill they most need to acquire is skill in protest. Such teaching is a prescription for black self-destruction and for the incitement of racial conflict in which blacks cannot ultimately prevail.

I do not believe that racial preferences and quotas can ever be made acceptable to the vast majority of the American people. It may be an inherent defect of policy recommendations by professors of constitutional law that they tend, along with other academics, to be so high-minded and self-sacrificing—having abandoned pursuit of personal gain in the interest of public service—that they lose touch with the mass of their less elevated fellow citizens. I differ from my professional colleagues in accepting the propriety of the pursuit of self-interest, if for no other reason than that it is inevitable. Despite their insistence that America is a racist nation, proponents of racial preferences seem simultaneously to assume a level of altruism or, at least, of acceptance of racial guilt on the part of most Americans that I am sure does not exist. The imposition of racial preferences in employment, therefore, can serve only to create the interracial hostility that proponents of preferences assert already exists and use to justify such preferences. The result is a vicious and potentially disastrous cycle of racial hostility.

The only good news I can offer is that this problem is not really difficult to solve. As with so many of our problems, all that is necessary is the repeal of legislation. Nearly one million employment discrimination claims were filed with the EEOC between 1965 and 1983, more than 175,000 settlements were reached in the administrative process, nearly 60,000 lawsuits were filed, and these figures, it is said, "only begin to suggest

the social effects generated by Title VII."[29] What these figures most clearly suggest is that the principal social effect generated by Title VII, as revised by the Supreme Court in *Griggs*, is virtually endless employment opportunities for lawyers. If a better world is a world with fewer lawyers, to repeal Title VII would be to make a significant improvement in human welfare. Racial discrimination in employment is undoubtedly a very bad thing, but that does not establish that a law against it is needed or, on the whole, useful.

But the repeal of Title VII is, of course, entirely wishful and unrealistic. There is no possibility that Title VII (or any other "civil rights" measure) will be repealed. On the contrary, Congress and the President are moving to undo the Supreme Court's recent efforts to put modest limits on the racially discriminatory effects of *Griggs*.[30] The bad news is that there is no guarantee that this nation will survive, and if it tears itself apart in the near future, it will surely be because of the enhanced racial consciousness and conflict that is the inevitable result of our present course on "civil rights." Perhaps America will then finally have paid the full price for the terrible mistake of bringing in Africans in chains.

29. Blumrosen, *The Legacy of* Griggs*: Social Progress and Subjective Judgments*, 63 CHI.[-]KENT L. REV. 1, 2 (1987).

30. *See* Civil Rights Act of 1990, H.R. 4000, 101st Cong., 2d Sess. (1990); S. 2104, 101st Cong., 2d Sess., 136 CONG. REC. S1019-20 (daily ed. Feb. 7, 1990). The Civil Rights Act of 1990, as passed by Congress, was vetoed by President Bush on October 22, 1990, Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1632 (Oct. 22, 1990). The Act's provisions would, *inter alia*, overrule several of the Court's decisions that attempt to place limits on the reach of *Griggs*, including Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989).