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I. Introduction

High unemployment rates of recent years exacerbate the problem of eliminating job discrimination in the United States. Lack of new jobs and an increasing number of layoffs have a disparate impact on minority and women employees and, as a result, a line of demarcation between minority and women employees hired before enactment of Title VII of the 1964 Civil Rights Act[1] and older white employees has been created. This line demarks the perpetuation via plantwide seniority rules of past systems of job distribution that improperly excluded women and minorities from more desirable jobs. Eradication of this line is an essential national goal toward which use and expansion of equitable remedies under federal job discrimination laws should be directed.

Central to understanding this problem is recognition that high unemployment rates have resurrected the adverse effects of past discrimination in a manner contravening the Title VII rights of a group of incumbent minority and women employees. This group consists of older employees who can show that, but for past discrimination, they would have attained the seniority status necessary to insulate them from layoffs. Juxtaposed against the Title VII rights of this group are the seniority expectations of many white male incumbent employees. Judge Wisdom succinctly portrayed this problem in *Local 189, United Papermakers & Paperworkers v. United States*[2] when he stated, "In this case we deal with one of the most perplexing issues troubling the courts under Title VII: how to rec-

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1. 42 U.S.C. §§ 2000e-2000e-15 (1970).
2. 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

oncile equal employment opportunity *today* with seniority expectations based upon yesterday's built-in racial discrimination."[3]

In its recent landmark decision of *Franks v. Bowman Transportation Co.*[4] the Supreme Court opted for the side of achieving equal employment opportunity *today*. It held that an award of retroactive seniority status to job applicants who had previously been denied employment because of their race was an appropriate remedy under Title VII. This analysis shows that the rationale adopted by the Court in *Franks* should be employed in other situations so that today's employer actions will be completely purged of yesterday's discriminatory hiring and job assignment practices.

II. Evolution of Title VII Issues

Passage of Title VII of the 1964 Civil Rights Act[5] was a significant breakthrough in terms of the long-standing need for federal legal authority[6] to guarantee fundamental individual rights protected under two of the Civil War amendments.[7] Prior to its passage, racial discrimination in employment had become firmly entrenched. Minority Americans, particularly Blacks, and women had been generally relegated to the least desirable, lowest paying jobs. Work allocation rules with overtly discriminatory and exclusionary impacts were an accepted nationwide practice.[8] Without some national impetus directed toward its elimination, the problem of racial and sexual discrimination in employment would have continued unabated. However, the civil rights demonstrations of the late 1950's and early 1960's created a favorable political climate for the passage of meaningful civil rights legislation. This was the setting in which Title VII was passed. Its purpose is to achieve free and open competition for jobs, *i.e.*, competition that is unfettered by discrimination based on race, color, religion, sex, or national origin.[9]

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3. *Id.* at 982-83.
4. 424 U.S. —, 96 S.Ct. 1251 (1976).
5. 42 U.S.C. §§ 2000e-2000e-15 (1970).
6. The Civil Rights Act was grounded upon congressional authority under the Commerce Clause. U.S. CONST. art. I, § 8. Subsequent court decisions, however, suggest that, as regards race discrimination, its proscriptions and prohibitions might well have been grounded upon the fundamental rights afforded minority Americans under the thirteenth and fourteenth amendments to the United States Constitution. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).
7. U.S. CONST. amend. XIII & XIV.
8. Blumrosen, *Seniority and Equal Employment Opportunity*, 23 RUTGERS L. REV. 268, 273 (1969).
9. As was observed by Chief Justice Burger in a seminal Supreme Court opinion,

> What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to disciminate on the basis of racial or other impermissible classification.

Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

The federal enforcement mechanisms created by Title VII, although not totally efficacious, have helped dramatically change the grossly discriminatory employment practices formerly applicable to minorities and women. The rules and, to a lesser extent, the practices governing competition for jobs and promotional opportunities are now quite different. Minority and female job applicants and candidates for promotions may no longer be summarily consigned to the "leftovers" in terms of access to more desirable job categories.[10] While minorities and women still do not enjoy employment opportunities commensurate with those available to white males, they now are less likely to encounter overt forms of discrimination.[11]

The more blatant forms of discrimination that characterized pre-Title VII employment practices have been largely displaced by post-Title VII employment practices that purport to be "objective" or "neutral," but, nevertheless, may have a prohibited exclusionary effect.[12] This change in the type of employment practices that discriminatorily affect minority and women workers has altered the issues currently confronting courts. Also, changes in the economy since the passage of Title VII have affected the type of questions before courts today. The early development of judicial solutions under Title VII occurred at a time when the economy was expanding. The courts at that time were dealing with problems of revising entrenched hiring and job assignment patterns.[13] Once principles requiring elimination of those patterns were enunciated, however, the focus of Title VII questions facing the courts turned from job and promotion opportunities to job security. Another reason for this shift was the

10. *See generally* Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws*, 82 HARV. L. REV. 1598 (1969) [hereinafter cited as Cooper & Sobol].

11. Even so, recent census data indicates that the significant progress achieved by Blacks in education has, as yet, not resulted in job market parity vis-a-vis Blacks and Whites. For example, as regards males between 25 and 64 years old, black college graduates generally earn less than white high school graduates. The median income for the former was $8,383, as compared to $8,951, for the latter. Census of Population: 1970 Subject Reports, Final Report P C (2) 8B, *Earnings by Occupation and Education*. Much of this difference is attributable to employment discrimination.

12. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971); Palmer v. General Mills, Inc., 513 F.2d 1040 (6th Cir. 1975); Cooper & Sobol, *supra* note 9, at 1600. Another reason is that the overt forms of racism were eventually replaced by covert or *sub rosa* arrangements. Discriminatory practices frequently rested upon unwritten understandings which, though not explicitly included within the written terms and conditions of the underlying collective bargaining agreement, nevertheless, were observed in practice. *See* Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 HARV. L. REV. 1260 (1967).

13. *See, e.g.*, Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

reduction in the national supply of jobs in recent years in relation to the number of job seekers. Because of all of this, courts have been encountering questions that relate to Title VII's impact on a discriminatee's job "rights" subsequent to entry into the national work force.

III. Appropriateness of Granting Affirmative Seniority Relief

A. Statutory Mandates of Title VII

Typical of the different type of Title VII issues presently confronting courts is the difficult question of whether seniority status computed under facially neutral plant-wide seniority systems that operate in a manner that "locks in" and perpetuates subordinate employment status created by earlier discriminatory hiring and job assignment practices[14] are consistent with Title VII requirements. Resolution of this issue entails a balancing of equities very similar to that undertaken by Judge Wisdom in *Local 189*.[15] Courts faced with problems of this type must decide whether they can and should revamp a seniority system that is itself "neutral," but perpetuates, in its operation, past discrimination.

Section 706(g) of Title VII[16] grants federal courts broad equitable discretion to correct discriminatory practices.

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), *or any other equitable relief as the court deems appropriate.*[17]

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14. Such discriminatory practices have been illegal at least since 1944. In that year the Supreme Court held that a union's designation as exclusive bargaining representative under the Railway Labor Act, 45 U.S.C. § 151 (1970), implied a duty of fair representation in favor of minority workers in the bargaining unit. Steele v. Louisville & Nashville R.R., 232 U.S. 192 (1944). In 1955 this doctrine was extended to unions designated as exclusive bargaining agents under comparable provisions of the National Labor Relations Act, 29 U.S.C. § 151 (1970). Syres v. Oil Workers Int'l Union, 350 U.S. 892 (1955).

Similarly, 42 U.S.C. § 1981 (1970) has been held to provide a federal cause of action to remedy private employment discrimination. *See, e.g.*, Johnson v. Railway Express, Inc., 421 U.S. 454, 459-60 (1975).

15. *See* text at note 3 *supra*. *See also* Poplin, *Fair Employment in a Depressed Economy: the Layoff Problem*, 23 UCLA L. REV. 177, 202 (1975). For precedent in the circuits on the "departmental seniority" issue, see cases cited, *id.* at n. 20. The Court's opinion in *Franks* makes it clear that the perpetuation rationale of these cases should also apply in situations involving facially neutral plant-wide seniority systems (*see* text *infra*).

16. 42 U.S.C. § 2000e-6(g) (1970).

17. *Id.* (emphasis added).

In conferring this broad equitable discretion on federal courts Congress intended to effectuate one of Title VII's central purposes—*i.e.*, that of making "persons whole for injuries suffered on account of unlawful employment discrimination."[18] The legislative history to the 1972 amendments of section 706(g) makes this clear:

> The provisions of [section 706(g)] are *intended to give the courts wide discretion in exercising their equitable powers to fashion the most complete relief possible.* . . . [T]he Act is intended to make the victims of unlawful employment discrimination whole and . . . the attainment of this objective . . . requires that *persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.*[19]

B. Early Judicial Precedents

The clear mandate of the 1972 amendments to section 706(g) that courts should freely exercise their equitable discretion to effectuate Title VII's "make-whole" objective comports with the decisions of two earlier Title VII cases, *Quarles v. Phillip Morris, Inc.*[20] and *Local 189, United Papermakers & Paperworkers v. United States.*[21] In these "departmental seniority" cases,[22] which dealt primarily with past "on the job" discrimination such as discriminatory job assignments and segregated lines of seniority progression, two important legal precedents were established.

First, the courts in both cases found that defendants' *present* facially neutral seniority rules perpetuated or "locked in" the subordinate seniority status of minorities and women that had been created by *past* "on the job" discrimination.[23] The fact that defendants'

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18. Albermarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975).
19. 118 CONG. REC. 7168 (1972).
20. 279 F. Supp. 505 (E.D. Va. 1968).
21. 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).
22. "Departmental seniority," as opposed to "benefit seniority," is one of several forms of "competitive status seniority." Competitive status seniority is used to determine priorities among employees for promotion, job seniority, shift preference, and other employment advantages. By contrast, benefit seniority is used without regard to the status of other employees to determine the eligibility of a given employee for certain types of fringe benefits, such as paid vacations or sick leave. In applying competitive status seniority arrangements, companies differ as to the organizational unit within which seniority operates. Length of service may be measured with the employer ("plant" or "mill" seniority), in a department ("department" seniority), or in a job ("job" seniority).
23. 416 F.2d at 988; 279 F. Supp. at 516-17.

present seniority systems were facially neutral was held to be irrelevant because the nub of the legal injury was perpetuation of the minority's subordinate seniority status. In *Local 189* the court declared,

> It is not decisive therefore that a seniority system may appear to be neutral on its face if the inevitable effect of tying the system to the *past* is to cut into the employees *present* right not to be discriminated against on the ground of race. The crux of the problem is how far the employer must go to undo the effects of past discrimination.[24]

The second important precedent set forth in *Local 189* and *Quarles* resulted from the courts' responses to the question of how far an employer must go to undo the effects of past discrimination. Both courts held that the "affected class" should be granted affirmative seniority relief that, though it did not include the right to bump encumbent white male employees, gave minority employees with greater plant seniority a superior right to fill job vacancies.[25] This early use of the "rightful place" doctrine mirrors section 706(g)'s present mandate that discriminatees be made whole.

C. Judicial Recalcitrance in Plant-Wide Seniority Cases

Despite the precedents set forth in *Quarles* and *Local 189* and the explicit language of the 1972 amendments to Title VII, courts, prior to the Supreme Court's decision in *Franks v. Bowman Transportation* Co.,[26] were reluctant to grant affirmative seniority relief in plant-wide seniority cases. Their reluctance was based on three arguments.

First, it was contended that granting affirmative seniority relief adversely affected the expectancy interests of majority male employees who had sufficient seniority as compared with minority employees to insulate themselves from the danger of being laid off.[27] These

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24. 416 F.2d at 988 (emphasis in the original).

25. *Id.*; 279 F. Supp. at 520. *But compare* Cox v. Allied Chem. Corp., 387 F. Supp. 309 (M.D. La. 1974) *and* Patterson v. American Tobacco Co., 8 BNA FAIR EMP. PRAC. CAS. 778 (E.D. Va. 1974), both of which indicate that, in some situations, courts may include limited "bumping rights" as part of the relief granted to Title VII plaintiffs when such relief is necessary to ameliorate continuing effects of past discrimination.

26. 424 U.S. —, 96 S.Ct. 1251 (1976).

27. A person's seniority status also affects many other important aspects of a worker's life.

> Included among the benefits, options, and safeguards affected by competitive status seniority, are not only promotion and layoff, but also transfer, demotion, rest days, shift assignments, prerogative in scheduling vacation, order of layoff, possibilities of lateral transfer to avoid layoff, "bumping" possibilities in the face of layoff, order of recall, training opportunities, working conditions, length of layoff endured without reducing seniority, length of layoff recall rights will withstand, overtime opportunities, parking

expectancy interests arose from collective bargaining agreements that had been given special stature pursuant to the federal policy[28] expressed in the National Labor Relations Act.[29]

Second, opponents of affirmative seniority relief referred to section 703(h) of Title VII[30] as a bar to granting such equitable relief. The pertinent part of section 703(h) states:

> Notwithstanding any other provisions of this Title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . .[31]

The Fifth Circuit Court of Appeals in its opinion in *Franks* based its refusal to grant affirmative seniority relief to one subclass of plaintiffs on section 703(h). It reasoned that a discriminatory refusal to hire "does not affect the bona fides of the seniority system." Proceeding from this premise, the court concluded, "Thus, the differences in the benefits and conditions of employment which a seniority system accords to older and newer employees is protected as 'not an unlawful employment practice.' "[32]

Third, it was argued that modifications of a neutral, plantwide seniority system should be avoided because such modifications were the equivalent of granting "fictional" seniority, *i.e.*, seniority not based on length of time actually on the job, to minorities on a preferential basis.[33] Proponents of this argument noted that plant-

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privileges, and, in one plant, a preferred place in the punch-out line.
Stacy, *Title VII Seniority Remedies in a Time of Economic Downturn*, 28 VAND. L. REV. 487, 490 (1975) (footnotes omitted).

28. Under the National Labor Relations Act, 29 U.S.C. § 151 (1970), employees of covered employers are afforded important organizational rights. In sum, these rights are that employees have the federally protected right to organize and freely elect a union of their choice as their exclusive bargaining representative. A union so designated can bind all employees in the bargaining unit that it represents to the terms and conditions of employment included in a collective bargaining agreement.

29. 29 U.S.C. § 151 (1970).

30. 42 U.S.C. § 2000e-3(h) (1970).

31. *Id.*

32. 495 F.2d 398, 417 (5th Cir. 1974), *rev'd*, 424 U.S. —, 96 S.Ct. 1251 (1976).

33. For instance the Seventh Circuit stated:

> Title VII mandates that workers of every race be treated equally according to their earned seniority. It does not require . . . that a worker be granted fictional seniority or special privileges because of his race. . . . Under the employment seniority system there is equal recognition of em-

wide seniority cases differed from the departmental seniority cases such as *Quarles* and *Local 189*. The latter cases granted seniority relief to minority workers for the time that they had in a segregated line of seniority progression ("earned" seniority), while the plant-wide seniority challenges sought seniority credit for time when the minority worker did not work because the defendant had discriminately refused to hire him ("fictional" seniority). This distinction, they contended, undermined the precedential value of the departmental seniority cases and revealed how the grant of "fictional" seniority right was supposedly preferential treatment that is prohibited by section 703(j) of Title VII.[34]

IV. The *Franks* Decision

These three reasons for refusing to exercise the equitable discretion given to courts by section 706(g) to grant affirmative seniority relief to minority and women employees are no longer viable. The Supreme Court conclusively rejected all three arguments in its recent landmark decision of *Franks v. Bowman Transportation Co.*[35] The *Franks* case clearly established the propriety of the judicial exercise of equitable discretion to award seniority rights to minority workers whom defendant discriminately refused to hire.

In *Franks*, Bowman Transportation Company ("Bowman") had engaged in racially discriminatory employment practices involving the hiring and discharge of their over-the-road (OTR) truck drivers. A class action alleging Title VII violations was brought by both employee and non-employee discriminatees. The district court identified four classes of plaintiffs based on type of discrimination suffered and their employee or non-employee status. Two classes consisted of applicants for OTR driving positions—a non-employee group (class 3) and an employee group (class 4). The district court enjoined Bowman from continuing the discriminatory practices, but denied the class 3 and 4 plaintiffs' claims for back pay and retroactive seniority status. These plaintiffs appealed this denial of relief. The Court of

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ployment seniority which preserves only the earned expectations of long-service employees.

Waters v. Wisconsin Steel Workers of Int'l Harvester Co., 502 F.2d 1309, 1319 (7th Cir. 1974) (U.S. appeal pending).

34. Section 703(j) states:

> Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant *preferential* treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . in comparison with the total number or percentage of [such] persons . . . in any community . . . .

42 U.S.C. § 2000e-2(j) (1970) (emphasis added).

35. 424 U.S. —, 96 S.Ct. 1251 (1976).

Appeals for the Fifth Circuit[36] vacated the district court's decision regarding back pay as to both classes, reversed the decision on retroactive seniority status of class 4 plaintiffs, but affirmed the decision denying retroactive seniority status to class 3 plaintiffs. The Fifth Circuit's decision distinguished between employee and non-employee plaintiffs' eligibility for the remedy of retroactive seniority status. It was this issue, "whether identifiable applicants who were denied employment because of race after the effective date and in violation of Title VII . . . may be awarded seniority status retroactive to the dates of their employment applications,"[37] that the Supreme Court addressed.[38] The Court, speaking through Justice Brennan, reversed the Fifth Circuit's decision by holding that an award of retroactive seniority status was appropriate for the class 3 plaintiffs.[39]

The Court began its opinion by directly rejecting the Fifth Circuit's view that section 703(h) barred the grant of retroactive or affirmative seniority relief.[40] The Court noted that the plaintiffs were not seeking a "modification or elimination of the existing seniority system, but only an award of the seniority status they would have individually enjoyed under the present system *but for* the illegal discriminatory refusal to hire."[41] Once the Court defined the issue in this manner, it reasoned that section 703(h) had no relevance because it was "only a definitional provision . . . [that] delineates which employment practices are illegal. . . ."[42] The Court then concluded that section 703(h) "does not expressly purport to qualify or proscribe relief otherwise appropriate under the remedial provisions of Title VII. . . ."[43]

In rejecting section 703(h) as a barrier to seniority relief, the Court was not troubled by the much discussed[44] legislative history of the section. The Court did not attempt to decipher the unusual legislative history; instead, it summarily declared that "the legislative

36. 495 F.2d 398 (5th Cir. 1974).
37. 424 U.S. —, —, 96 S.Ct. 1251, 1257 (1976).
38. In addition to this issue, the Court preliminarily addressed a mootness question. *Id.* at —, 96 S.Ct. at 1258-60.
39. *Id.* at —, 96 S.Ct. at 1261.
40. *See* notes 27-29 and accompanying text *supra.*
41. 424 U.S. at —, 96 S.Ct. at 1261 (emphasis added).
42. *Id., citing* Comment, *Last Hired, First Fired Seniority, Layoffs, and Title VII,* 11 COLUM. J.L. & SOC. PROB. 343, 376, 378 (1975).
43. 424 U.S. at —, 96 S.Ct. at 1261.
44. *E.g.,* Note, *Last Hired, First Fired Layoffs and Title VII,* 88 HARV. L. REV. 1544, 1548-53 (1975) [hereinafter cited as *Last Hired, First Fired*].

history of § 703(h) plainly negates its reading as limiting or qualifying the relief authorized under § 706(g)."[45]

The Court's refusal to treat the confusing legislative history of section 703(h) as limiting the equitable relief available under Title VII was sound. The portion of the legislative history that is relied on by proponents of a remedially restrictive view of Title VII includes the Clark-Case memorandum,[46] a Department of Justice memorandum,[47] and an exchange of questions and answers between Senators Clark and Dirksen.[48] The force of these materials is of doubtful validity because they were each introduced and employed in debate over a bill that was not enacted by Congress. In short, the "dispute" addressed by these materials concerning the effect of the act was finally "reconciled" by "new" language in a substitute bill. This substitute bill, which contained what is now section 703(h), was introduced on May 26, 1964 after Congress had heard and presumably considered the views contained in these materials. Therefore, when interpreting section 703(h) it is more reliable to rely on its actual language as the Supreme Court did, rather than upon legislative history that pertains to a prior bill that was not adopted.[49]

The Court next considered "whether an award of seniority relief is appropriate under the remedial provision of Title VII, specifically § 706(g)."[50] It answered this question affirmatively, reasoning that a grant of retroactive seniority was necessary because:

> Adequate relief may well be denied in the absence of a seniority remedy slotting the victim in that position in the seniority system that would have been his had he been hired at the time of his application. *It can hardly be questioned that ordinarily such relief will be necessary to achieve the "make-whole" purposes of the Act.*[51]

The Court emphasized the important rights and benefits affected by seniority status[52] and concluded that "merely to require Bowman to hire the class 3 victim of discrimination falls far short of a 'make whole' remedy."[53]

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45. 424 U.S. at —, 96 S.Ct. at 1261.
46. 110 CONG. REC. 7213 (1964).
47. 110 CONG. REC. 7207 (1964).
48. 110 CONG. REC. 11,926, 11,931 (1964).
49. After exploring the confusion on this point, which is implicit in the legislative history of Title VII, one commentator concluded:
> It is perhaps not unreasonable to conclude, therefore, that Congress chose to leave the resolution of the problems posed by seniority to the courts rather *than codify in the Act the concerns expressed in the Senate debates.*

Last Hired, First Fired, supra note 44, at 1550 (emphasis added).
50. 424 U.S. at —, 96 S.Ct. at 1263.
51. *Id.* at —, 96 S.Ct. at 1265.
52. The Court stated that "[s]eniority systems and entitlements conferred by credits earned thereunder are of vast and increasing importance in the economic employment system of this Nation." *Id.*
53. *Id.*

The Court went on to find that there was no support in Title VII for the Fifth Circuit's differentiation in its remedial treatment of class 4 employee discriminatees and class 3 non-employee discriminatees.[54] This finding indicated an implicit and correct recognition by the Court that the distinction, which courts previously had been making, between "earned" and "fictional" seniority did not encompass a meaningful difference. As one commentator prophetically declared:

> The distinction between earned and fictional seniority seems to respond to a moral perception that it is improper to grant seniority credit to one who did not work to acquire it. Such a distinction might seem justified if the comparison were between two persons both of whom could have worked, but one of whom did not. However, where minority applicants were refused jobs and thus prevented from acquiring seniority in the usual manner, no fault can attach to their failure to do so. *It seems anomalous to hold that the seniority of minority workers subjected to partial discrimination, that is those who were hired but assigned to less desirable jobs, must be recomputed but that the seniority of minority workers who were entirely excluded from the work force cannot be recomputed.*[55]

In support of its conclusion that section 706(g) permitted an award of affirmative seniority relief, the Court cited cases construing section 10(c) of the National Labor Relations Act (NLRA).[56] Justice Brennan reasoned that since section 10(c) of the NLRA was model for section 706(g) of Title VII the section 10(c) cases granting affirmative seniority relief[57] were applicable precedent for Title VII cases.[58]

Having established that affirmative seniority relief was an appropriate equitable remedy under section 706(g), the Court still had to contend with the fact that the district court had exercised its discretion and refused to grant this remedy to class 3 plaintiffs. The Court decided that the district court had abused its discretion and, in so ruling, rejected the argument that, on the facts of that case, it was within the district court's discretion to deny this form of relief as an accommodation to the competing interests of other groups of employees.[59]

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54. *Id.*
55. *Last Hired, First Fired, supra* note 42, at 1555.
56. 29 U.S.C. § 160(c) (1970).
57. *E.g.*, NLRB v. H.J. Rutter-Rex Mfg. Co., 396 U.S. 258, 263 (1969); Local 60, United Bhd. of Carpenters & Joiners of America, AFL-CIO v. NLRB, 365 U.S. 651, 657 (1961) (Harlan, J., concurring).
58. 424 U.S. at —, 96 S.Ct. at 1266.
59. *Id.* at —, 96 S.Ct. at 1267. The stated district court's reasons for denial

The Court's discussion of this issue largely resolved a problem that had been previously troubling courts: how the competing equities of the expectancy interests of majority male employees and public policy goals of Title VII should be balanced. The Court declared:

> [W]e find untenable the conclusion that this form of relief may be denied merely because the interests of other employees may thereby be affected. "If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed."[60]

In buttressing its position the Court noted that "a sharing of the burden of past discrimination is presumably necessary—[and that such sharing] is entirely consistent with any fair characterization of equity jurisdiction. . . ."[61] Then, Justice Brennan referred to a number of Supreme Court cases that held "*that employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest.*"[62] Moreover, competitive status seniority rights cannot be considered vested rights because it has been recognized that these rights may be abrogated by revisions in the underlying collective bargaining agreement.[63]

Finally, the Court clearly stated its position in regard to how the aforementioned equities should be balanced in footnote 41:

> [O]ur holding is that in exercising their equitable powers, *district courts should take as their starting point the presumption in favor of rightful place seniority relief, and proceed with further legal analysis from that point*; and that such relief may not be denied on the abstract basis of adverse impact upon interests of other employees but rather only on the basis of unusual adverse impact arising from facts and circumstances that would not be generally found in Title VII cases.[64]

The importance of this direction was illustrated by the subsequent remand of the *EEOC v. Jersey Central Power & Light Co.*[65] case to the Third Circuit for further consideration.

V. Conclusion

The Court's opinion in *Franks* laid to rest much of the contro-

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of relief to class 3 members were dismissed by the Supreme Court. *Id.* at —, 96 S.Ct. at 1266.

60. *Id.* at —, 96 S.Ct. at 1269, *quoting from* United States v. Bethlehem Steel Corp., 446 F.2d 652, 663 (2d Cir. 1971).

61. 424 U.S. at —, 96 S.Ct. at 1270.

62. *Id.* (emphasis added), *citing* Tilton v. Missouri Pac. R.R., 376 U.S. 169 (1964); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275 (1946).

63. Humphrey v. Moore, 375 U.S. 335, 345-50 (1964).

64. 424 U.S. at — n.41 (emphasis added), 96 S.Ct. at 1271.

65. — U.S. —, 44 U.S.L.W. 3669 (May 25, 1976).

versy regarding what balance must be struck between the two important public policy interests implicit in Title VII on the one hand and job security computed on the basis of plant seniority on the other. And while the facts before the Court in that case relate only to the inferior seniority of the class 3 plaintiffs that was brought about by post-Act hiring discrimination, it is noteworthy that this class consisted entirely of job applicants who had not yet achieved any employee status whatsoever vis-à-vis the defendant employee. Accordingly, there can be little doubt that *incumbent minority and female employees* whose relatively low seniority status is derived from pre-Act hiring discrimination would be entitled to similar relief under the Court's reasoning.[66] Concommitantly, in granting affirmative seniority relief, the Court emphasized the essentially equitable character of the remedies that may be afforded under Title VII in layoff situations even in the currently depressed economy. This approach provides a meaningful frame of reference within which the numerous permutations of this knotty problem may now be resolved. For if sensitive use is made of the familiar rules of equity, as was done in *Franks*, both the Title VII rights of older minority and female employees as well as the employment expectancy interests of majority males may be accommodated without unduly negating the legitimate employment interests of either.

66. Significantly, for example, the Court in *Franks* explicitly noted without further comment that "by its terms" the judgment of the district court in that case expressly extended to pre-Act discriminatory refusals to hire "and is not qualified by a limitation [to post-Act discrimination] . . . ." 424 U.S. at — n.10, 96 S.Ct. at 1261.