



10-1981

American Tobacco Co. v. Patterson

Lewis F. Powell Jr

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Argued 19...
Submitted 19...

Assigned 19...
Announced 19...

No. 80-1199

AMERICAN TOBACCO CO.

vs.

PATTERSON

B.R.W. Thinks
this presents
a major Q

Relit
for BRW
who will
write.

I'll take good

| | HOLD FOR | CERT. | | JURISDICTIONAL STATEMENT | | | | MERITS | | MOTION | | ABSENT | NOT VOTING |
|----------------|-------------|-------|---|-----------------------------|------|-----|-----|--------|-----|--------|---|--------|------------|
| | | G | D | N | POST | DIS | AFF | REV | AFF | G | D | | |
| Burger, Ch. J. | | | ✓ | | | | | | | | | | |
| Brennan, J. | | ✓ | ✓ | | | | | | | | | | |
| Stewart, J. | | ✓ | | | | | | | | | | | |
| White, J. | | ✓ | ✓ | | | | | | | | | | |
| Marshall, J. | | | ✓ | | | | | | | | | | |
| Blackmun, J. | | | ✓ | | | | | | | | | | |
| Powell, J. | | | ✓ | | | | | | | | | | |
| Rehnquist, J. | | ✓ | | | | | | | | | | | |
| Stevens, J. | | | ✓ | | | | | | | | | | |
| | | | | | | | | | | | | | |

Look at his
opinion.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 4 JUN 1981

Recirculated: _____

No. 80-1199 - AMERICAN TOBACCO CO. v. PATTERSON

Justice White, dissenting.

Section 703(h) of Title VII, 42 U.S.C § 2000e-2(h),
provides that:

"Notwithstanding any other provision of this subchapter, 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 or merit system, ... provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin,"

A plurality of the Court of Appeals for the Fourth Circuit, sitting en banc, has construed the protections afforded by §703(h) as not applying to any seniority system instituted after the effective date of Title VII. The plurality based its holding in part on its view that the legislative history of §703(h) was "replete with indications" which "conclusively demonstrates that

Congress intended the immunity accorded seniority systems by §703(h) to run only to those systems in existence at the time of Title VII's effective date, and of course to routine post-Act applications of such systems." Accordingly, the plurality held that post-Act seniority systems should be assessed under the test articulated in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and not under the more relaxed standard announced in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), for challenges to bona fide seniority systems adopted before the effective date of Title VII. Since the particular seniority system at question in this part of the case had already been found to violate Griggs, the plurality held that a Title VII violation had been demonstrated with respect to the particular seniority system at issue.¹

In my view, the Fourth Circuit has decided an important question of federal law which this Court should review. First, nothing in the language of §703(h) supports the bright-line distinction drawn by the court below. On its face, §703(h) directs that bona fide seniority systems can only be found to violate Title VII if they intentionally discriminate on the basis

¹ The original panel found that the seniority system in question was not "bona fide," within the meaning of §703(h). See Patterson v. American Tobacco Co., 586 F.2d 300, 303 (CA4 1978). The plurality did not rely on this ground, however, but instead based its decision on the nonapplicability of §703(h) to seniority systems enacted after the effective date of Title VII. Similarly, the Fourth Circuit specifically refused to base its decisions on respondents' argument that the specific system under consideration was not in fact a seniority system within the meaning of §703(h). 634 F.2d, at 749 n.3.

of race, sex, or other statutorily prohibited bases. There is no indication in the text of the provision that Congress intended bona fide seniority systems imposed after the effective date of Title VII to be treated in a fashion different from pre-effective date systems.

It is also not clear that the Fourth Circuit's decision follows directly from the legislative history. The court below relied primarily on various statements from the legislative history indicating that Title VII was not intended to undermine "established" or "existing" seniority rights. See 110 Cong. Rec. 7213 (1964) (Memorandum of Sen. Clark and Sen. Case); id., at 7207 (Justice Department comments). The Fourth Circuit was correct that Title VII in general, and §703(h) in particular, evidence a concern that seniority rights already vested at the time of the effective date of Title VII should be protected. But it does not necessarily follow from this observation that §703(h) was not intended to protect subsequently-imposed seniority systems. Reading such negative implications into the legislative history is a speculative enterprise given the lack of any limiting language in the statute itself. As presently advised, I am not prepared to say that the legislative history constitutes a "clearly expressed legislative intention to the contrary" of the statute's otherwise clear language. See Consumer Products Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

Nor is the reading given §703(h) by the Court of Appeals obviously consistent with the Court's prior constructions of that Section. In Teamsters, the Court stated that "the unmistakable

purpose of §703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII." 431 U.S., at 352. See Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 82 (1977) ("§703(h) provides that "absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences"). The Court has also noted that Title VII was passed "against the backdrop of this Nation's longstanding labor policy of leaving to the chosen representatives of employers and employees the freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment." California Brewers Association v. Bryant, 444 U.S. 598, 608 (1980). While none of these cases considered the exact question at issue in this case, and thus do not necessarily require a result contrary to the decision below, it is equally true that the Court has never suggested that the effective date of Title VII makes any difference in terms of the applicability of §703(h).

Finally, while the Fourth Circuit's decision is in accord with the present position of the Equal Employment Opportunity Commission,² it is in conflict with decisions of other Courts of Appeals that have routinely applied Teamsters to post-Act

² See EEOC Notice, No. N-915 (July 14, 1977) (EEOC's position is that "a seniority system is protected under Section 703(h) only if it was instituted prior to the effective date of Title VII").

imposition or revision of seniority systems. See, e.g., Alexander v. Aero Lodge No. 735, 565 F.2d 1364 (6th Cir. 1977), cert. denied, 436 U.S. 946 (1978); Hameed v. International Association of Bridge, Structural and Ornamental Iron Workers, 637 F.2d 506, 516 (CA8 1980).

Given the above concerns and the obvious importance of the issue presented with respect to the validity of all recently adopted seniority systems, an issue which will necessarily recur time and again, I would issue the writ of certiorari.

A

Seniority system was
part adoption of VII,
& DC found it was not
bona fide.

Preliminary Memo

April 17, 1981 Conference
List 1, Sheet 2

No. 80-1199

AMERICAN
TOBACCO CO.,
et al. *

v.

PATTERSON,
et al. *

Cert to CA 4
(Haynsworth, Hall
& Phillips; Winter
& Butzner, concurring
& dissenting; Widener
& Russell, concurring
& dissenting)
Federal/Civil

Timely

1. SUMMARY: Petrs argue that the CA4 improperly refused to
apply §703(h) of Title VII, as construed in International
Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977),
to a seniority system imposed after the operative date of Title
VII.

I am inclined to deny, although I do
think that the case merits discussion.

no problem |

GM

2. FACTS: In 1973, resp EEOC filed an employment discrimination case charging that petrs' promotion and seniority practices had confined blacks and women to low-paying jobs, in violation of Title VII. The case was consolidated with a private Title VII class action case filed by resp Patterson. In 1974, the district court entered a declaratory judgment finding that the employment practices violated Title VII. Specifically, the court found that until 1963 jobs at petrs' two plants were overtly segregated on the basis of race and sex. Covert segregation continued well after the express segregation was discontinued. In 1968, petrs instituted a posting and bidding system which established six "lines of progression." Each line of progression required that an employee work in a lower level job in that line before advancing to the next level job in the same line. The district court concluded that the "lines of progression" perpetuated past discrimination and were not justified as a business necessity.

On appeal, the CA4 affirmed the DC's findings, and with minor modifications upheld the injunctive relief. The case was remanded for individual back pay proceedings. This Court denied certiorari, 429 U.S. 920 (1976).

While pending on remand, petrs moved to vacate the judgment on the basis of the Court's decision in Teamsters; United States Air Lines, Inc. v. Evans, 431 U.S. 553 (1977); and Hazelwood School District v. United States, 433 U.S. 299 (1977). The DC DC denied the motion, finding that the seniority system was not a bona fide system under Teamsters "because this system operated

right up to the day of trial in a discriminatory manner . . .
[and] had a discriminatory genesis."

A panel of the CA4 affirmed, finding that the employment practice did not fall within the scope of §703(h) of Title VII, which provides that:

"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 [or] sex."

The court remanded, however, for further findings with respect to the bona fide nature of another practice challenged by resps, namely the validity of a policy controlling interplant transfers between petrs' two plants.

3. DECISION BELOW: On rehearing en banc, a plurality of the CA4 held that §703(h) had no applicability to the lines of progression policy, even assuming it was a seniority system, because the legislative history of the provision "conclusively demonstrates that Congress intended the immunity accorded seniority systems by §703(h) to run only to those systems in existence at the time of Title VII's effective date, and . . . to routine post-Act applications of such systems." See Franks v. Bowman Transportation Co., 424 U.S. 747 (1976); Teamsters. The legislative history is "replete with indications that the interests sought to be protected by this special exception to Title VII's general coverage of all 'conditions of employment' were those seniority rights already vested in incumbent workers when Title VII went into effect." The EEOC is of the view that

-4-

§703(h) has no applicability to seniority systems not in operation at the effective date of Title VII. EEOC Notice N-915 (July 14, 1977). Moreover, a memo prepared by Senators Clark and Case at the time of enactment stated that §703(h) was intended to assure that Title VII had no effect on established seniority rights. 110 Cong. Rec. 7213 (1964). Accordingly, the district court properly assessed the discriminatory effect of lines of progression policy under Griggs v. Duke Power Co., 401 U.S. 424 (1971). The plurality then ²reached other contentions not presented before this Court, and ordered a remand on the question whether petr's inter-branch transfer rule violated Title VII.

Judge Winter, joined by Judge Butzner, concurred in the result on the basis of the panel opinion. Judge Winter disagreed that a remand to consider the effects of Hazelwood School District v. United States, 433 U.S. 299 (1977), on the propriety of the inter-branch transfer rule was required.

Judge Widener, joined by Judge Russell, dissented on the ground that the record indicated that the lines of progression policy were instituted before the effective date of the Act, and thus the holding that §703(h) does not apply to post-Act seniority systems is irrelevant.

4. CONTENTIONS: Petr argues that the decision below is inconsistent with numerous Supreme Court cases construing §703(h). Last Term, in California Brewers Association v. Bryant, 444 U.S. 598 (1980), the Court held that the term "seniority system" should be broadly construed in light of Title VII's recognition of the long-standing labor policy recognizing the

importance of seniority systems. The uncertainty concerning post-Act seniority systems raised by the decision below should be resolved. The result below requires that post-Act seniority systems meet the Griggs test, which is far harsher than the purpose test required in Teamsters. The difference in treatment between post-Act and pre-Act seniority systems is illogical in that otherwise bona fide seniority plans which discriminate only in effect will be found to violate Title VII, if instituted after 1965, but not if created before. This will work to the disadvantage of blacks who may benefit from affirmative action programs which will be suspect under the majority's strict reading of §703(h).

Petr argues that the decision below is plainly inconsistent with the express language of §703(h), as well as being contrary to its legislative history. If Congress has meant to limit §703(h)'s effect, it easily could have done so in plainer language. The legislative history relied on by the majority is not persuasive of the effect of post-Act seniority systems. The decision below conflicts with the Court's construction of §703(h) in Teamsters, Evans, and TWA. In TWA, the Court noted that Griggs was not meant to apply to seniority systems, 432 U.S. at 82-83 n. 13 ("absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences"). Petrs also allege that the decision below conflicts with Alexander v. Aero Lodge, 565 F.2d 1364 (6th Cir. 1977), cert. denied, 436 U.S. 946 (1978), and Hammeed v. Iron Workers, ___ F.2d ___, 24 FEPC 352

(8th Cir. 1980), where the courts inquired whether seniority systems were bona fide, and not whether they met Grigg's requirements. Petrs also cite a number of allegedly conflicting district court cases.

Resp EEOC argues that cert should be denied given the limited nature of petr's argument. Under Federal Rule 60(b)(5), a district court has broad discretion to decide whether to reopen a prior judgment to avoid extreme hardship or unfairness. See, e.g., Browder v. Director, 434 U.S. 257, 263 n. 7 (1978). Even assuming that §703(h) applies, petrs are not entitled to relief under Rule 60(b)(5), since bona fide requires that a system "not have its genesis in racial discrimination [and that has been] negotiated . . . and maintained free from any illegal purpose." Teamsters, 431 U.S. at 356. Here, the record demonstrates that the lines of progression had their origin in overt discriminatory practices and were part of various policies designed to limit blacks and women to lower paying jobs. The DC properly concluded that the lines of progression were not bona fide seniority systems.

Moreover, the CA4 correctly held that §703(h) affords no immunity to post-Act creation of the lines of progression, even assuming that the practice was a seniority system. On its face, §703(h) neither defines bona fide nor purports to sanction post-Act establishment of seniority systems that unlawfully "operate to 'freeze' the status quo of prior discriminatory practices." Griggs, 401 U.S. at 430 (1971). The emphasis in Teamsters is on vested rights accruing as the result of existing seniority

-7-

systems, 431 U.S. at 352 (§703(h) was a congressional compromise designed to resolve "ambiguities concern[ing] Title VII's impact on existing collectively bargaining seniority rights . . . [by] allow[ing] for full exercise of seniority accumulated before the effective date of the Act."). See Evans, 431 U.S. 557-558; Franks, 424 U.S. at 759-761. No case cited by petr has squarely presented the question whether §703(h) was meant to limit judicial scrutiny of post-Act seniority systems, and thus no conflict exists.

Resp workers argue that the decision below is not inconsistent with prior Supreme Court precedent, since the case law has expressly held that the purpose of §703(h) is to protect pre-Act bona fide seniority systems, even if they act to perpetuate pre-Act discrimination. Without this provision, all of these seniority systems would be invalid. Clearly, this only goes to protect pre-Act plans and, as the majority recognized, any routine applications of those plans. The logic of §703(h) cannot be stretched to immunize totally new seniority plans from normal scrutiny under Title VII. None of the cases relied on by petr concern the same issue as presented here. The decision below is also supported by the alternative ground that the lines of progression systems was not a seniority system. The original panel decision was based on that ground, and it was encompassed in the opinion of Judge Butzner, joined in by Judge Winter. The three-judge majority also recognized that there was considerable support for this view, but determined not to reach the issue given their resolution of the other point. Finally, resps argue

that the case is not ripe for review in light of the extensive remand ordered by the CA4 on back pay issues and other matters relative to Teamsters with respect to other union practices.

5. DISCUSSION: I agree with the SG that review is unwarranted in this case. The allegedly inconsistent Supreme Court cases are clearly distinguishable in that they have uniformly considered pre-Act seniority systems. Certainly the distinction between pre-Act and post-Act actions is significant, and it is not at all illogical to suggest separate treatment for seniority systems depending on when they were enacted. The entire thrust of Title VII is to make a rather bright line distinction between events occurring before the effective date of the Act, and those occurring after the date. The majority's decision effectuates that underlying philosophy. Nothing in the statutory language of §703(h) demands that the usual Griggs analysis be discarded. Bona fide does not inherently require application of a purpose test, and the peculiar legislative history does suggest that the primary focus of Congress was on considering the effect of pre-Act seniority systems.

In any event, this case is not a good factual vehicle for considering the question since, as the SG points out, there is ample evidence that the seniority system imposed was not bona fide and was intentionally put into effect to continue petrs' discriminatory practices. While the en banc court did not rely on this logic, the DC did make this finding (as did the original panel), and the SG is not foreclosed from relying on the argument under the Supreme Court Rules. Clearly, it would be better to

consider the legal issue in a case where the proof of discrimination had been more clearly based on a disparate impact Griggs analysis.

On balance, I would deny.

There are responses.

4/2/81

Metzloff

Opinion in
Petition

ME

June 5, 1981

Re: No. 80-1199 American Tobacco Co. v. Patterson

Dear Byron:

Please join me in your dissent from denial of certiorari.

Justice White

Copies to the Conference

Sincerely,

I'll join Byron

Issue is important & there is a conflict.

Just has a point, but ~~it~~ it would be desirable to clarify the law if we can

I think Justice White makes a good case for reviewing the legal question. But I do note that the Dist. Ct. found as a fact that the "post-Title VII" seniority system was established with a discriminatory purpose. Thus, the system is not a bona fide system even if § 703(h) does apply to it. This was not the CA's ground for decision (see note 1 of Justice White's opinion); but it is a finding which supports the contention that the legal question of § 703(h)'s applicability is not raised.

GM

June 8, 1981

No. 80-1199 American Tobacco Co. v. Patterson

Dear Byron:

Please join me in your dissent from denial of certiorari.

Sincerely,

Mr. Justice White

LFP/lab

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
✓ Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

1st PRINTED DRAFT

Circulated: _____

Recirculated: 9 JUN 1981

SUPREME COURT OF THE UNITED STATES

AMERICAN TOBACCO COMPANY ET AL. v. JOHN
PATTERSON ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF AP-
PEALS FOR THE FOURTH CIRCUIT

No. 80-1199. Decided June —, 1981

JUSTICE WHITE, with whom JUSTICE POWELL and JUSTICE
REHNQUIST join, dissenting.

Section 703 (h) of Title VII, 42 U. S. C. § 2000e-2 (h),
provides that:

"Notwithstanding any other provision of this sub-
chapter, it shall not be an unlawful employment practice
for an employer to apply different standards of compensa-
tion, or different terms, conditions, or privileges of em-
ployment pursuant to a bona fide seniority or merit
system, . . . provided that such differences are not the
result of an intention to discriminate because of race,
color, religion, sex, or national origin,"

A plurality of the Court of Appeals for the Fourth Circuit,
sitting en banc, has construed the protections afforded by § 703
(h) as not applying to any seniority system instituted after
the effective date of Title VII. The plurality based its hold-
ing in part on its view that the legislative history of § 703 (h)
was "replete with indications" which "conclusively demon-
strates that Congress intended the immunity accorded senior-
ity systems by § 703 (h) to run only to those systems in
existence at the time of Title VII's effective date, and of
course to routine post-Act applications of such systems."
Accordingly, the plurality held that post-Act seniority systems
should be assessed under the test articulated in *Griggs v. Duke
Power Co.*, 401 U. S. 424 (1971), and not under the more
relaxed standard announced in *International Brotherhood of
Teamsters v. United States*, 431 U. S. 324 (1977), for chal-
lenges to bona fide seniority systems adopted before the effec-

Nothing new. You've joined.

GM

tive date of Title VII. Since the particular seniority system at question in this part of the case had already been found to violate *Griggs*, the plurality held that a Title VII violation had been demonstrated with respect to the particular seniority system at issue.¹

In my view, the Fourth Circuit has decided an important question of federal law which this Court should review. First, nothing in the language of § 703 (h) supports the bright-line distinction drawn by the court below. On its face, § 703 (h) directs that bona fide seniority systems can only be found to violate Title VII if they intentionally discriminate on the basis of race, sex, or other statutorily prohibited bases. There is no indication in the text of the provision that Congress intended bona fide seniority systems imposed after the effective date of Title VII to be treated in a fashion different from pre-effective date systems.

*Plain
Language
of Act*

It is also not clear that the Fourth Circuit's decision follows directly from the legislative history. The court below relied primarily on various statements from the legislative history indicating that Title VII was not intended to undermine "established" or "existing" seniority rights. See 110 Cong. Rec. 7213 (1964) (memorandum of Sen. Clark and Sen. Case); *id.*, at 7207 (Justice Department comments). The Fourth Circuit was correct that Title VII in general, and § 703 (h) in particular, evidence a concern that seniority rights already vested at the time of the effective date of Title VII should be protected. But it does not necessarily follow from this observation that § 703 (h) was not intended to pro-

¹ The original panel found that the seniority system in question was not "bona fide" within the meaning of § 703 (h). See *Patterson v. American Tobacco Co.*, 586 F. 2d 300, 303 (CA4 1978). The plurality did not rely on this ground, however, but instead based its decision on the non-applicability of § 703 (h) to seniority systems enacted after the effective date of Title VII. Similarly, the Fourth Circuit specifically refused to base its decision on respondents' argument that the specific system under consideration was not in fact a seniority system within the meaning of § 703 (h). 634 F. 2d, at 749, n. 3.

tect subsequently-imposed seniority systems. Reading such negative implications into the legislative history is a speculative enterprise given the lack of any limiting language in the statute itself. As presently advised, I am not prepared to say that the legislative history constitutes a "clearly expressed legislative intention to the contrary" of the statute's otherwise clear language. See *Consumer Products Safety Commission v. GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980).

Nor is the reading given § 703 (h) by the Court of Appeals obviously consistent with the Court's prior constructions of that Section. In *Teamsters*, the Court stated that "the unmistakable purpose of § 703 (h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII." 431 U. S., at 352. See *Trans World Airlines, Inc. v. Hardison*, 432 U. S. 63, 82 (1977) (§ 703 (h) provides that "absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences"). The Court has also noted that Title VII was passed "against the backdrop of this Nation's long-standing labor policy of leaving to the chosen representatives of employers and employees the freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment." *California Brewers Association v. Bryant*, 444 U. S. 598, 608 (1980). While none of these cases considered the exact question at issue in this case, and thus do not necessarily require a result contrary to the decision below, it is equally true that the Court has never suggested that the effective date of Title VII makes any difference in terms of the applicability of § 703 (h).

Finally, while the Fourth Circuit's decision is in accord with the present position of the Equal Employment Opportunity Commission,² it is in conflict with decisions of other Courts

² See EEOC Notice, No. N-915 (July 14, 1977) (EEOC's position is that "a seniority system is protected under Section 703 (h) only if it was instituted prior to the effective date of Title VII").

of Appeals that have routinely applied *Teamsters* to post-Act imposition or revision of seniority systems. See, e. g., *Alexander v. Aero Lodge No. 735*, 565 F. 2d 1364 (CA6 1977), cert. denied, 436 U. S. 946 (1978); *Hameed v. International Association of Bridge, Structural and Ornamental Iron Workers*, 637 F. 2d 506, 516 (CA8 1980).

Given the above concerns and the obvious importance of the issue presented with respect to the validity of all recently adopted seniority systems, an issue which will necessarily recur time and again, I would issue the writ of certiorari.

| | | |
|-------------------------------|-------------------------------|-------------|
| <i>Court</i> | <i>Voted on</i>, 19... | No. 80-1199 |
| <i>Argued</i>, 19... | <i>Assigned</i>, 19... | |
| <i>Submitted</i>, 19... | <i>Announced</i>, 19... | |

vs.

PATTERSON

Relisted for Mr. Justice White.

elisted for Mr. Justice Wh

I've joined B2W

Grant

[illegible]

Review L N 17

meb 01/16/82

Many would Reverse.

*See Byron's dissent from
denial of Cert that I joined.*

BENCH MEMORANDUM

To: Mr. Justice Powell

January 16, 1982

From: Mary

No. 80-1199, The American Tobacco Co., Tobacco Workers' Int'l Union,
& Local 182 of Tobacco Workers' Int'l Union
v. John Patterson, et al.

Question Presented

Does §703(h) protect bona fide post-Civil Rights Act
seniority plans, or does it only apply to pre-Act plans?

I. BACKGROUND

In 1968, petrs instituted (or modified) a posting and bidding system, which resulted in the six "lines of progression" now at issue in this case (three other lines of progression are not challenged here). Each line of progression required that an employee work in a lower level job in that line before advancing to the next level job in the same line.

In 1973, resp EEOC filed an employment discrimination case challenging petrs' promotion and seniority practices on the ground that they ~~Confined~~ blacks and women to low-paying jobs, ^{*}in violation of Title VII. The case was consolidated with a private Title VII class action filed by resp Patterson on the basis of administrative charges filed in 1969.

In 1974, the DC entered a declaratory judgment, finding DC that six lines of progression and certain other employment practices violated Title VII. Specifically, the court found that until 1963, jobs at petrs' two plants wre overtly segregated on the basis of race and sex and that covert segregation continued well after the express segregation was discontinued. The DC concluded that the "lines of progression" perpetuated past discrimination and were not justified by busness necessity. At the time of these findings, the CA4 rule was that Title VII invalidated seniority systems that perpetuate the effects of pre-Act discrimination regardless of motivation.

On appeal, the CA4 affirmed the DC's findings, and, with CA4 minor modifications, upheld the injunctive relief. The case was aff'ed remanded for individual back pay proceedings. This Court denied

cert, 429 U.S. 920 (1976).

While pending on remand, the Court handed down International Brotherhood of Teamsters v. U.S., 431 U.S. 324 (1977). There, the Court held that §703(h) protects plans that perpetuate past discrimination provided they are not motivated by discriminatory intent. The company and union moved for relief from the DC in light of Teamsters, United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977), and Hazelwood School District v. U.S., 433 U.S. 299 (1977). The DC denied the motion on the merits, holding that the challenged system was not a bona fide plan under Teamsters because it "had a discriminatory genesis" and operated right up to the day of trial in a discriminatory manner. J.A. 110.

The CA upheld the DC's findings with respect to the lines of progression at issue before this Court, but remanded on another issue, holding that more fact findings were needed regarding the bona fides of the use of length of time of branch service to measure seniority. The CA did not affirm the DC's finding that the lines of progression were not bona fide; instead, it held that they were not part of a seniority system; §703(h) was, therefore, inapplicable, and the DC had applied the proper legal standard (disparate impact) in considering them.

The company and the union filed petns for rehearing en banc. While these petns were pending, California Brewers Ass'n v. Bryant, 444 U.S. 598 (1980) came down. That case gave a broader reading to the term "seniority system" than that applied by the panel.

En banc, the CA¹ ruled that §703(h) had no applicability

Footnote(s) 1 will appear on following pages.

CA4 limited 703(h) exemption to seniority systems in existence at time of VII
to the lines of progression, even assuming that it was a seniority system, because the legislative history of the provision

"conclusively demonstrates that Congress intended the immunity furnished accorded seniority systems by §703(f) to run only to those systems in existence at the time of Title VII's effective date, and ... to routine post-Act applications of such systems." The CA4 found the legislative history "replete with indications that the interests sought to be protected by this special exception to Title VII's general coverage of all 'conditions of employment' were those seniority rights already vested in incumbent workers when Title VII went into effect."

✓ Judge Widener, joined by Judge Russell, dissented. Judge Widener doubted that the majority's holding was correct in limiting §703(h) protection to pre-Act seniority systems. He noted that "§703(h) on its face immunizes all bona fide seniority systems" and that §703(h) is not written like a grandfather clause, though Congress undoubtedly knows how to write such clauses when it wishes. J.A. 160 n.1. Judge Widener focused, not on this point, but on the adequacy of the record supporting the majority's finding that the lines of progression were adopted in 1968. He noted that the DC had made no findings on the point and that the record evidence indicated that a much larger number of lines of progression (including these 6) had existed in practice prior to the Act, though not expressly

¹ (Haynesworth, Winter, Butzner, Russell, Widener, Hall & Phillips) (Widener & Butzner dissenting from the majority's construction of §703(h)).

defined in the collective bargaining agreement. In 1968, the parties substantially reduced the number of lines of progression, these 6 being among the 9 that survived. If these facts, all supported by record evidence of some kind, were true, he observed that the 1968 "change" only benefited black employees by reducing the number of jobs covered by the restrictive lines of progression. He considered a remand necessary so that the DC could make initial findings on these points.²

The en banc CA remanded for a hearing on, among other things, the bona fides of the rule that seniority was forfeited when an employee transferred between branches or divisions. These issues are not before the Court; cert was granted only on whether §703(h) } applies to pre-Act, not post-Act, seniority plans.³

*only issue
before us.*

II. DISCUSSION

A. The Statute

Section 703(h) provides:

"Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an

²The majority merely stated that the record contained enough evidence to support the conclusion that substantial changes or "formalizations" were made in 1968 "(whether in favor of or against employee interests) to constitute a new policy, or at least one so radically altered from prior unstructured procedures that it could not be considered simply a 'routine application,' ... of those 1965 procedures." J.A. 143, n.4 (citing Teamsters).

³No other circuit has distinguished between pre-Act and post-Act plans in considering whether a plan violates Title VII. See cases collected in brief of Amer. Tobacco (blue) n.32, at 25.

employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an 'intention to discriminate' because of race, color, religion, sex, or national origin. . . .

By its clear terms, the provision makes no discriminations in terms of time--it would seem to apply equally to all seniority plans, whether pre-Act or post-Act.

B. Evidence Supporting the CA4

What?
Limited analysis The CA4 does not mention the 'language of the statute'. The CA4's analysis of whether §703(h) covers post-Act plans consists of one 2-sentence paragraph in text and one footnote. See petn for cert at app. 9-10 & n.5 at app. 10. In text, the Court states that the legislative history examined by this Court in Teamsters and Franks v. Bowman, 424 U.S. 747 (1976), "conclusively demonstrates that Congress intended the immunity [of §703(h)] to run only to those systems in existence at the time of Title VII's effective date, and of course to routine post-Act applications of such systems." Petn app. 10. In support, ~~the~~ CA cites Teamsters, 431 U.S., at 352, where the Court noted that §703(h) was designed to clarify that the Act "would not outlaw such differences in treatment among employees as flowed from a bona fide seniority system that allowed for full exercise of seniority accumulated before the effective date of the Act."

The CA4's textual discussion ends with the statement that the legislative history is "replete" with evidence that §703(h) was to protect seniority rights already vested at the time the Act

became effect. A footnote supports this second assertion. Here, the CA relies on: (1) EEOC's position that §703(h) has no application to post-Act seniority systems (a position partially abandoned in the brief to this Court); (2) a memorandum prepared by Senators Clark and Case explaining that Title VII would have no effect on established seniority rights; (3) a Justice Department statement that Title VII would have no effect on seniority rights in existence on its effective date; (4) a statement in Teamsters, 431 U.S., at 352, to the effect that Title VII would allow "full exercise of seniority accumulated before the effective date of the Act" (already cited in text after the first sentence); and (5) the fact that Title VII is a broad remedial statute.

The sole support for the CA4's position, aside from the remedial nature of Title VII,⁴ is the EEOC's position (now partially abandoned), the negative pregnant present in the assertion that Title VII and/or §703(h) would not interfere with seniority rights vested as of the Act's effective date (confined in 3 statements, one from Justice, one from an explanation prepared by two senators, and one in Teamsters).

⁴The remedial-nature argument is no more than a statement of preference for Title VII plaintiffs over Title VII defendants. If such a preference determines the scope of provisions Congress inserted to limit Title VII's impact, those limits will be eroded, if not eliminated. Because §703(h) is a provision limiting the scope of Title VII, Title VII's remedial nature should not be the overriding principle guiding its construction.

C. The Evidence Opposing the CA4

As Justice White pointed out in his dissent from denial in this case, which you joined, the evidence opposing the CA4's position is considerable. (Justices Stewart and Rehnquist also eventually voted to grant).

1. Evidence in the legislative history. The union's brief (blue) 12-31 does an excellent job of marshalling the legislative history in opposition to the CA4's position, and this section includes only a brief summary of the large amount of evidence discussed in that brief. *Unions Brief good on leg. hist*

First, there is not one statement in all of Title VII's history stating that §703(h) does not protect post-Act plans. "Absent a clearly expressed legislative intention to the contrary," the language of a statute "must ordinarily be regarded as conclusive." Consumer Product Safety Comm'n v. GTE Sylvania, 447 U.S. 102, 108 (1980).

Many statements not reported by the CA4 are inconsistent with its interpretation. For example, Senator Clark's introductory remarks to the Clark-Case explanation include the statement that "the bill would not affect seniority at all." 110 Cong. Rec. 7207.

Moreover, the discussion of "pre-Act" seniority systems was initiated by the bill's opponents prior to the addition of §703(h); during this pre-§703(h) period, they argued that Title VII would destroy even existing seniority rights. In contrast, the bill's proponents repeatedly focused their assurances on the fact that Title VII would not affect seniority plans. This aspect of the

history is discussed in the union's brief (blue) at 14-23.⁵

The House passed the bill without §703(h), and it was introduced to the Senate in that form. After the speeches in support were completed, a filibuster began. To end the filibuster, the Dirksen-Mansfield substitute was introduced; its amendments included §703(h). In making the major presentation of these changes, Senator Humphrey explained that §703(h) was not a substantive change, but only a clarification. 110 Cong. Rec. 12732. *Hubert*

As noted in Amer. Tobacco's brief, Senator Dirksen thought that the amendment was probably the most meticulously drafted piece of legislation he had ever worked on, adding "We have tried to be mindful of every word, of every comma, and of the shading of every phrase." 110 Cong. Rec. 11935. And Senator Dirksen's statements in reference to seniority plans indicate that §703(h) protects all bona fide plans. See, e.g., *id.*, 14331 ("Senate amendments permit and protect seniority, merit, and all incentive systems."). It cannot be doubted that Senator Dirksen knew how to draft a grandfather

⁵See, e.g., 119 Cong. Rec. 1518 (statement of Representative Celler, Chairman of the House Judiciary Committee, in presenting the bill on the House floor) ("It has been asserted also that the bill would destroy worker seniority systems and employee rights vis-a-vis the union and the employer. This again is wrong."); *id.*, at 6566 (memorandum prepared by Republican sponsors in the House describing bill as it passed the House) ("Title VII ... does not permit interferences with seniority rights of employees or union members."); *id.*, at 5094 (during debate on whether bill should be referred to Committee, Senator Humphrey, co-manager, introduced newspaper article quoting the answers of a Justice Department "expert" to the "ten most common objections.") ("What is prohibited is the refusal to hire someone because of his race or religion. Similarly, the law will have no effect on union seniority rights."). For additional statements of Senator Humphrey, see brief of union (blue) at 16-17, 22-23.

clause--and the conclusion that §703(h) means what it says seems inescapable.

Moreover, as the union's brief (blue) notes at 28, Congress intended Title VII to be a "spur or catalyst" to broadening employment opportunities for minorities. Yet, if §703(h) is a grandfather clause protecting only pre-Act plans not changed or modified since the Act, it will operate (as the decision below illustrates) as a disincentive to broaden (or change in any way) seniority plans, even in order to ameliorate their effect on minorities. *Good point*

2. Title VII and labor policy. This Court has recognized that Title VII in general, and §703(h) in particular, must be construed with the knowledge that Congress did not intend Title VII to intrude unnecessarily upon national labor policy:

"Collective bargaining" ... lies at the core of our national labor policy, and seniority provisions are universally included in these contracts. Without a clear and express indication from Congress, we cannot agree ... that an agreed-upon seniority system must give way ..."
TWA v. Hardison, 432 U.S. 63, 79 (1981).

And in California Brewers Ass'n v. Bryant, 444 U.S. 598, 606 (1980), the Court stated:

"Congress passed the Civil Rights Act of 1964 against the backdrop of this Nation's longstanding labor policy of leaving to the chosen representatives of employers and employees the freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment. See generally Steelworkers v. Weber, 443 U.S. 193. It does not behoove a court to second guess either that process or its products. Seniority systems, reflecting as they do, not only the give and take of free collective bargaining, but also the specific characteristics of a particular business or industry, inevitably come in all sizes and shapes. As we made clear in the Teamsters

case, seniority may be "measured in a number of ways" and the legislative history fo §703(h) does not suggest that it was enacted to prefer any particular variety of senioriy system over any other." (citations omitted).

2. Evidence in the prior decisions of this Court construing §703(h). Although the CA4 found one "negative pregnant" in Teamsters, the decision below is consistent with neither Teamsters nor the other decisions of this Court construing §703(h). Although these cases did not directly address whether §703(h) is only a grandfather clause, their discussions suggest that §703 is generally applicable regardless of the date on which a plan originated.

In Teamsters, the Court stated that Congress intend to protect many kinds of seniority plans, noting that "[t]hen, as now, seniority was measured in a number of ways." 431 U.S., at 355 n.41.

In United Air Lines v. Evans, 431 U.S. 553 (1977), the Court upheld a seniority system that perpetuated the effect of post-Act discriminaton. The Court rejected the "narrow" construction of §703(h) adopted by the CA:

"This reading of §703(h) is too narrow. The statute does not foreclose attacks on the current operation of seniority systems which are subject to challenge as discriminatory, But such a challenge to a neutral system may not be predicated on the mere fact that a past event which has no present legal significance has affected the calculation of seniority credit, even if the past event might at one time have jusitified a valid claim against the employer." Id., at 560.

In Evans, the Court also noted that "§703(h) unequivocally mandates that there is no statutory violation in the absence of a showing of discriminatory purpose." Id., at 559-560.

And in TWA v. Hardison, 432 U.S. 63 (1977), the Court

emphasized, without differentiating between pre-Act and post-Act practices, that "seniority systems are afforded special treatment under Title VII itself. Id., at 81.

D. The SG's Position *- off-track again!*

The SG urges a novel and rather strange interpretation of §703(h). Section 703(h) states that it is not unlawful (notwithstanding any other provision of Title VII) for an employer "to apply different standards of compensation," etc., "pursuant to a bona fide seniority plan." And §703(a)(2) makes it illegal for an employer "to limit ... or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race." The SG concludes that §703(h) only "immunizes"⁶ application of a bona fide plan, but an employer's adoption of such a plan is not "immunized" by §703(h) if the plan has an adverse impact on minorities--and it is therefore illegal under §703(a)(2).

Thus, in the case at bar, presuming the challenged plan was bona fide but had a discriminatory impact, it was illegal for the employer to agree to the lines of progression in 1968, but it was

⁶The use of the word "immunize" to refer to the effect of §703(h) on plans under it is not entirely appropriate. Section 703(h) does not immunize plans--it provides that plans that are bona fide and that are not intended to discriminate do not violate Title VII. A plan is not, however, "immune" if it is adopted to discriminate. Thus, construing §703(h) as applying to post-Act as well as pre-Act plans will not "immunize" intentionally-discriminatory plans.

not illegal to make employment decisions pursuant to that plan thereafter.

There are several problems with this approach. A threshold problem is that the SG urges affirmance of the court below in the absence of any finding of a timely charge under the SG's theory. Under that theory, a seniority plan is "immunized" by §703(h) once it is adopted and the relevant period for filing a timely charge passes without any charge being filed. The SG apparently concedes that the EEOC's charge and the sex-discrimination charge are time-barred. See reply brief of Amer. Tobacco (yellow) at 13-14. (The relevant limit for filing charges was then 90 days.) The charges underlying the Patterson class action (for racial discrimination) were filed in Jan. and Feb. of 1969. Id. The SG's timeliness argument is made in n.6 at 5 of the SG's brief. There, the SG notes that the challenged "'lines of progression ... were finally set up at a meeting in November 1968 ...'" (quoting trial transcript, statement of Mr. Truitt). The only relevant finding by a lower court, however, is the CA's: "This policy was not in effect ... in 1965 when Title VII went into effect, but was only adopted in January 1968" Petn app. 9. If the lines of progression were adopted Jan., 1968, rather than Nov., 1968, then the Patterson charges (filed in Jan. & Feb., 1969) were untimely (more than 90 days). Even if the Court were to adopt the SG's theory, it would have to vacate or remand on the timeliness question.

There are less-technical reasons^{why} the SGs' approach should be rejected. First, the legislative history, discussed above, indicates that Congress meant to clarify Title VII (not implement a

substantive change) when it adopted §703(h). The clarification was to show that Title VII would not interfere with bona fide seniority plans. Yet the SG asserts that Congress only meant to protect bona fide plans from charges filed more than 90 days (now 180 days) after the plan's adoption.

Second, the SG's reading of the statutory language is strained; it rests on a negative pregnant found within the purely cautionary language of §703(h). Section 703(h) provides that (notwithstanding other provisions) certain employment actions (pursuant to bona fide plans) are legal; it does not proscribe any conduct nor does it purport to provide an exhaustive list of the kinds of employment actions that are legal under Title VII. Thus, the fact that an action pursuant to a bona fide plan is expressly stated to be legal does not, in the context of a clarifying proviso such as §703(h), mean that the adoption of the plan is illegal. If anything, it suggests that such the adoption of such a plan is not be the type of "classification" or "limitation" §703(a)(2) was designed to proscribe. In this context, it should be noted that the words used in §703(h) to describe seniority plans are quite different from the words used to describe the conduct prohibited by §703(a)(2).⁷

⁷Section 703(a)(2) makes it illegal to "limit, segregate, or classify ... employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin."

Section 703(h) provides that "[n]otwithstanding any other provision 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

Footnote continued on next page.

Third, the SG turns §703(h) into what is essentially a special statute of limitations for seniority plans. Yet Congress did not use wording in any way similar to the other provisions of Title VII dealing with time limits.

Finally, if the SG is right, and the adoption of seniority plans by employers are proscribed by §703(a)(2) because that act is not expressly included within §703(h), then the adoption of §703(h) was not a clarification but a major substantive change from what Congress had previously intended, and the proponents of the Act were repeatedly dishonest in asserting, both before and after the addition of §703(h), that Title VII would not interfere with seniority systems under collective bargaining agreements.

On balance, it is most unlikely that Congress meant §703(a)(2) to outlaw the adoption of the kinds of things regarded as seniority plans under §703(h).

CONCLUSION

In reaching the decision below, the CA4 relied heavily on a negative pregnant in three statements (one in an explanation prepared by two senators, one in a memorandum prepared by Justice, and one in Teamsters), to the effect that Title VII was not intended to destroy seniority rights already vested at the time of its

employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin...."

enactment. But nowhere in the legislative history is there support for concluding that the Congress meant to limit the protection of §703(h) to seniority plans then in effect--indeed, the legislative history provides overwhelming support for the proposition that §703(h) means what it says and applies to all seniority plans, regardless of date of adoption. The decisions of this Court discussing §703(h) and the decisions of other courts also support the plain language of the statute.

The CA4's decision was supported by the EEOC's position, but that position has now been abandoned. The SG maintains that §703(h) protects only actions taken pursuant to bona fide plans, but that an employer's adoption of such plans is not protected by §703(h) and is prohibited by §703(a)(2). Section 703(h) is, *SG says* therefore, simply a statute of limitations ~~if~~ a charge against a plan is not filed within 90 days of its adoption, the plan is protected by §703(h). If Congress intended to create a special statute of limitations when it enacted §703(h), it certainly expressed its meaning in an unusually oblique way. Moreover, this construction is neither demanded by the statutory language (§703(h) proscribes nothing and is not an exhaustive list of legal employment practices) nor consistent with the legislative history, which reveals that the supporters of Title VII repeatedly assured opponents, both before and after the adoption of §703(h), that Title VII would not interfere with seniority rights.

80-1199 Am Tobacco v Patterson 1/17/82

Reverse { CA 4, en banc, held that § 703(h) of Title VII does not protect seniority system adopted after effective date of VII.

x x x x

See BRW's dissent from denial of Cert (9 joined)

i. Language of 703(h) is not limited. On its face it protects such systems regardless of when adopted provided there was "no intention to discriminate".

We granted Cert. only on whether § 703(h) applies prospectively as well as to pre-Act plans.

2. Leg. history. CA 4 relies on history but its discussion is limited & selective.

Union Brief demonstrates ~~absence~~ of an express intent to limit to pre-Act plans.

3. Labor Law Policy. § 703(h) leaves these plans to collective bargaining.

4. Our Cases. None directly on point, but Teamsters (emphasizing that absent discriminatory intent, 703(h) protects plans. No distinction made bet. pre & post.

x x x x

Note. SG has a novel intermediate type theory that would convert 703(h) into a sort of 54/Limitation. Forget it!

See
Harris's
Brief
Lawrence
Gold
See Reply
Brief's
answer
to SG

80-1199 AMERICAN TOBACCO v. PATTERSON

Argued 1/19/82

Wickham (Pet - Employer)
(Nothing new)

Rosenberg (Rep - Union)

EEOC position & agree that
systems ~~adopted~~ adopted after enactment
of VI are protected by § 703(h), but
now proposes a distinction between
"adaptation" & "implementation".

"Lines of progression" are standard
provisions in ~~Plan~~ a seniority
system. Not issue in this case.

EEOC's rule has no meaning
in real world.

Henn

^ Marsh (Reber)

"liner of progression" are not part of a System

Need not endorse the full holding
of CA 4 to aff. this case.

Teamsters & California support view
that "liner of progression" are not part of
System

Do not oppose EEOC position. It
would require aff. of this case. There was
a timely objection w/in the 90 day.

But Marsh believe Reber view of
RE 703(h) is sounder than EEOC's

(Reply Brief states ~~that~~ CA 4 en banc
~~brief~~ did not address Q
whether "liner of progression"
are part of a ~~rep~~ system.
Marsh said CA 4 panel did
decide this)

Strawn (SG)

The ground relied on by SG was
not raised below. (BRW asked if there
is any case by this Ct. in which we
decided on a ground never raised below)

Argues that adoption of system after
1964 is not protected at all by 703(h). Gregg's
applies.

Straw (cont)

Straw
gave
no
satisfactory
response

J P S noted that if the "adoption" of the system is illegal under Griggs how can subsequently "implementation" even be valid.

Rosenberg (Reply)

Cited history - Humphrey, et al - to support her view of 703(h)

"Sanity" of "seniority" was emphasized repeatedly.

Of course, system must be "bona fide".

80-1199 Am. Tobacco Co

3G - relying solely on word "apply" in § 703(h), argues that the "adoption" of a seniority plan is not protected (i.e. the Griggs standard of "impact" or "effects" applies to "adoption" - but not to subsequent action implementing the Plan.

That a Plan can be invalid when "adopted" but its "application" is protected ~~is~~ is absurd.

There is no sense - as AFL/CIO Reply Brief demonstrates.

Not a word in Leg. Hist. supports this.

The Chief Justice

Rev.

Passed

x x y

After discussion; voted to Rev.

Justice Brennan

Aff

Leg. history supports view that 703(h) applies only to pre-Act plans.

Also as S.G. says 703(h) ~~is~~ is limited to application - not adoption.

But will affirm on either basis to affirm.

Justice White

Reverses

Language of 703(h) applies to both pre- & post-Act systems.

Real Q in this case is whether "intent" standard (Teamsters) or the "impact" standard of Gonzales

Justice Marshall Aff'm

not bona fide system

Also agree with W. & B.

Justice Blackmun Aff'm across board,

§ 703(h) is an exemption - not a grandfather provision.

Agree with SG - not mention of 'adoption'

Justice Powell Reverse

Still with B & W.

SG's position ~~is~~ would result in ~~an~~ absurdity.

Reverse

Agree with BRW & LFP

Justice Stevens

Aff.

§ 703 (h) apply to both.

But problem is whether the
~~re~~ system is bona fide. If
discrimination was unintentional
at time of pre-act adoption. But
after date of Act, any change would
have to be judged under Griggs
standard. In substance, agree
with SG.

Justice O'Connor

Rev.

On G on which we granted Cert.
Remand on "lines of progression"
issue

To: The Chief Justice *LJP*
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell ✓
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice White

Circulated: 16 FEB 1982

Recirculated: _____

*Bryon demolishes the
silly notion of EEOC - 5-8*

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1199

AMERICAN TOBACCO COMPANY, ET AL., PETITION-
ERS v. JOHN PATTERSON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

[February —, 1982]

JUSTICE WHITE delivered the opinion of the Court.

Under *Griggs v. Duke Power Co.*, 401 U. S. 424 (1971), a prima facie violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 257, 42 U. S. C. § 2000e-2(h), "may be established by policies or practices that are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group." *Teamsters v. United States*, 431 U. S. 324, 349 (1977). A seniority system "would seem to fall under the *Griggs* rationale" if it were not for § 703(h) of the Civil Rights Act. *Ibid.* That section provides in pertinent part:

"Notwithstanding any other provision of this subchapter, 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 or merit system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended

*I recommend a join.
Mary*

*Reviewed
L.F.P.*

*Good
opinion
with which
I agree*

Join

or used to discriminate because race, color, religion, sex, or national origin. . . .”

Under § 703(h), the fact that a seniority system has a discriminatory impact is not alone sufficient to invalidate the system; actual intent to discriminate must be proved. The Court of Appeals in this case, however, held that § 703(h) does not apply to seniority systems adopted after the effective date of the Civil Rights Act.¹ We granted the petition for certiorari to address the validity of this construction of the section. — U. S. —.

I

Petitioner American Tobacco Company operates two plants in Richmond, Virginia, one which manufactures cigarettes and one which manufactures pipe tobacco. Each plant is divided into a prefabrication department, which blends and prepares tobacco for further processing, and a fabrication department, which manufactures the final product. Petitioner Bakery, Confectionery & Tobacco Workers' International Union and its affiliate Local 182 are the exclusive collective bargaining agents for hourly-paid production workers at both plants.

It is uncontested that prior to 1963 the company and the union engaged in overt race discrimination. The union maintained two segregated locals, and black employees were assigned to jobs in the lower paying prefabrication departments. Higher paying jobs in the fabrication departments were largely reserved for white employees. An employee could transfer from one of the predominately black prefabrication departments to one of the predominately white fabrication departments only by forfeiting his seniority.

In 1963, under pressure from government procurement agencies enforcing the antidiscrimination obligations of government contractors, the company abolished departmental

¹ Title VII became effective July 2, 1965, one year after its enactment.

seniority in favor of plant-wide seniority and the black union local was merged into the white local. However, promotions were no longer based solely on seniority but rather on seniority plus certain qualifications, and employees lost accumulated seniority in the event of a transfer between plants. Between 1963 and 1968, when this promotions policy was in force, virtually all vacancies in the fabrication departments were filled by white employees due to the discretion vested in supervisors to determine who was qualified.

In November 1968 the company proposed the establishment of 9 lines of progression, 6 of which are at issue in this case. The union accepted and ratified the lines of progression in 1969. Each line of progression consisted of two jobs; an employee was not eligible for the top job in the line until he had worked in the bottom job. Four of the six lines of progression at issue here consisted of nearly all-white top jobs from the fabrication departments linked with nearly all-white bottom jobs from the fabrication departments; the other two consisted of all-black top jobs from the prefabrication departments linked with all-black bottom jobs from the prefabrication departments. The top jobs in the white lines of progression were among the best-paying jobs in the plants.

On January 3, 1969 respondent Patterson and two other black employees filed charges with the Equal Employment Opportunity Commission alleging that petitioners had discriminated against them on the basis of race. The EEOC found reasonable cause to believe that petitioners' seniority, wage, and job classification practices violated Title VII. After conciliation efforts failed, the employees filed a class action in District Court in 1973 charging petitioners with racial discrimination in violation of Title VII and 42 U. S. C. § 1981. Their suit was consolidated for trial with a subsequent Title VII action filed by the EEOC alleging both race and sex discrimination. Following trial, the District Court held that petitioners' seniority, promotion, and job classification practices violated Title VII. The court found that 6 of

the 9 lines of progression were not justified by business necessity and “perpetuated past discrimination on the basis of sex and race.” App. 32. The court enjoined the company and the union from further use of lines of progression. The Court of Appeals for the Fourth Circuit affirmed and remanded for further proceedings with respect to remedy, 535 F. 2d 257 (1976), and we denied a petition for certiorari. 429 U. S. 920 (1976).

On remand petitioners moved to vacate the District Court’s 1974 orders and to dismiss the complaints on the basis of this Court’s decision in *Teamsters v. United States*, *supra*, which held that § 703(h) insulates bona fide seniority systems from attack even though they may have discriminatory impact on minorities. The District Court denied the motions, holding that petitioners’ seniority system “is not a bona fide system under *Teamsters* . . . because it operated right up to the day of trial in a discriminatory manner.” App. 110. A divided panel of the Court of Appeals agreed that “*Teamsters* requires no modification of the relief we approved with regard to . . . lines of progression,” because they were not part of a seniority system within the meaning of § 703(h). 568 F. 2d 300, 303 (1978).

The Court of Appeals reheard the case *en banc*. It did not decide whether the lines of progression were part of a seniority system. Instead, it held that even if the lines of progression were considered part of a seniority system, “Congress intended the immunity accorded seniority systems by § 703(h) to run only to those systems in existence at the time of Title VII’s effective date, and of course to routine post-Act applications of such systems.” 634 F. 2d 744, 749 (1980).² We reverse.

²The *en banc* court remanded the case to the District Court for additional proceedings to determine whether the plantwide seniority system in effect since 1963 is a bona fide seniority system within the contemplation of § 703(h). See 634 F. 2d 744, 750. This issue is not before the Court.

II

Petitioners argue that the plain language of § 703(h) applies to post-Act as well as pre-Act seniority systems. The respondent employees claim that the provision “provides a narrow exemption [from the ordinary discriminatory impact test] which was specifically designed to protect bona fide seniority systems which were in existence before the effective date of Title VII.” Brief for Respondents Patterson, *et al.* 29. Respondent EEOC supports the judgment below, but urges us to interpret § 703(h) so as to protect the post-Act *application* of a bona fide seniority system but not the post-Act *adoption* of a seniority system or an aspect of a seniority system.

As in all cases involving statutory construction, “our starting point must be the language employed by Congress,” *Reiter v. Sonotone Corp.*, 442 U. S. 330, 337 (1979), and we assume “that the legislative purpose is expressed by the ordinary meaning of the words used.” *Richards v. United States*, 369 U. S. 1, 9 (1962). Thus “[a]bsent a clearly expressed legislative intention to the contrary, the language must ordinarily be regarded as conclusive.” *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980). The plain language of § 703(h) is particularly cogent in light of the circumstances of its drafting. It was part of the Dirksen-Mansfield compromise substitute bill which represented “not merely weeks, but months of labor.” 110 Cong. Rec. 11935 (1964) (remarks of Sen. Dirksen). As Senator Dirksen explained, “I doubt very much whether in my whole legislative lifetime any measure has received so much meticulous attention. We have tried to be mindful of every word, of every comma, and of the shading of every phrase.” *Ibid.*

On its face § 703(h) makes no distinction between pre- and post-Act seniority systems, just as it does not distinguish between pre- and post-Act merit systems or pre- and post-Act

~~but~~
circum-
stances

ability tests. The section employs the present tense and the future tense, *i. e.* "shall not be" and "to apply," which indicates that it applies prospectively. It does not take the form of a savings clause or a grandfather clause designed to exclude existing practices from the operation of a new rule. Other sections of Title VII enacted by the same Congress contain grandfather clauses, see § 703(b), 78 Stat. 253 (1964), 42 U. S. C. § 2000e-(e), which increases our reluctance to transform a provision that we have previously described as "defining what is and is not an illegal discriminatory practice," *Franks v. Bowman Transportation Co.*, 424 U. S. 747, 761 (1976), from a definitional clause into a grandfather clause.

The EEOC's position receives little support from the statutory language permitting an employer to "apply" different standards of employment pursuant to a bona fide seniority or merit system. The application of different standards must, by the terms of the statute, be *pursuant* to a seniority or merit system; the system and its application are thus inextricably interwoven. Furthermore, it makes little sense to distinguish adoption from application in the context of a Title VII challenge to a seniority system. The adoption of a seniority system which has not been "applied" or put into operation would not give rise to a cause of action, for it would result in discrimination only if it were to be put into operation or if that event were sufficiently likely, in which case it would be odd not to judge the matter based on the validity of the factor that creates the cause of action, *i. e.*, the *application* of the system. An adequate remedy for adopting a discriminatory seniority system would very likely include an injunction against the future application of the system and backpay awards for those harmed by its application. However, such an injunction would lie only if the requirements of § 703(h)—that such application be intentionally discriminatory—were satisfied.

Under the EEOC's interpretation of the statute, plaintiffs who file a timely challenge to the adoption of a seniority sys-

True

tem arguably would prevail in a Title VII action if they could prove that the system would have a discriminatory impact even if it was not purposefully discriminatory. See *Griggs v. Duke Power Co.*, *supra*. On the other hand, employees who seek redress under Title VII more than 180³ days after the adoption of a seniority system—for example, all persons whose employment begins more than 180 days after an employer adopts a seniority system—would have to prove the system was intentionally discriminatory.⁴ Yet employees who prevailed by showing that a bona fide seniority system had a discriminatory impact although not adopted with discriminatory intent would not be entitled to an injunction forbidding the application of system: § 703(h) plainly allows the application of such a seniority system.

A further result of the EEOC's theory would be to discourage unions and employers from modifying pre-Act seniority systems or post-Act systems whose adoption was not timely challenged. Any modification, if timely challenged, would be subject to the *Griggs* standard—even if it benefited persons covered by Title VII—thereby creating an incentive to retain existing systems which enjoy the protection of § 703(h).⁵

| ya

³ Prior to 1972, Title VII generally required charges to be filed within 90 days of an alleged discriminatory practice. Section 706(e), 78 Stat. 260, was added in 1972. It now requires aggrieved persons to file a charge "within one hundred and eighty days after the alleged unlawful employment practice occurred." 42 U. S. C. § 2000e-5(e).

⁴ The facts of this case give rise to just such an anomaly under the EEOC theory. The respondent employees filed race discrimination charges within 90 days of the adoption of the lines of progression but sex discrimination charges were filed more than 90 days after the adoption. Under the EEOC theory, the lines of progression would be analyzed under two different tests: the *Griggs* impact test and the § 703(h) intentional discrimination test.

⁵ "Significant freedom must be afforded employers and unions to create differing seniority systems." *California Brewers Ass'n v. Bryant*, 444 U. S. 598, 608 (1980). Petitioners' interpretation of § 703(h) would impinge on that freedom by discouraging modification of existing seniority

Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible. The EEOC's reading of § 703(h) would make it illegal to adopt, and in practice to apply, seniority systems that fall within the class of systems protected by the provision. We must, therefore, reject such a reading. Yes

III

Although the plain language of § 703(h) makes no distinction between pre-Act and post-Act seniority systems, the court below found support for its distinction between the two in the legislative history. Such an interpretation misreads the legislative history.

We have not been informed of and have not found a single statement anywhere in the legislative history saying that § 703(h) does not protect seniority systems adopted or modified after the effective date of Title VII. Nor does the legislative history reveal that Congress intended to distinguish between adoption and application of a bona fide seniority system. The most which can be said for the legislative history of § 703(h) is that it is inconclusive with respect to the issue presented in this case.

As we have previously described, see *Franks v. Bowman Transportation Co.*, *supra*, at 759-761, the initial bill⁶ passed by the House of Representatives on February 10, 1964 did not contain § 703(h) and neither the bill nor the majority Judiciary Committee Report⁷ even mentioned seniority. However, the House Minority Report warned that the bill, if enacted, would destroy seniority. H. Rep. No. 914, 88th Cong. 1st Sess. 64-65 (1963). Following a 17-day debate over whether the bill should be referred to committee, the Senate voted to reject the motion to refer it to committee

systems or adoption of new systems.

⁶ H.R. 7152

⁷ H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963).

and began to formally consider the merits of the bill on March 30, 1964. Meanwhile, a bipartisan group led by Senators Dirksen, Mansfield, Humphrey, and Kuchel worked to reach agreement on amendments to the House bill which would ensure its passage. Vaas, Title VII: Legislative History, 7 B.C. Ind. & Com. L. Rev. 431, 445 (1966). The Mansfield-Dirksen compromise, which contained § 703(h), was introduced on the Senate floor in the form of a substitute bill on May 24, 1964.⁸ Prior to the introduction of the Mansfield-Dirksen substitute, supporters of the House bill responded to charges that it would destroy existing seniority rights.⁹ On April 8, 1964 Senator Clark made a speech in which he concluded that “the bill will not affect seniority at all.” 110 Cong. Rec. 7207 (1964). In support of his conclusion, he inserted three documents into the Congressional Record which this Court has characterized as “authoritative indicators” of the purpose of § 703(h),¹⁰ *Teamsters v. United States*, *supra*, at 352 (1977), and which the court below relied upon for its conclusion that post-Act seniority systems were not intended to be protected by § 703(h). See 634 F. 2d at 749–750, n. 5.

The first document was a Justice Department memorandum which stated, in part, that “Title VII would have no effect on seniority rights existing at the time it takes effect.”¹¹

⁸ 110 Cong. Rec. 11926, 11931 (1964).

⁹ For examples of charges that the bill would destroy existing seniority rights see, *e. g.*, H.R. Rep. No. 914, 88th Cong., 1st Sess. 64–66 (1963) (Minority Report); 110 Cong. Rec. 486–489 (1964) (Remarks of Sen. Hill); 110 Cong. Rec. 11741 (1964) (Remarks of Sen. Javits discussing charges made by Governor Wallace).

¹⁰ Senator Humphrey, one of the drafters of the Mansfield-Dirksen substitute, explained that § 703(h) did not alter the meaning of Title VII but “merely clarifie[d] its present intent and effect. 110 Cong. Rec. 12723 (1964). Therefore statements made prior to the introduction of § 703(h) by proponents of Title VII are evidence of the meaning of § 703(h).

¹¹ 110 Cong. Rec. 7207. The full text of the statement with respect to seniority may be found in *Franks v. Bowman Transportation Co.*, 424 U. S. 747, 760 n. 16 (1976).

The second document was an interpretive memorandum which had been prepared by Senator Clark and Senator Case, and it also said Title VII would “have no effect on established seniority rights.”¹² Senator Clark also introduced written answers to questions propounded by Senator Dirksen which included the statement, “Seniority rights are in no way affected by the bill.”¹³

On the basis of the statements that Title VII would not affect “existing” and “established” seniority rights, petitioners infer that Title VII would affect seniority rights which were not “established” or “existing” when the Act became effective. Such an inference is unjustified. While the materials which Senator Clark inserted into the Congressional Record did speak in terms of Title VII not affecting “vested,” “existing,” or “established” seniority rights, they did so because they were responding to a specific charge made by the bill’s opponents, namely that the bill would destroy existing seniority rights. Had Senator Clark intended the bill not protect post-Act seniority systems, it is highly unlikely he would have stated on the floor of the Senate that “the bill would not affect seniority at all,”¹⁴ 110 Cong. Rec. 7207 (1964), or introduced a written response to a question posed by Senator Dirksen which said:

“Seniority rights are in no way affected by the bill if under a ‘last hired, first fired’ agreement, a Negro hap-

¹² 110 Cong. Rec. 7213 (1964). The full text of the statement with respect to seniority may be found in *Franks v. Bowman Transportation Co.*, *supra*, at 759 n. 15.

¹³ 110 Cong. Rec. 7217 (1964). The questions and answers with respect to seniority may be found in *Franks v. Bowman Transportation Co.*, *supra*, 760–761 n. 16.

¹⁴ Strictly speaking, Senator Clark’s statement that Title VII would not affect seniority is incorrect. Title VII does affect seniority rights, for *Franks v. Bowman Transportation Co.*, *supra*, allows awards of retroactive seniority to victims of unlawful discrimination. However, Senator Clark’s technical error does not alter our conclusion that he and other key proponents of the bill intended that it have minimal impact on seniority systems.

pens to be the 'last hired,' he can still be 'first fired' so long as it is done because of his status as 'last hired' and not because of his race." *Id.*, at 7217.

Petitioners' argument also ignores numerous other references to seniority by proponents of Title VII which were couched in terms of "seniority" rather than "existing seniority rights." See, *e. g.*, 110 Cong. Rec. 5423 (1964) (remarks of Sen. Humphrey); *id.*, at 6554 (remarks of Sen. Kuchel); *id.*, at 6665-6666 (memorandum prepared by House Republican sponsors); *id.*, at 11768 (remarks of Sen. McGovern). In addition, the few references to seniority after § 703(h) was added to the bill are to the effect that "the Senate substitute bill expressly protects valid seniority systems." *Id.*, at 14329 (letter from Senator Dickson to Senator Williams). See also *id.*, at 14331 (remarks of Senator Williams).

Going behind the plain language of a statute in search of a possibly contrary Congressional intent is "a step to be taken cautiously" even under the best of circumstances. *Piper v. Chris-Craft Industries*, 430 U. S. 1, 26 (1977). "[I]n light of its unusual legislative history and the absence of the usual legislative materials," *Franks v. Bowman Construction Co.*, *supra*, at 761, we would in any event hesitate to give dispositive weight to the legislative history of § 703(h). More importantly, however, the history of § 703(h) does not support the far-reaching limitation on the terms of § 703(h) announced by the court below and urged by petitioners. The fragments of legislative history cited by petitioners, regardless of how liberally they are constructed, do not amount to a "clearly expressed legislative intent contrary the plain language of the statute." *Consumer Product Safety Commission v. GTE Sylvania*, *supra*, at 108.

IV

Our prior decisions have emphasized that "seniority systems are afforded special treatment under Title VII itself," *Trans World Airlines, Inc. v. Hardison*, 432 U. S. 63, 81 (1977), and have refused to narrow § 703(h) by reading into it

limitations not contained in the statutory language. In *Teamsters v. United States*, *supra*, we held that § 703(h) exempts from Title VII the disparate impact of a bona fide seniority system even if the differential treatment is the result of an intent to discriminate on racial grounds. Similarly, by holding that “[a] discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed,” *United Air Lines, Inc. v. Evans*, 431 U. S. 553, 558 (1977), the Court interpreted § 703(h) to immunize seniority systems which perpetuate post-Act discrimination. Thus taken together, *Teamsters* and *Evans* stand for the proposition stated in *Teamsters* that “[s]ection 703(h) on its face immunizes all bona fide seniority systems, and does not distinguish between the perpetuation of pre- and post-Act” discriminatory impact. *Teamsters*, *supra*, at 348 n. 30 (emphasis added).¹⁵ Section 703(h) makes no distinction between seniority system adopted before its effective date and those

¹⁵ Nowhere in *Teamsters v. United States*, 431 U. S. 324 (1977), does the Court indicate when the seniority system at issue there was adopted, and examination of the record illustrates the difficulty of fixing an adoption date. Article V of the National Motor Freight Agreement of 1964 contains a seniority provision subject to modification by area agreements and local union riders. See Brief for Petitioner Teamsters 24–25. However, National Motor Freight Agreements are of 3-year duration, and the 1970 Agreement was in effect when the complaint was filed. If a seniority system ceases to exist when the collective bargaining agreement which creates it lapses, then the seniority system in *Teamsters* was adopted post-Title VII. On the other hand, if in practice the seniority system was continuously in effect from 1964, it can be argued that its adoption predates Title VII. However, *Teamsters* places no importance on the date the seniority system was adopted, and we follow *Teamsters* by refusing to distinguish among seniority systems based on date of adoption. Given the difficulty of determining when one seniority system ends and another begins and the lack of legislative guidance, we think it highly unlikely Congress intended for courts to distinguish between pre-Act and post-Act seniority systems.

adopted after its effective date. Consistent with our prior decisions, we decline petitioners' invitation to read such a distinction into the statute.

Seniority provisions are of "overriding importance" in collective bargaining, *Humphrey v. Moore*, 375 U. S. 335, 346 (1964), and they "are universally included in these contracts." *Trans World Airlines, Inc. v. Hardison*, *supra*, at 79. See also Aaron, Reflections on the Legal Nature and Enforceability of Seniority Rights, 75 Harv. L. Rev. 1532, 1534 (1962). The collective bargaining process "lies at the core of our national labor policy. . . ." *Trans World Airlines, Inc. v. Hardison*, *supra*, at 79. See, *e. g.*, 29 U. S. C. § 151. Congress was well aware in 1964 that the overall purpose of Title VII, to eliminate discrimination in employment, inevitably would, on occasion, conflict with the policy favoring minimal supervision by courts and other governmental agencies over the substantive terms of collective bargaining agreements. *California Brewers Ass'n v. Bryant*, 444 U. S. 598, 606 (1980). Section 703(h) represents the balance Congress struck between the two policies, and it is not this Court's function to upset that balance.

Because a construction of § 703(h) limiting its application to seniority systems in place prior to the effective date of the statute would be contrary to its plain language, inconsistent with our prior cases, and would run counter to the national labor policy, we vacate the judgment below and remand for further proceedings consistent with this opinion.¹⁶

So ordered.

¹⁶ All parties agree that on remand the court should decide whether the lines of progression are part of a seniority system, and if so, whether they are bona fide within the meaning of § 703(h). We decline to reach those issues because, as the court below noted, their resolution requires additional factual development. See 634 F. 2d 744, 749 n. 3.

Supreme Court of the United States
Washington, D. C. 20543

✓

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 16, 1982

Re: No. 80-1199 - American Tobacco Co. v. Patterson

Dear Byron:

I await the dissent.

Sincerely,

T.M.

T.M.

o.

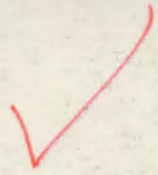
Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 16, 1982



RE: No. 80-1199 American Tobacco Co. v. Patterson

Dear Byron:

In due course I shall circulate a dissent in
the above.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bill", is written below the word "Sincerely,".

Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 17, 1982

No. 80-1199 American Tobacco Company v.
Patterson

Dear Byron,

Please join me in the opinion in the
referenced case.

Sincerely,

Sandra

Justice White

Copies to the Conference

February 17, 1982

80-1199 American Tobacco Company v. Patterson

Dear Byron:

Please join me.

Sincerely,

Justice White

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

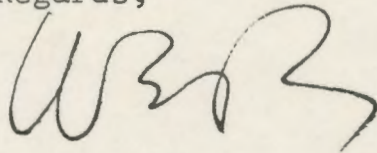
February 22, 1982

Re: No. 80-¹¹⁷⁹~~1522~~ - American Tobacco Co. v. Patterson

Dear Byron:

I join.

Regards,



Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 22, 1982

Re: No. 80-1199 American Tobacco Co. v. Patterson

Dear Byron:

Please join me in your opinion for the Court.

Sincerely,
W

Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

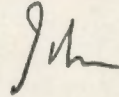
February 26, 1982

Re: 80-1199 - American Tobacco v. Patterson

Dear Byron:

I shall await Bill Brennan's dissent and perhaps
add a few words of my own.

Respectfully,



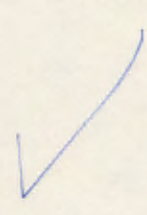
Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 8, 1982

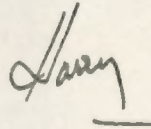


Re: No. 80-1199 - American Tobacco Co. v. Patterson

Dear Byron:

I shall await the dissent in this case.

Sincerely,



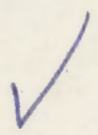
Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 18, 1982

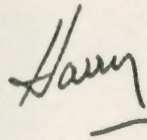


Re: No. 80-1199 - American Tobacco Co. v. Patterson

Dear Bill:

With the slight change we discussed on the telephone to be made, I am glad to join your dissenting opinion in this case.

Sincerely,



Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

✓

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 18, 1982

Re: No. 80-1199 - American Tobacco Co. v. Patterson

Dear Bill:

Please join me in your dissent.

Sincerely,

T.M.

T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 18, 1982

Re: No. 80-1199 - American Tobacco Co. v. Patterson

Dear Bill:

Please join me in your dissent.

Sincerely,

T.M.

T.M.

Justice Brennan

cc: The Conference

[illegible]