Civil Rights Law and Breaking Down Patterns of Segregation: The Case of Nepotism

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For thirty years or more, lawyers have debated the goal of civil rights law—procedural fairness or substantive social change. Since oceans of ink have been spilled without bringing the question noticeably nearer resolution, it may make sense to address the question modestly, through focus on narrower, more manageable and less charged issues. By discussing the treatment of nepotism under Title VII of the Civil Rights Act of 1964 ("Title VII"), this Article attempts to illuminate the larger question, too.

Hiring based on nepotism has been challenged, often successfully, as race or national origin discrimination proscribed by Title VII. Nepotism is attacked as what the Supreme Court in Griggs v. Duke Power Co. called a "built-in-headwind" against minority workers—"practices . . . neutral on their face, and even neutral in terms of intent, [that nonetheless] cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." Equality, Griggs explained, must not be

merely in the sense of the fabled offer of milk to the stork and the fox. . . . The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. . . .


4. Id. at 430.
... [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability.\(^5\)

As later cases put it, such built-in headwinds have a "disparate impact" as distinct from the "disparate treatment" which exists when there is discriminatory intent.\(^6\)

Nepotism cases illustrate more general issues raised by disparate impact law. In contrast to the "disparate treatment" by definition intended to differentiate between two classes of employees, few, if any, employers that favor owners' or current employees' relatives began doing so in order to exclude minorities,\(^7\) nor are minorities unique in being affected by such policies. When challenged, nepotism in hiring is therefore analyzed in terms of the framework required by \textit{Griggs}: it is prohibited if it is shown that it (1) "operates to exclude" members of a race (or other protected classification), that is, to have a disparate impact, and (2) "cannot be shown to be related to job performance."\(^8\) A vast array of precedent deals with the burden of proof and the use of statistics in disparate impact cases.

One Supreme Court holding, \textit{Wards Cove Packing Co. v. Atonio},\(^9\) is discussed later in this Article. In the Civil Rights Act of 1991,\(^10\) Congress reversed \textit{Atonio}'s controversial holding that plaintiffs in a disparate impact case must specifically show "that the disparity they complain of is the result of one or more of the employment practices that they are attacking."\(^11\) As amended by the 1991 law, Title VII states instead that if a plaintiff shows "that the elements of a respondent's deci-

\(^5\) \textit{Id.} at 431-32.  
\(^7\) While nepotism could be intended to exclude African-Americans, that is not necessarily the case. \textit{See generally} Holder v. City of Raleigh, 867 F.2d 823, 825-27 (4th Cir. 1989) (finding that although there was favoritism based on a family relationship when giving a promotion, racial discrimination was not established and cannot be inferred).  
\(^8\) \textit{Griggs}, 401 U.S. at 431.  
\(^11\) \textit{Atonio}, 490 U.S. at 657. A less controversial requirement that statistics be carefully drawn from the appropriate workforce and labor pool remains in effect. \textit{See id.} at 650-51.
sionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice."

This Article argues that such a holistic, even impressionistic approach, is not anomalous but intrinsic to meaningful civil rights law. Part I of the Article summarizes precedent in nepotism cases. Part II argues that other employment practices, as well as nepotism, are usually proscribed when judged to operate systematically—with "systematic" ultimately understood in a fairly impressionistic way—to exclude minorities or women. Though sometimes criticized for this reason, disparate impact law is not unique. It can be likened to the law of torts, in which abstract logic also often matters less than a case-by-case, intuitive feel for what makes sense. While statistical or other technical proof is appropriate, exclusive focus on it can distract from the essence of a case: whether a practice helps perpetuate race hierarchy, and just how much the law should do to stop that if it does.

I. PRECEDENT IN NEPOTISM CASES

A. Union Nepotism

The first influential judicial opinion about nepotism as race discrimination was issued before Title VII even took effect by a judge of the New York Supreme Court (the state's trial court) under the state Human Rights Law.\textsuperscript{13} \textit{State Commission for Human Rights v. Farrell}\textsuperscript{14} enforced an administrative order against a sheet metal union, Local 28, found to exclude African-Americans from the apprenticeship program which led to membership.\textsuperscript{15} The decision approved new apprenticeship rules negotiated after the court warned that despite Local 28's "forceful presentation in favor of attaching some preference to those applicants who are sons or sons-in-law of present or deceased members,"\textsuperscript{16} no plan would "be approved that did not abolish the existing practice of favoritism because of family affiliation."\textsuperscript{17}

Not only non-whites, but all non-relatives of members, had traditionally found it hard to join the union: "in the most recently completed

\textsuperscript{13} N.Y. EXEC. LAW § 296 (McKinney 1993).
\textsuperscript{14} 252 N.Y.S.2d 649 (Sup. Ct. 1964).
\textsuperscript{15} See Farrell, 252 N.Y.S.2d at 651-52.
\textsuperscript{16} Id. at 657.
\textsuperscript{17} Id. at 653.
training program, 80 per cent of the trainees were related in some manner to the members of Local 28.” 18 Because the local “has never had nor does it presently have a Negro member,” 19 favoring relatives had the effect of maintaining a white membership, but no proof suggested that was the purpose of the practice. 20 The vast majority of whites also had eighty percent of apprenticeships closed to them; nepotism (though not necessarily other union practice) left remaining positions open to all races. 21 Acknowledging that “giving some preference to applicants with filial ties to Union members is widespread and dates back to the very inception of craft unions,” 22 the court nevertheless concluded that

[u]nder the realities of today’s society, the guarantee of equal protection of the laws and the prohibition against discrimination... requires that this Court refuse to sanction any plan which could be used, directly or indirectly, to discriminate against any person on the basis of race, color, creed or national origin. 23

In later years, Local 28 repeatedly resisted orders to implement the rules to which it had agreed, arguing, for example, that a selection test should be invalidated because “nonwhites had received ‘unfair tutoring’ and had passed in unreasonably high numbers.” 24 The union “restricted the size of its membership in order to deny access to nonwhites,” 25 accepted transfers from sister locals outside New York, but never from a mainly nonwhite New York local, 26 and “selectively organized nonunion sheet metal shops with few, if any, minority employees.” 27 Almost twenty years after the Farrell consent order, the United States Supreme Court found the union in contempt of court and approved a percentage goal for nonwhite membership, ruling that Title VII does not prohibit racial preferences invoked as “necessary to remedy past discrimination,” not “simply to create a racially balanced work force.” 28 Almost ten years after that, the union was again held in contempt for systematic deception

18. Id. at 652.
19. Id.
21. See id.
22. Id. at 657.
23. Id.
25. Id. at 430.
26. See id.
27. Id. at 431.
28. Id. at 475.
about nonwhite membership and continuing bias from its business agents.29

This later history which strongly suggests that Local 28 never wanted black members was not before the Farrell court, nor is it relevant, as a matter of strict logic, to insistence on abolishing (not just modifying or suspending) favoritism by family affiliation. Indeed, Farrell included remarkably little argument.30 To the pronouncement about "the realities of today's society" already quoted,31 the court added a claim "that filial preference is contrary to modern day societal objectives concerning job qualifications. No lawyer or doctor today would expect his son to receive preference by reason of family relationship in applying for admission to the Bar or for a medical license."32

At a minimum, this leaves a lot unsaid. For instance, most lawyers or doctors bequeath their wealth to relatives, and union seniority, as courts have recognized, may be "the most valuable capital asset that the worker 'owns,' worth even more than the current equity in his home."33 One might ask why workers should not bequeath it to their children.

More fundamentally, the court's praise for hiring by objective criteria would not have led it to outlaw other criteria if they did not exclude African-Americans. Yet the effect of the nepotism rule on any individual African-American was little different from its effect on nearly all whites. Long before nepotism came under attack on racial grounds, the United States Supreme Court upheld against an equal protection challenge a Louisiana law that let river pilots pick relatives and friends as apprentices, explaining that at least for pilotage, a "highly personalized calling,"34 the "morale and esprit de corps which family and neighborly tradition might contribute" could justify such preference.35 (Four dissenters said that even though not "consciously racial," tests based on "race or consanguinity ... cannot be used constitutionally" in public employment.)36 In refusing to permit "any plan which could be used, di-

29. See EEOC v. Local 638, 81 F.3d 1162, 1172-75 (2d Cir. 1996).
30. See generally State Comm'n for Human Rights v. Farrell, 252 N.Y.S.2d 649 (Sup. Ct. 1964) (holding that the findings made by the State Commission for Human Rights which were supported by substantial evidence on the record as a whole were conclusive).
31. Id. at 657.
32. Id.
35. Id. at 563.
36. Id. at 566 (Rutledge, J., dissenting).
rectly or indirectly, to discriminate," Farrell elided what might have been thought central, whether the plan was used to discriminate by race.

Rather than puzzling over this or other logical riddles, the Farrell court wrote in sweeping terms like those later used by the United States Supreme Court in Griggs,

The issue herein, involving the development of non-discriminatory shop training programs, cannot be approached strictly within the conventional confines of an adversary proceeding...

....

.... Today's crucial testing ground for the American system of democracy is in the area of equal rights for its Negro citizens. Equality for our minority groups—the right to equal job opportunity, the right to equal educational opportunities, the right to equal housing opportunities, and the right to vote—is the essence of democracy today.

The idea, highlighted by a list of leaders who had called for ending discrimination and by national statistics, was to integrate an industry by making sure that African-Americans could enter the building trades. What made Local 28's apprenticeships important, and distinguished them from an individual lawyer hiring his son, was that they offered the only practical access to the sheet metal trade's union sector. If that sector was not to stay white, at least for a long time, apprenticeship, as a practical matter, had to be opened to nonrelatives of union members.

After Title VII took effect, federal courts faced with unions that favored members' relatives reached the same conclusion as the New York court, also in decisions in which what was explained was often less significant than what was just announced. For example, a leading case called Local 53, International Association of Heat & Frost Insulators v.

37. Farrell, 252 N.Y.S.2d at 657 (emphasis added).
38. See id.
39. Id. at 652-53.
40. See id. at 654-56.
41. See id. at 656-57.
Vogler explained that since a nepotism policy “was originally instituted at least in part because of racial discrimination,” barring its continuation “did no more than prevent future discrimination.” Yet there is no reason to believe the rule outlawed in Vogler was racially motivated. It excluded from membership not only African-Americans, but also nearly all whites. The reasons given by the Vogler court to see the rule as racially inspired—“the general policies of racial discrimination in Louisiana . . . and Local 53’s admitted policy of racial discrimination both prior to and following the effective date of the Act”—if anything show the opposite. With discrimination overt, until Title VII’s passage, there would have been no reason for such subterfuge. That other barriers excluded African-Americans makes it most unlikely that a policy of limiting union membership to incumbents’ sons originated in anti-black prejudice.

The Vogler court also said that “in a completely white union the present effect of its continued application is to forever deny to negroes and Mexican-Americans any real opportunity for membership.” That made sense as a reason to modify the rule but could not fully explain the court’s decision. If a union has excluded African-Americans, eliminating the effects of such discrimination requires admitting some nonrelatives at least until the union is integrated. But Vogler, like Farrell, went further, barring all “use of members’ endorsements, family relationship or election as criteria” and ordering “the development of objective membership criteria” instead.

The most obviously hurtful discrimination by Local 53 had occurred not in admitting members, but in referral to employers of workers—discrimination which, although the Vogler court did not mention it, had been illegal even before Title VII. Since 1947, the Labor Management Relations Act has barred unions from causing employer discrimination against people denied membership for reasons other than

44. Vogler, 407 F.2d at 1054.
45. Among those excluded were three quarters of workers at firms under contract with the union, who were either members of sister local unions or non-members working with union approval. See Vogler v. McCarty, Inc., 294 F. Supp. 368, 370 (E.D. La. 1968), aff’d sub nom. Local 53, Int’l Ass’n of Heat & Frost Insulators v. Vogler, 407 F.2d 1047 (5th Cir. 1969).
46. Vogler, 407 F.2d at 1054.
47. Id.
48. Id. at 1051.
49. See discussion supra p. 361 and text accompanying note 45.
refusal to pay dues. On appeal, Local 53 acknowledged that discrimination in referral to employers must be given up. The court, though, did not even discuss any distinction that might have been drawn between discrimination in referrals to jobs, and nepotism in union membership. Vogler, like Farrell, treated discrimination and nepotism as obviously and inescapably interrelated.

To understand such a sweeping approach, it is necessary to recognize that Vogler and Farrell—as Farrell expressly said—involved not just “litigation between private parties, but ... vital matters filled with greatest public concern.” The “discrimination” at issue was not just a matter of procedural unfairness to individuals, but of an industrywide system of employment. Regardless of logical puzzles implicit in seeing pro-white bias in a policy that did not mention race and that excluded nearly all whites, courts had at heart a glaringly unjust overall situation and a practical goal: to dismantle segregation in employment, the walling off of some jobs as black and others as white. As discussed later in this Article, this was the same goal the Supreme Court, upholding the legality of voluntary affirmative action programs, would later attribute to Title VII: “to break down old patterns of racial segregation and hierarchy.”

The same pattern is apparent in other decisions outlawing union nepotism and requiring affirmative action to undo it. One court announced that “[t]he desire of a union to insure family security by restricting new membership to the sons and close relatives of present members may constitute a legitimate ‘business purpose.’ But it cannot override the racial impact where present union membership is all-white.”

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51. See id. § 158(b)(2). Applicants for employment are protected. See, e.g., NLRB v. Mason & Hanger-Silas Mason Co., 449 F.2d 425, 427 (8th Cir. 1971) (finding that black carpenters who sought employment and confronted racial discrimination were employees within the meaning of the National Labor Relations Act). See generally Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 191-92 (1941) (defining the term “employee”).
52. See Vogler, 407 F.2d at 1050 n.6, 1051.
53. See id. at 1054.
55. See id. at 659-60.
56. See id.
58. Robinson v. Lorillard Corp., 444 F.2d 791, 798 n.5 (4th Cir. 1971); cf. United States v. International Ass’n of Bridge, Structural & Ornamental Iron Workers, Local No. 1, 438 F.2d 679, 683 (7th Cir. 1971) (stating that alleged nepotism is relevant in a discrimination case since “[a] union which has only white members can effectively preclude non-whites from membership” through nepotism).
In another case, the United States sued construction unions that refused to join an affirmative action plan promulgated by the governor of Illinois.\(^5\) Two local unions persuaded the trial court that mere refusal to institute affirmative action was not proscribed discrimination, but the appeals court reversed saying the refusal could not be viewed in isolation.\(^6\) The court emphasized the locals' nepotism even though "[s]ons of some of Local 169's early black transfer members were admitted in later years, which shows, as the district court found, that 'the nepotism is not racially oriented.'\(^6\)\(^1\)

In a mostly white union, the court explained that "nepotism applied evenly tends to solidify the minuscule percentage of blacks."\(^6\)\(^2\) The court went on to say that "[t]he record begins with the historical exclusion of blacks, reinforced by nepotism and hiring hall 'jump-up' referrals. The record continues through the militant opposition not only to the Ogilvie Plan itself but also to the equal employment opportunities which the plan was striving to achieve."\(^6\)\(^3\) Nepotism was thus a basis to require affirmative action—not on its own demerits, but as part of a system that "solidified the minuscule percentage of blacks."\(^6\)\(^4\)

Similarly, a St. Louis union, found to have tacitly continued a nepotism policy, was ordered to set up "a good public information program . . . [to] help to persuade the doubtful and the skeptical that the discriminatory bars have been removed."\(^6\)\(^5\) The court said that the ineffectiveness of previous recruitment must be evaluated in light of a larger picture including the nepotism policy, "the fact that individual union members will inevitably continue to talk with their sons,"\(^6\)\(^6\) and a record showing "that qualified Negro tradesmen have been and continue to be residents of the area" but were discouraged by knowledge of the union's history.\(^6\)\(^7\) Most of these factors have no intrinsic relation to illegal dis-

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59. *See generally* United States v. United Bhd. of Carpenters & Joiners of Am., Local 169, 457 F.2d 210 (7th Cir. 1972) (holding that the district court erred in finding for the defendants where the defendants opposed the Ogilvie Plan for the recruitment, placement and training of minority group members in the highway industry). The plan’s legality was later upheld in *Southern Illinois Builders Association v. Ogilvie*, 471 F.2d 680, 686 (7th Cir. 1972).

60. *See United Bhd. of Carpenters & Joiners*, 457 F.2d at 215-16, 221.

61. *Id.* at 215 n.8.

62. *Id.*

63. *Id.* at 217.

64. *Id.* at 215 n.8.

65. United States v. Sheet Metal Workers Int’l Ass’n, Local Union No. 36, 416 F.2d 123, 139 (8th Cir. 1969).

66. *Id.*

67. *Id.* at 132.
crimination, and the court acknowledged there was no proof of discrimination against individuals after Title VII took effect. Yet an overall unjust situation, viewed largely from the perspective of its victims, once more required affirmative action and an end to nepotism.

Standing alone, requirements that unions drop a practice "contrary to modern day societal objectives concerning job qualifications" might be understood in another way: as part of a movement towards outlawing all arbitrary union action. As noted above, since 1947 it has been a statutory unfair labor practice for unions to cause discrimination against people denied membership for reasons other than refusal to pay dues. In addition, judges have imposed on unions a broad duty of fair representation, originating in a decision outlawing race discrimination, but generalized to protect all employees within a union’s bargaining unit. Outlawing nepotism could be said to follow a pattern of broadening protection for black workers to a more general ban on invidious or even arbitrary union action.

Yet notice this does not uproot the ban on nepotism from civil rights law. The labor law duty of fair representation is premised on a view that unions, given legal authority to speak for dissenters, have "powers comparable to those possessed by a legislative body" and should be subject to comparable restrictions. The duty, in general, is only owed to members of the bargaining unit and so has little application to those most hurt by nepotism rules: workers outside a unit, trying to get in. And it continues to be true that nepotism found not to be part of a discriminatory system—for example, because blacks are already achieving reasonable representation—is not a violation of Title VII.

68. See id.
69. Farrell, 252 N.Y.S.2d at 657.
70. See supra note 51 and accompanying text.
73. Steele, 323 U.S. at 202.
74. But cf. Brotherhood of R.R. Trainmen v. Howard, 343 U.S. 768, 774 (1952) (holding that a union could not discriminate against black employees nominally outside the unit).
75. See EEOC v. Sheet Metal Workers, Int'l Ass'n, Local No. 122, 463 F. Supp. 388, 421-22 (D. Md. 1978). Another example may be where so few people are promoted that the rule has little impact. See Scott v. Pacific Maritime Ass'n, 695 F.2d 1199, 1207-08 (9th Cir. 1983); cf. Platner v. Cash & Thomas Contractors, Inc., 908 F.2d 902, 905 & n.6 (11th Cir. 1990) (holding that no Title VII violation occurred in a firm where a female employee, who was suspected of having an affair with the owner’s son, was dismissed and the owner’s son, who was also an employee, was not dismissed, and also noting that nepotism may not even be unseemly or regrettable in a "small, closely-held, family-run business").
Most significantly, while no analogue of the duty of fair representation applies to employers (even though corporations, like unions, are granted special power by law), Title VII’s restriction of nepotism has been applied to businesses as well as unions. Indeed, by the end of Title VII’s first decade, it was taken as given that to find an employer’s (as well as a union’s) nepotism “not discriminatory because there was no evidence that it was undertaken with a purpose to discriminate... rested upon a mistake of law. Since the relatives being preferred were disproportionately white, the nepotism discriminated against blacks whether or not appellees acted with a discriminatory purpose.”

That Title VII outlaws all nepotism in employment which adversely affects a protected class has become hornbook law.

**B. Non-Union Nepotism**

The leading non-union case, *Parham v. Southwestern Bell Telephone Co.*, holding nepotism in employment vulnerable to race discrimination charges, involved a company which “depended primarily upon existing employees to refer new prospects for employment.” This policy, the court found,

operated to discriminate against blacks.... With an almost completely white work force, it is hardly surprising that such a system of recruitment produced few, if any, black applicants. As might be expected, existing white employees tended to recommend their own relatives, friends and neighbors, who would likely be of the same race.

The court noted that regulations for government contractors discouraged hiring through employee referrals because “[e]mployees tend to refer friends from their own racial and ethnic backgrounds and, there-

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76. See supra note 75 and accompanying text.
77. Gibson v. Local 40, Supercargoes & Checkers of the Int’l Longshoremen’s & Warehousemen’s Union, 543 F.2d 1259, 1268 (9th Cir. 1976).
79. 433 F.2d 421 (8th Cir. 1970).
81. Id. at 427.
fore, if few minority group workers are already employed, few minority group workers are likely to be referred.’’

It is noteworthy that the court required no specific proof that employees tend to recommend others of their own race. In later years, the Supreme Court would label similar assumptions, for example that voters favor candidates of their race, “impermissible racial stereotypes,” but the Parham court called such affinities “hardly surprising.”

The Equal Employment Opportunity Commission (“EEOC”) similarly ruled that “preference for the children of present employees, like informal word-of-mouth recruitment without equalizing and supplementary recruiting in local minority group communities, continues the effects of past discrimination and discriminates against Negroes and other minorities.”

These decisions treated a preference for family members in terms of disparate impact; with other facts, it has also been found “sufficient to establish the requisite intent” for a finding of disparate treatment. Either way, decision makers rarely spent much energy discussing how nepotism could be interpreted as racial. What they did say was sometimes questionable: for instance, that “preference to . . . close friends and relatives of . . . [an] existing work force is inherently discriminatory against Negro females.” In a plant where “males, Negro and

82. Id.
83. See id. at 426-27.
85. Parham, 433 F.2d at 427.
86. Decision No. 71-1447, 3 Fair Empl. Prac. Cas. (BNA) 391, 394 (1971) (footnote omitted); cf. Decision No. 74-13, 6 Fair Empl. Prac. Cas. (BNA) 1245, 1247 (1973) (stating that while respondent’s nepotism requirement applied to both Negroes and Caucasians, it still had the effect of denying Negroes the same opportunities because the workforce was primarily Caucasian); Decision No. 71359, 2 Fair Empl. Prac. Cas. (BNA) 1104, 1105 (1970) (stating that the use of a word-of-mouth hiring practice resulted in discrimination against minorities, since the front office workforce was almost exclusively Caucasian).
87. Garland v. USAir, Inc., 767 F. Supp. 715, 726 (W.D. Pa. 1991); cf. EEOC v. Metal Serv. Co., 892 F.2d 341, 350 (3d Cir. 1990) (stating that a word-of-mouth hiring process among an all white workforce is strong circumstantial evidence of discrimination); Holder v. City of Raleigh, 867 F.2d 823, 827 (4th Cir. 1989) (stating that “[w]here the interviewers responsible for a particular promotion decision are white, a favoritism toward relatives would work to the detriment of black applicants”); Domingo v. New England Fish Co., 727 F.2d 1429, 1436 (9th Cir. 1984) (stating that discriminatory hiring practices favoring whites occurred where nearly all of the superintendents, foremen, and captains who conducted the recruiting were white and priority was given to friends and relatives); Grant v. Bethlehem Steel Corp., 635 F.2d 1007, 1016-17 (2d Cir. 1980) (holding that the minority appellants made out a prima facie case of discriminatory treatment by a foreman who hired workers less qualified than the appellants).
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white . . . were employed in various job classifications” even before Title VII—and where males presumably had female friends and relatives—it is hard to infer this logically. The EEOC’s opinion criticizing “preference for the children of present employees” had similar logical gaps, but with a focus on integrating an unjustly segregated system, such questions did not seem important. While employer favoritism towards relatives of current workers has been found acceptable when minorities were not, in fact, disproportionately excluded from employment, courts that saw a system of discrimination have been severe towards nepotism “[w]hether this practice was a major factor in hiring or not.”

Decisions about favoritism towards relatives of owners more often defer to an employer’s wishes. In one case where the EEOC marshaled statistics against a firm “including many members of” the owners’ family, the court, acknowledging that nepotism “is not a proper defense,” said that when assessing racial figures it would not include the owners’ relatives at all. Not even the EEOC, apparently, questioned the fact that all six executives were family members.

In a more widely cited decision, Bonilla v. Oakland Scavenger Co., the Ninth Circuit found that an employee-owned company could not favor stockholders in job assignments when corporate bylaws restricted stock to children of past owners. The court rejected an argument that disparate impact on black and Spanish-surnamed employees was outweighed by the firm’s interest in “providing for members of the immediate families of the founders,” explaining,

89. Id. at 98.
90. Decision No. 71-1447, 3 Fair Empl. Prac. Cas. (BNA) 391, 394 (1971). For example, the opinion declared that requiring five years experience for promotion discriminated against blacks by tending “to deny to the class of Negroes hired before 1964, consideration for supervisory positions.” Id. at 393. Those hired before 1964 were seemingly the only blacks not hurt by the requirement. See id.
93. See, e.g., Platner v. Cash & Thomas Contractors, Inc., 908 F.2d 902, 905 & n.6 (11th Cir. 1990). For further discussion of Platner, see supra note 75 and accompanying text.
95. See id. at 419-20.
96. 697 F.2d 1297 (9th Cir. 1983).
97. See Bonilla, 697 F.2d at 1302-03.
98. Id. at 1303.
Title VII case law has from the beginning made clear that nepotistic concerns cannot supersede the nation’s paramount goal of equal economic opportunity for all.

We reject the Company’s argument that its legitimate interest in protecting its family members overrides the countervailing national interest.

We emphasize that our decision by no means interferes with the capacity of the proprietors of a small family-owned business, or, for that matter, any small business, to conduct its affairs with heightened solicitude toward family or friends.

Title VII, the court noted, exempts employers of fewer than fifteen workers, illustrating “Congress’s due regard for the special concerns of smaller businesses. Here, however, we deal with an enterprise employing nearly 500 people. The ‘family’ consists of more than 100 members. We will not dilute Title VII’s imperative by altering the balance Congress has already struck.”

One can ask why owners should receive more solicitude than employees. It does not make much sense to say, as did one court, that there can be no discrimination with respect to a job “created for the owner’s son” because being the son is “an essential qualification for the position.” While being the owner’s son is undoubtedly important to the owner, race or gender could be important too; that would not make them essential for a position of a sales manager. On the contrary, a court would require proof that such criteria were related to job success. Strictly logical analysis would treat nepotism the same way whether those favored had relatives in high or low positions.

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99. Id. at 1303-04; cf. Platner, 908 F.2d at 905 n.6.
100. Bonilla, 697 F.2d at 1304.
102. See generally Dothard v. Rawlinson, 433 U.S. 321, 331-32 (1977) (stating that the appellants produced no evidence showing that height and weight requirements were essential to good job performance).
That judges do not do this may sometimes just be due to greater empathy for owners than for workers, but distinguishing the two also makes sense in terms of attacking a system of employment discrimination. In any particular firm, favoritism towards the boss’s children involves just a few positions. While it is true that for the United States as a whole, whites are far more likely than blacks to own a company, Title VII bans discrimination in employment, not inequality in wealth. In the context of dismantling segregation in employment, it makes sense to see a “family” consisting of more than 100 members differently from one with just a few; it may make sense to see a few top executives differently from more numerous lower-level employees; and it is reasonable to conclude that “an employer does not violate Title VII or any other anti-discrimination statute by grooming his son to take over the business.”

Decisions in nepotism cases, I have been arguing, are ultimately based in large part on an impressionistic sense of whether minorities are getting a fair shake, an overall intuitive conclusion that an existing situation is, or is not, tolerably compatible with genuine opportunity for a diverse workforce. The Supreme Court’s ruling in *Wards Cove Packing Co. v. Atonio*, which dealt with, among other things, charges that nepotism violated Title VII, links the nepotism cases to broader disparate impact law. In *Atonio*, five members of the Court rejected the impressionistic approach to Title VII which I have argued is implied by

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This Article discusses how juries are much more likely to identify with common plaintiffs in discrimination claims than judges. Judges are more likely to favor age discrimination plaintiffs and similar parties because they are better at identifying with those parties.


105. *Cf.* Bonilla, 697 F.2d at 1302-03 (rejecting an argument “that Title VII has no application to discrimination in the sale of corporate stock” because while “[t]he Company’s organization closely entangles stock ownership and employment privilege, . . . the predominant characteristics are those of employment”).

106. *Id.* at 1304.


110. *See Atonio*, 490 U.S. at 657.
most nepotism cases. Their decision, though, was repudiated by Congress, in the Civil Rights Act of 1991.

Atonio was a class action on behalf of nonwhites—Filipinos and Alaska Natives—employed at seasonal Alaska salmon canneries. Such canneries often hired whites for skilled and clerical positions but non-whites (through a largely Filipino union, or in Alaska villages) for canning jobs, with the groups housed and fed separately as well. A pre-Atonio case against another cannery found “pervasive” nepotism and that “[n]epotism helped both whites and non-whites obtain employment. But when whites controlled the best jobs, the policy of nepotism favored the whites.”

In Atonio, the Ninth Circuit rebuked a district court for finding no forbidden nepotism since those hired for skilled jobs were qualified. Nepotism, the Circuit said, is by definition a practice of giving preference to relatives, and where those doing the hiring are predominantly white, the practice necessarily has an adverse impact on non-whites. That the court found individuals were hired for their skills and not because they were relatives serves to dispel the inference of discriminatory intent but it does not meet the defendants’ burden in refuting a claim of disparate impact. What is required is that the defendants prove the business necessity of the nepotism policy. As we said in Bonilla, generally “nepotistic concerns cannot supersede the nation’s paramount goal of equal opportunity for all.”

The Supreme Court rejected this approach, in addition to finding the statistical showing of discrimination inadequate since it did not recognize that skilled and unskilled workers came from different labor pools. The Court said,
respondents have alleged that several “objective” employment practices (e.g., nepotism . . . ), as well as the use of “subjective decision making” to select noncannery workers, have had a disparate impact . . . [E]ven if on remand respondents can show that nonwhites are underrepresented in the at-issue jobs in a manner that is acceptable . . . this alone will not suffice to make out a prima facie case of disparate impact. Respondents will also have to demonstrate that the disparity they complain of is the result of one or more of the employment practices that they are attacking here, specifically showing that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites.119

The Civil Rights Act of 1991 reversed this holding of Atonio, by reaffirming that a respondent must prove a job practice with a disparate impact is justified by business necessity, and that if a plaintiff shows “that the elements of a respondent’s decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.”120

In enacting the 1991 amendment, Congress claimed not to break new ground but to return to pre-Atonio law.121 Four dissenters in Atonio had also objected to requiring “practice-by-practice statistical proof of causation, even where, as here, such proof would be impossible,” citing more impressionistic evidence that an Alaska cannery “resembles a plantation economy.”122 As Justice Stevens wrote: “the maintenance of inferior, segregated facilities for housing and feeding nonwhite employees strikes me as a form of discrimination . . . although it does not necessarily fit neatly into a disparate-impact or disparate-treatment mold.”123

119. Id. On remand, the district court said it had never even found that nepotism existed, only “that a substantial number of the employees of the defendants were related.” Atonio v. Wards Cove Packing Co., 54 Fair Empl. Prac. Cas. (BNA) 1623, 1626 (W.D. Wash. 1991), aff’d in relevant part, 10 F.3d 1485 (9th Cir. 1993). The defendants, the court said, did not in fact favor relatives of employees. See id.


121. See Pub. L. No. 102-166, 105 Stat. 1071. Section Two of the Act declares that the Atonio decision “has weakened the scope and effectiveness of Federal civil rights protections,” and Section Three declares the Act’s purpose of codifying pre-Atonio law. Id.

122. Atonio, 490 U.S. at 662 (Blackmun, J., dissenting).

123. Id. at 664 n.4 (Stevens, J., dissenting) (citation omitted).
The Court majority’s disdain for such impressionism and insistence on detailed, specific proof were effectively reversed by the Civil Rights Act of 1991.

II. NEPOTISM AND TITLE VII

I have been arguing that the logical categories of disparate impact analysis do not fully explain the nepotism cases. When a majority of the Supreme Court insisted on stringent use of such categories in Atonio, Congress amended Title VII to endorse the more impressionistic approach called for, and identified with existing law, by four dissenters.

An impressionistic legal approach is always problematic because impressions of the same facts vary widely. What looks fair enough to one person looks to another like obvious bias. When the Seventh Circuit held that Loyola University could require professors to be Jesuits because “it seems wholly reasonable to believe that the educational experience at Loyola would be different if Jesuit presence were not maintained,” Judge Richard Posner, concurring, remarked that

[in the same type of showing made here, a men’s clothing store could claim a right to hire only men as salesmen in order to maintain the character of the store, or Ivy League universities the right to maintain a ceiling on the number of Jews in some departments in order to maintain the traditional character of those departments . . . .

As the Supreme Court said in an early disparate impact case, without general rules, judges’ discretion would be “unfettered by meaningful standards” and unreviewable.

In this section of the Article, I suggest, nevertheless, that the nepotism cases typify Title VII law. In the Loyola case, Judge Posner tried a narrower, more logical approach than that of his colleagues, stressing points resembling those made above about nepotism: that “only a tiny
fraction of Catholics are Jesuits,” that “it would be odd” to say a Catholic institution discriminated on religious grounds by reserving “some positions in its philosophy department for Jesuits, thus excluding most Catholics,” and that “only seven positions out of 31 are at issue.” Yet Posner’s own conclusion that “the reservation of a few tenure slots for Jesuits in a private university founded by and to some extent still controlled by Jesuits . . . is less offensive than a racial quota in a steel mill” was hardly less intuitive than the majority’s conclusion.

Those who think Title VII has been misused often claim its meaning “rings out with unmistakable clarity,” but a ban that goes beyond intentional discrimination always requires answers to debatable questions. Even a disparate treatment case can involve “subtle discriminatory practices” such as the “message . . . communicated” by the current racial composition of a workforce. The sweeping language of *Griggs v. Duke Power Co.* always carried a range of possible senses. Whose prior discrimination should not be frozen through a seemingly neutral practice—only that of a particular employer, or that which historically pervaded society? Who is to judge the “touchstone . . . business necessity?” To label as “discriminatory in operation” practices conceded to have been well intended raised questions that have grown ever more contested; broadly, about how to tell equal from special treatment.

Such questions have also arisen in new contexts as rights to equal treatment regardless of disability, sexual orientation, or religion where recognized or expanded. In 1996, for example, the Supreme Court struck down as unconstitutional a statute barring government from protecting people against discrimination based on sexual orientation, rejecting dissenters’ view that Colorado had merely forbidden “special

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131. *Id.* at 356.
132. *Id.* at 355.
136. *Griggs* itself, which proscribed non-job-related academic requirements for employment, arguably fit either interpretation. The Court said that “the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites.” *Griggs*, 401 U.S. at 426. However, the court also stated that “[b]ecause they are Negroes, petitioners have long received inferior education in segregated schools,” a fact for which the employer had no special responsibility. *Id.* at 430.
137. *Id.* at 431.
138. See *id.*
protection for homosexuals." A year later, the same Court struck down a statute which aimed to protect religious people by prohibiting government acts that substantially burdened religion. Denying that those protected by the statute were "burdened any more than other citizens," the Court rejected dissenters' view that "the Free Exercise Clause is not simply an antidiscrimination principle . . . [but] an affirmative guarantee of the right to participate in religious practices and conduct without impermissible governmental interference."

At least for Justice Kennedy, who wrote the majority opinion in both cases, the difference in their results clearly reflected a perceived difference in lawmakers' attitudes toward religious and sexual minorities: on the one hand, a lack of "modern instances of . . . laws passed because of religious bigotry," on the other hand, a law placing "[h]omosexuals, by state decree . . . in a solitary class." More important for the purposes of this Article, the difficulties of differentiating equal from special treatment, however they are ultimately resolved, can be traced to sometimes divergent goals of civil rights law: on the one hand, a neutral selection process (with what results of lesser moment); on the other hand, a more integrated, less stratified society (with less focus on the process used in a particular case).

In retrospect, the same difficulties were inherent not only in Griggs, but in the very concept of employment discrimination—as distinct, for example, from discrimination in public accommodations, which the Civil Rights Act of 1964 also proscribed, but which today prompts little discussion. A public accommodation is by definition open to all comers; if there is space, hardly anyone would be turned away. To ban invidious discrimination is simple because one expects no discrimination at all. In employment, by contrast, all comers who qualify for a job, the equivalent of having an admission price, are typically not hired, retained or promoted. Discrimination among workers—often with little objective basis and nearly always with no indisputable basis—is common and even necessary. Only in extreme cases, of a blanket refusal

140. Id. at 640 (Scalia, J., dissenting).
142. Id. at 2171. However, Justice Stevens stated that "the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain." Id. at 2172 (Stevens, J., concurring).
143. Id. at 2177 (O'Connor, J., dissenting).
144. Id. at 2169.
145. Romer, 517 U.S. at 627.
147. See id. § 2000a(a).
even to consider a category of workers, is it clear from the mere rejection of an applicant that there has been prohibited discrimination.

In all other cases, to judge if there has been race or sex discrimination, some review is required of the fairness or at least rationality of the employer's ultimate choice—even though no such review would be available if a plaintiff had not claimed mistreatment on account of race or sex. It is a central, inescapable paradox of civil rights law, not a hallmark of judicial overreach, that the existence of this review can be called special, not equal, treatment, and can create or provide a pretext for resentment. The mere existence of civil rights protection can be called special treatment. When the Supreme Court after Reconstruction invalidated a statute requiring equal access to public accommodations, it said disapprovingly that such legislation meant making ex-slaves "special favorite[s] of the laws." In the 1950s, law professors feared that to abolish whites-only primary elections, racially restrictive covenants and segregated schools would depart from the law's principled neutrality. With at least as much force, job applicants unfairly passed over for others of their own race—for example, through nepotism—might decry the "favoritism" which lets an African-American passed over for a white, or vice versa, question the employer's decision by suing for invidious discrimination.

Yet if the reach of Title VII were limited to cases of refusal even to consider applicants—the only stage of hiring comparable to public accommodation—the statute's reach would be quite meager and the equality it enforces would indeed often be "merely in the sense of the fabled offer of milk to the stork and the fox." Tension between the goal of equality, and the availability of real redress for its infringement, is therefore inherent to civil rights law. Title VII is not an abstract requirement of subjective fairness in individual cases; to pretend that it is ignores what prompted the law: the effort to redress a pervasive, long-


150. See generally Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1, 26-34 (1959) (discussing cases where race-based claims of inequality and deprivations were vindicated).

151. See, e.g., Backlund v. Hessen, 104 F.3d 1031 (8th Cir. 1997) (allowing a constitutional challenge to a fire department practice of hiring incumbents' relatives). In the case of a private employer, no such challenge would be possible.

standing social injustice, "to break down old patterns of racial segregation and hierarchy." 153

To say that Title VII has a social goal is not quite to say, as those who believe the goal has been pursued too assiduously often do, that it has been twisted to require "proportionate representation by race and by sex in the workplace." 154 The point is not that proportionality is required but that practices which in reality impede equal opportunity may have to change even if they are time-honored and in the abstract not linked to race or sex. When Title VII was being considered by Congress, the chairman of the House Judiciary Committee said the law meant "changing patterns of life that have existed for a century or more... like asking one to sever hand from wrist." 155 The ideal behind Title VII, the color-blind society so often alluded to, was not a division into groups, each of which would receive its proportionate share, but something even harder to achieve: a world in which individual people really could be treated as individual people.

In terms used by two sociologists (one later a U.S. senator), it involved not a model of fixed castes, but one of permeable, shifting groups shaped by individuals' self-definition and voluntary commitment. 156 The sociologists' labels for these models—Southern and Northern 157—are now mainly of historical interest: total integration and openness have never yet existed, North or South. Among current judges, Justice Stevens, who has written eloquently of the "prolonged effort" involved in agitation for civil rights, 158 has been their foremost exponent, insisting, for example, that affirmative action in school employment be analyzed not "by asking whether minority teachers have some sort of special entitlement to jobs" but in terms of "the public interest in educating children" with an integrated faculty. 159

There is no bright line identifying either just how glaring the injustice of an overall situation must be to call for correction, or just how much must be done to correct it. A court has to exercise judgment, com-

157. See id. at xxiii.
paring and contrasting cases as at common law. In this respect, though, Title VII is little different from laws which aim at other social goals. That facilitating equality or reducing segregation can be called a vague goal—that no one can say exactly how much the law should or even can do to achieve it—does not distinguish it from a goal like safety. Just how much a company should be required to do for safety is a hard question, but law can aim for safety even at great cost, "limited only by the feasibility of achieving such an environment." Safety and its cost are assessed differently under different statutes and in different states, but however the balance is struck, a social goal of safety weighs in the scale.

Especially in mass tort cases, in which a large class claims to have been harmed by a product, courts face some of the same problems of assessing proof as when an employment practice like nepotism appears to have contributed to keeping out minority workers but it is hard to say exactly which ones or how much. Even in ordinary two-party tort cases, modern law is as likely to focus on negligence, and the incentives created by various legal rules, as on whether a defendant purposefully did anything wrong. To decide that there has been an actionable tort can involve questions far beyond whether a wrong was purposeful.

Economic definitions of negligence have been attempted and can be useful in deciding if a firm was negligent, but they do not capture the full range of factors that affect such a conclusion—for example, what most other companies do, how much harm a challenged procedure caused and how foreseeable the harm was, and whether the firm seems culpable under traditional, intuitive notions of fault. Tort law, while


161. See id.

162. Id. at 540 (stating that OSHA does not require cost-benefit analysis before promulgation of safety standards).

163. See, e.g., In re "Agent Orange" Prod. Liab. Litig., 818 F.2d 145 (2d Cir. 1987) (holding that the settlement of an Agent Orange class action suit brought by servicemen and their relatives was reasonable and properly approved).

164. See generally Seth Kupferberg, Double Effects in Economics and Law, with Special Reference to ERISA, 73 OR. L. REV. 467 (1994) (discussing some of the pitfalls of analyzing cases in terms of incentives).

165. For example, Judge Learned Hand defined it as a failure to take precautions that are less expensive than the cost of an accident multiplied by its probability. See United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947); Conway v. O'Brien, 111 F.2d 611, 612 (2d Cir. 1940).

aiming for safety, certainly does not require every conceivable precaution. How much care is required is a contested question about which judges can differ and ideas change over time. Negligence claims also give rise to litigation costs, and to settlements in cases that if tried, would end in the defendant’s exoneration. Yet while the law can be lampooned as giving plaintiffs windfalls or seeking to abolish risk, to eliminate all possible overreaching would require sacrificing both valid claims and the incentives to safety, to which liability gives rise. Comparable things are true of civil rights law.

Its disparate impact branch aims to minimize segregation much as negligence law aims to minimize risk. In neither case is fault or common practice irrelevant, nor is every possible step toward the overall aim required. Yet the aim remains social, not simply to correct individual acts of injustice. To pretend otherwise is to present a caricature. In this respect, nepotism typifies disparate impact. Deciding what is forbidden is not a matter of abstract logic, but involves summing up factors open to debate. As a general matter, one can say that systematic exclusion of minorities is forbidden much as one can say the same of negligence.

Justice Stevens, already mentioned as a leading judicial exponent of integration, is also the most prominent judge whose opinions openly turn as much on an overall sense of whether discrimination exists as on the analytic categories recognized by precedent. His dissent in *Atonio*, typically, referred to discrimination, “although it does not necessarily fit neatly into a disparate-impact or disparate-treatment mold.” By contrast, Justices Thomas and Scalia—but not the rest of the Supreme Court—have denounced distinctions based on the actual purpose or even effect of a challenged rule, insisting that “government cannot make us equal” and that “discrimination based on benign preju-

167. See id. at 193-94.
168. See id.
169. See discussion supra p. 376 and notes 158-59.
170. See, e.g., *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 245 (1995) (Stevens, J., dissenting) (stating that “the term ‘affirmative action’ is common and well understood. Its presence in everyday parlance shows that people understand the difference between good intentions and bad”). As discussed above, Justice Kennedy and other judges have also clearly been influenced by their overall sense of whether or not people are being fairly treated. See discussion supra pp. 372-74 and notes 127-45.
dice is just as noxious as discrimination inspired by malicious prejudice.\textsuperscript{172}

Justice Stevens’ position may be surprising since when he was a court of appeals judge, his approach was more abstractly logical. He dissented, for example, from a decision, \textit{Sprogis v. United Air Lines, Inc.},\textsuperscript{173} which held that firing a flight attendant for marrying was sex discrimination.\textsuperscript{174} Since airlines did not hire male flight attendants at the time of the plaintiff’s discharge,\textsuperscript{175} then Judge Stevens wrote that the plaintiff could not show “that if she were a member of the opposite sex she would have had any greater employment opportunities.”\textsuperscript{176} Title VII, he said, is concerned with “employment opportunities of the members of one sex as opposed to the other,” not whether a practice derives “from a stereotyped attitude toward females.”\textsuperscript{177}

Today, of course, airlines hire married and unmarried, male as well as female, flight attendants. Ending the job’s restriction to unmarried stewardesses opened up opportunities not only to women, but to men as well. To the Judge Stevens who dissented in \textit{Sprogis}, this might itself have suggested that the change went beyond the goals of Title VII, but if the law is understood to have a broad social goal, “to break down old patterns of . . . segregation and hierarchy,”\textsuperscript{178} the matter is less simple.

The thrust of Justice Stevens’ later dissents—that an impediment to equality at work \textit{can} be “a form of discrimination . . . although it does not necessarily fit neatly into a disparate-impact or disparate-treatment mold”\textsuperscript{179}—is more compelling than his dissent in \textit{Sprogis}, but also much more open-ended. His early insistence on a readily parsed approach suggests how hesitant careful judges are to take on open-ended questions like just how irrational and significant an impediment is. Yet if Title VII is to proscribe “not only overt discrimination but also practices

\textsuperscript{172} \textit{Adarand}, 515 U.S. at 240-41 (Thomas, J., concurring); \textit{cf. id.} at 239 (Scalia, J., concurring) (stating that the government should not discriminate on the basis of race to make up for past racial discrimination). Three other Justices, while agreeing that all racial classifications are subject to strict scrutiny, insisted that “the point of strict scrutiny is to ‘differentiate between’ permissible and impermissible governmental use of race” and that the existence of strict scrutiny does not determine the ultimate result. \textit{Id.} at 228.

\textsuperscript{173} 444 F.2d 1194 (7th Cir. 1971).

\textsuperscript{174} \textit{See Sprogis}, 444 F.2d at 1197.

\textsuperscript{175} \textit{See id.} at 1203 (Stevens, J., dissenting).

\textsuperscript{176} \textit{Id.} at 1205 (Stevens, J., dissenting).

\textsuperscript{177} \textit{Id.} (Stevens, J., dissenting).


\textsuperscript{179} \textit{Atonio}, 490 U.S. at 664 n.4 (Stevens, J., dissenting).
that are fair in form, but discriminatory in operation," there is no choice but to make such judgments, like Justice Stevens now. Other judges have always done the same thing in practice.

As with Sprogis, this is often especially clear in sex discrimination cases. Take a leading case which sustained a policy of not hiring spouses of incumbent workers—in a sense, the reverse of a nepotism rule. The policy had been challenged as having "substantial discriminatory impact which is demonstrated by the statistic that seventy-one of the last seventy-four people disqualified under it were women. It therefore is invalid under Title VII unless defendant can show that it is job-related."182

In theory, such a showing of job-relatedness should be made through evidence; there was none. Yet the court called "the assumption that it is generally a bad idea to have both partners in a marriage working together.... far from frivolous" and concluded,

We are therefore left in a difficult situation. Defendant cannot statistically prove that its rule increases production, but its arguments that the rule "improves" the workplace are convincing. In our judgment the solution to this problem lies in examining the animating spirit behind the Griggs rule.

The no-spouse rule in this case does not operate as a "built-in headwind" for women. Defendant asserts, and there is nothing in the record contradicting its assertion, that in some of its other plants historical circumstances operated differently and there is a majority of female workers.

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181. See Yusuf v. Libbey-Owens-Ford Co., 562 F.2d 496, 498-500 (7th Cir. 1977) (holding that a no-spouse rule which plausibly improved the work environment and did not penalize women on the basis of their environmental or genetic background, was job related).
182. Id. at 498.
183. See discussion supra p. 368. See generally Dothard v. Rawlinson, 433 U.S. 321, 331-32 (1977) (stating that appellants produced no evidence that height and weight requirements were essential to good job performance).
184. Yuhas, 562 F.2d at 499. The principal reason the court gave for assuming that it is bad for spouses to work together, was the "intense emotions" generated by marriage. See id.
Because the no-spouse rule plausibly improves the work environment, and because it does not penalize women on the basis of their environmental or genetic background, we hold that the rule is job-related.\footnote{185}

A shorter way to put this would be to say that the law's "animating spirit"\footnote{186} is more important than the logical rules devised to implement it.

As with proof of disparate impact,\footnote{187} the Supreme Court initially took an abstractly logical approach to another area of discrimination law, the treatment of pregnancy, only to have its reading overturned by Congress.\footnote{188} The Court said it was not sex discrimination for an employer to exclude pregnancy from the disabilities covered by insurance, because no similarly situated member of the other sex—no pregnant man—was treated differently from the women denied coverage.\footnote{189} The discrimination, the Court said, was not by sex, but between "pregnant women and nonpregnant persons."\footnote{190}

As a matter of abstract logic, this may or may not make sense. Three dissenting Justices objected that men were fully insured for "disabilities... that affect only or primarily their sex, such as... gout."\footnote{191} On the other hand, there were undoubtedly also fully compensated disabilities, like breast cancer, that mainly affect women. The real issue was more practical: whether equality for women requires that they not be penalized for having children; a question which if answered in the affirmative, potentially calls for broad change in employment as well as other areas of life. When the Court extended its holding, originally issued in a constitutional case, to one brought under Title VII,\footnote{192} Congress, as it later would with regard to proof of disparate impact, reversed the decision by amending the statute.\footnote{193}

\footnotetext{185}{Id. at 499-500.}
\footnotetext{186}{Id.}
\footnotetext{187}{See discussion supra pp. 369-72 (discussing Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) and the Civil Rights Act of 1991).}
\footnotetext{188}{See generally 42 U.S.C. § 2000e(b) (1994) (defining the terms "because of sex" to include "pregnancy, childbirth, or related medical conditions"); General Elec. Co. v. Gilbert, 429 U.S. 125 (finding no gender-based discriminatory effect from an employer's disability-benefits plan "simply because women disabled as a result of pregnancy do not receive benefits").}
\footnotetext{189}{See Geduldig v. Aiello, 417 U.S. 484, 494-97 (1974) (holding invalid a woman's contention that she suffered discrimination under the Equal Protection Clause of the Fourteenth Amendment because a disability contributable to a pregnancy was not compensable).}
\footnotetext{190}{Id. at 497 n.20.}
\footnotetext{191}{Id. at 501 (Brennan, J., dissenting).}
\footnotetext{192}{See generally General Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (holding that the peti-
The nepotism cases have, I hope, illuminated the more general account of Title VII in this section of the Article. The general account, in turn, may cast some light back on the nepotism cases. Rules likely to impede race or gender equality are looked on with suspicion—properly so, I have been arguing—even when it is hard to tease out the logical categories which Title VII precedent (also properly) has developed to analyze claims. Title VII is concerned not only with hate, but also with practices which act as "built-in headwinds," a less clear-cut concept that on occasion requires judges to assess the strength of a headwind. A nepotism rule, even though not necessarily discriminatory by race, is an example.

Even though there is no inevitable logical connection, it is not just accidental that unions with nepotism policies, in the construction industry and elsewhere, were also virtually all white. As one court would say, "[a] clannish preference for relatives may also be intertwined with racial stereotypes." While Title VII does not outlaw clannish preference, it does forbid acting on the basis of attitudes from which such preference is often impossible to disentangle. Decisions in which courts brushed aside defenses of nepotism were broadly consistent with the law's spirit.

194. Griggs, 401 U.S. at 432.
195. See, e.g., Patterson v. Newspaper & Mail Deliverers' Union, 514 F.2d 767, 769-70 (2d Cir. 1975) (discussing a union's discriminatory practices of restricting union membership to whites).