

# The Burger Court Opinion Writing Database

## *American Tobacco Co. v. Patterson*

456 U.S. 63 (1982)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



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

CHAMBERS OF  
THE CHIEF JUSTICE

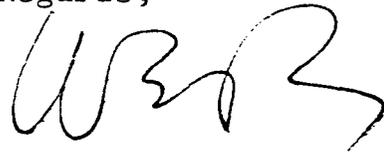
February 22, 1982

Re: No. <sup>80-199</sup> 80-1538 - American Tobacco Co. v. Patterson

Dear Byron:

I join.

Regards,



Justice White

Copies to the Conference

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7

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

January 25, 1982

MEMORANDUM TO: Justice Marshall  
Justice Blackmun  
Justice Stevens

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

We four are in dissent in the above. I'll be happy  
to undertake the dissent.



W.J.B. Jr.

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

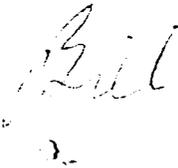
February 16, 1982

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 typed name "Justice White".

Justice White

cc: The Conference

To The Chief Justice  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From Justice Brennan

Circulated MAR 17 1982

Recirculated: \_\_\_\_\_

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 80-1199

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

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

[March —, 1982]

JUSTICE BRENNAN, dissenting.

Purporting to construe the plain language of § 703(h) of Title VII, the Court today holds that seniority plans adopted after Title VII became effective are not subject to challenge under the disparate-impact standard of *Griggs v. Duke Power Co.*, 401 U. S. 424 (1971). In failing to distinguish for purposes of § 703(h) between suits challenging the *adoption* of a seniority plan and those challenging its subsequent *application*—a distinction urged by the Equal Employment Opportunities Commission (EEOC)—the Court turns a blind eye to both the language and legislative history of the statutory provision. Section 703(h) is by its very terms of relevance only where the *application* of a seniority plan is challenged. The provision reflects Congress' desire to protect vested seniority rights; Congress did not seek to ensure the vesting of new rights that are the byproduct of discrimination. Because the Court ignores this fundamental distinction between challenges to the adoption, and challenges to the application, of seniority plans, I dissent.

I

Up until 1963, the American Tobacco Company and the union serving as collective bargaining agent for the hourly-paid production workers at the Company's two Richmond

1, 3, 5, 9

To: The Chief Justice  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Brennan

Circulated: \_\_\_\_\_

Recirculated: MAR 19

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 80-1199

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

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

[March —, 1982]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and  
JUSTICE BLACKMUN join, dissenting.

Purporting to construe the plain language of § 703(h) of Title VII, the Court today holds that seniority plans adopted after Title VII became effective are not subject to challenge under the disparate-impact standard of *Griggs v. Duke Power Co.*, 401 U. S. 424 (1971). In failing to distinguish for purposes of § 703(h) between suits challenging the *adoption* of a seniority plan and those challenging its subsequent *application*—a distinction urged by the Equal Employment Opportunities Commission (EEOC)—the Court turns a blind eye to both the language and legislative history of the statutory provision. Section 703(h) is by its very terms of relevance only where the *application* of a seniority plan is challenged. The provision reflects Congress' desire to protect vested seniority rights; Congress did not seek to ensure the vesting of new rights that are the byproduct of discrimination. Because the Court ignores this fundamental distinction between challenges to the adoption, and challenges to the application, of seniority plans, I dissent.

### I

Up until 1963, the American Tobacco Company and the union serving as collective bargaining agent for the hourly-

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PP 2, 3, 5, 7-9, 11

To: The Chief Justice  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice Souter  
Justice Thomas  
Justice Ginsburg  
Justice Breyer  
Justice Kagan  
Justice Sotomayor

From: J. Brennan

Circulated: \_\_\_\_\_

Recirculated: MAR 24 1982

3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 80-1199

**AMERICAN TOBACCO COMPANY, ET AL., PETITIONERS v. JOHN PATTERSON, ET AL.**

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

[March —, 1982]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

Purporting to construe the plain language of § 703(h) of Title VII, the Court today holds that seniority plans adopted after Title VII became effective are not subject to challenge under the disparate-impact standard of *Griggs v. Duke Power Co.*, 401 U. S. 424 (1971). In failing to distinguish for purposes of § 703(h) between suits challenging the *adoption* of a seniority plan and those challenging its subsequent *application*—a distinction urged by the Equal Employment Opportunities Commission (EEOC)—the Court turns a blind eye to both the language and legislative history of the statutory provision. Section 703(h) is by its very terms of relevance only where the *application* of a seniority plan is challenged. The provision reflects Congress' desire to protect vested seniority rights; Congress did not seek to ensure the vesting of new rights that are the byproduct of discrimination. Because the Court ignores this fundamental distinction between challenges to the adoption, and challenges to the application, of seniority plans, I dissent.

I

Up until 1963, the American Tobacco Company and the union serving as collective bargaining agent for the hourly-

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To: The Chief Justice  
Justice Brennan  
Justice Marshall ✓  
Justice Stewart  
Justice White  
Solicitor General  
Clerk of the Court

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1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 80-1199

AMERICAN TOBACCO COMPANY, ET AL., PETITIONERS  
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

The Chief Justice  
Justice Brennan  
Justice Marshall  
Justice Blackmun  
**Justice Powell**  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

SEE PAGE 10  
THROUGHOUT.

From: Justice White

Circulated: \_\_\_\_\_

2nd DRAFT

Recirculated: 17 FEB 198

## SUPREME COURT OF THE UNITED STATES

No. 80-1199

AMERICAN TOBACCO COMPANY, ET AL., PETITIONERS  
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:

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To: The Chief Justice  
Justice Brennan  
~~Justice Marshall~~  
Justice Blackmun  
Justice Powell  
Justice P. Br. Quist  
Justice Stevens  
Justice O'Connor

Stylistic changes & p. 12

From: Justice White

Circulated: \_\_\_\_\_

Recirculated: \_\_\_\_\_ 18 FEB 1982

3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 80-1199

AMERICAN TOBACCO COMPANY, ET AL., PETITIONERS  
*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. 253, as amended, 42 U. S. C. § 2000e *et seq.*, “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:

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

From: Justice White

- pp. 3, 6-9, 14 & stylistic -

Circulated: \_\_\_\_\_

Recirculated: 23 MAR 1982

4th DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 80-1199

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

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

[March —, 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. 253, as amended, 42 U. S. C. § 2000e *et seq.*, “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:

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To: The Chief Justice  
Justice Brennan  
Justice Marshall  
Justice Blackman  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

6, 8, 14 & Stylistic

From: Justice White

Circulated: \_\_\_\_\_

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5th DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 80-1199

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

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

[March —, 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. 253, as amended, 42 U. S. C. § 2000e *et seq.*, “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:

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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.

Justice White

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

March 8, 1982

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

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

March 18, 1982

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

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

Dear Bill:

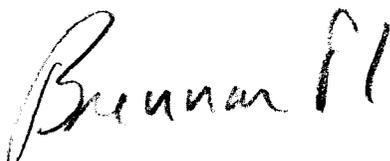
Your dissent in this case certainly expresses my point of view, and I do wish to join you.

I am mildly troubled, however, by the material near the top of page 5. You speak of liberal interpretation for Title VII, but quote Thurgood's dissent in Teamsters. I did not join that dissent and, like Hugo, I am troubled by your using it. Could you find some other authority? I ask this in part because Byron is objecting to language in the second full paragraph on page 8 of my circulating opinion in North Haven. I shall try to accommodate him. As of the moment, I am pulled to-and-fro.

Sincerely,



Mr. Justice Brennan



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 LEWIS F. POWELL, JR.

February 17, 1982

80-1199 American Tobacco Company v. Patterson

Dear Byron:

Please join me.

Sincerely,

A handwritten signature in cursive script that reads "Lewis".

Justice White

lfp/ss

cc: The Conference

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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,  
*WJW*

Justice White

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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

[0\$1199I/0\$1199IF]

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice O'Connor

80-1199 - American Tobacco v. Patterson

From: Justice Stevens

Circulated: MP 7/10

Recirculated: \_\_\_\_\_

JUSTICE STEVENS, dissenting.

Section 703(h) provides an affirmative defense for an employer whose administration of a bona fide seniority or merit system has produced consequences that appear to discriminate against a member of a particular race, religion, or sex.<sup>1</sup> Thus,

<sup>1</sup>The full text of that section provides:

"Notwithstanding 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 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, 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 or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d))." 42 U.S.C.

Footnote continued on next page.

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice O'Connor

From: **Justice Stevens**

Circulated: \_\_\_\_\_

Recirculated: \_\_\_\_\_

*Printed*  
1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 80-1199

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

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

[April —, 1982]

JUSTICE STEVENS, dissenting.

Section 703(h) provides an affirmative defense for an employer whose administration of a bona fide seniority or merit system has produced consequences that appear to discriminate against a member of a particular race, religion, or sex.<sup>1</sup> Thus, for example, if an employee proves that he was denied a promotion to a particular job and that the job was filled by a

<sup>1</sup>The full text of that section provides:

"Notwithstanding 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 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, 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 or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U. S. C. 206(d))." 42 U. S. C. § 2000e-2(h).

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice O'Connor

From: **Justice Stevens**

Circulated: \_\_\_\_\_

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2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 80-1199

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

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

[April —, 1982]

JUSTICE STEVENS, dissenting.

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<sup>1</sup> The full text of that section provides:

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

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

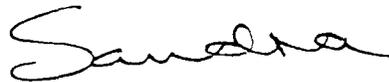
February 17, 1982

No. 80-1199 American Tobacco Company v.  
Patterson

Dear Byron,

Please join me in the opinion in the  
referenced case.

Sincerely,



Justice White

Copies to the Conference