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How Far Can Affirmative Action Go Before It Becomes Reverse Discrimination?

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COMMENTS

HOW FAR CAN AFFIRMATIVE ACTION GO BEFORE IT BECOMES REVERSE DISCRIMINATION?

One of the most volatile questions confronting federal courts today is to what extent they can utilize their broad equity powers to fashion an effective remedy for the victims of unlawful employment discrimination without infringing on the legitimate expectations of other employees.[1] Pervasive discrimination against minorities and women has been a deplorable characteristic of the national job market for many years. Only recently have these groups been permitted to demonstrate their capabilities in the employment arena on a par with other workers. In fact, commentators still cite statistical evidence of the survival of discriminatory hiring and promotional patterns.[2] In order to remedy this continuing discrimination, and to effectuate the mandate of Title VII of the Civil Rights Act of 1964,[3] federal district courts have begun to utilize their discretionary equitable powers to a greater extent. Although equitable remedies correcting past discrimination are laudable, it is clear nevertheless that such affirmative action may unjustifiably infringe on the rights of existing workers and thereby become subject to legitimate attack as a form of "reverse discrimination."

Both the statutory language and legislative history of Title VII clearly indicate, as the Supreme Court recently confirmed in *McDonald v. Sante Fe Trail Transportation Co.*,[4] that the Act does give rise to a cause of action

1. The United States Court of Appeals for the Second Circuit recently described this issue as "one of the most important and difficult questions currently facing the federal judiciary. . . ." EEOC v. Local 638, Sheet Metal Workers' Int'l Ass'n, 532 F.2d 821, 823 (2d Cir. 1976).

2. *See, e.g.*, Edwards, *Race Discrimination in Employment: What Price Equality?* 1976 U. ILL. L. F. 572, 579-80 (1976); Hill, *The National Labor Relations Act and the Emergence of Civil Rights Law: A New Priority in Federal Labor Policy*, 11 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 299, 302 n.13 (1976).

3. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253, *as amended by* Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e to 2000e-17 (Supp. III 1973).

4. 427 U.S. 273 (1976).

for reverse discrimination. Although undoubtedly intended as a means of providing equal employment opportunities to women and certain minority groups,[5] the Act, in fact, extends its protection to all persons, whether black or white, male or female. The Act, however, authorizes federal district courts to order appropriate "affirmative action" as a remedy for intentional discriminatory conduct.[6] Affirmative action encompasses a broad span of remedies, some directed toward particular individuals and others toward entire groups. The difficult question, not yet addressed by the Court, is at what point such affirmative remedies give rise to a claim of reverse discrimination by infringing on the protected rights and expectations of white, male employees.

Perhaps the most visible injury to the protected rights of employees occurs as a result of a quota-type affirmative relief. Quota relief typically imposes on the defendant-employer the burden of hiring or promoting a certain number or percentage of persons of a particular race or sex. Although the appellate courts have split on whether quotas are a permissible Title VII remedy,[7] some circuits have recently expressed concern that quota relief may produce "innocent victims"—persons who would have been hired or promoted due to superior job qualifications but for the "remedial" order of a court binding the employer to a quota.[8] Indeed, in the 1976 decision in

5. *Accord*, Griggs v. Duke Power Co., 401 U.S. 424 (1971): "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Id.* at 429-30 (quoting H.R. REP. No. 914, 88th Cong., 1st Sess. 18 (1963)).

6. Section 706(g) of the Equal Employment Opportunity Act, 42 U.S.C. § 2000e-5(g) (Supp. III 1973). This section provides in relevant part:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement *or hiring of employees*, with or without back pay . . . or any other equitable relief as the court deems appropriate.

Id. (emphasis added). In Franks v. Bowman Transp. Co., 424 U.S. 747 (1976), the Supreme Court noted that the purpose of section 706(g) was to grant wide discretion to the courts in " 'exercising their equitable powers to fashion the most complete relief possible. . . .' " *Id.* at 764 (quoting Section-by-Section Analysis of H.R. 1746, accompanying the Equal Employment Opportunity Act of 1972, Conf. Rpt., 118 CONG. REC. 7166, 7168 (1972)).

7. *Compare* Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir. 1976) *and* Chance v. Board of Examiners, 534 F.2d 993 (2d Cir. 1976) *with* Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971) (en banc), *cert. denied*, 406 U.S. 950 (1972). The types of quotas which have been ordered vary widely. In all, eight circuits have approved some form of temporary quota relief for discriminatory practices. *See* note 46 *infra*.

8. *See, e.g.*, Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir. 1976).

Franks v. Bowman Transportation Co.,[9] three Justices of the Supreme Court expressed similar concern.

The *McDonald* and *Franks* decisions—more specifically, the concurring and dissenting opinions in *Franks*—portend a rough road ahead for affirmative action programs which increase employment opportunities for women and minorities at the expense of legitimate expectations of other workers. At the very least, court-imposed quota programs are likely to be subjected to an exacting scrutiny should the Supreme Court decide to review a case that mandates such relief. An analysis of the appellate decisions upholding the imposition of racial ratio hiring in constitutional, Title VII, or other federal statutory contexts, indicates that the reasoning of those courts may well be unable to withstand careful scrutiny. For instance, until recently, courts have almost unanimously ignored the legislative history of Title VII. The relevant legislative history is not only unambiguous but it cannot reasonably be reconciled with the imposition of preferential hiring or promotions based on race, sex, or national origin. Furthermore, appellate courts have largely failed to apply the appropriate equal protection analysis when ordering quota remedies in a constitutional context. Accurate legislative and constitutional analysis would curtail quotas as an appropriate remedy except, perhaps, under the most egregious circumstances.

I. The Supreme Court Sets a Limit

In *McDonald v. Santa Fe Trail Transportation Co.*,[10] the Supreme Court unanimously held that Title VII of the Civil Rights Act of 1964[11] is "not limited to discrimination against members of any particular race" but prohibits discrimination by private employers *in favor* of minority racial groups as well as discrimination *against* minorities.[12] The petitioners in *McDonald*, two white employees of the Santa Fe Trail Transportation Company, sought relief when they were discharged for misappropriating cargo from a company shipment. The white employees contended that their dis-

9. 424 U.S. 747 (1976). *See* opinions of Chief Justice Burger (concurring in part and dissenting in part) and Justice Powell with whom Justice Rehnquist joined (concurring in part and dissenting in part). *Id.* at 780-81.

10. 427 U.S. 273 (1976).

11. Section 703 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (Supp. III 1973), provides in relevant part: "It shall be an unlawful employment practice for an employer—(1) . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . ."

12. 427 U.S. at 278-79.

charge was racially discriminatory because a black employee who had been charged with the same offense had not been dismissed. Relying on both the decisions of the Equal Employment Opportunity Commission (EEOC) and the legislative history of Title VII, the Court agreed.

The EEOC, whose administrative interpretations of Title VII are generally accorded considerable weight by the courts,[13] has repeatedly declared that Title VII forbids racial discrimination against whites as well as against non-whites. To hold otherwise, stated the Commission, would "constitute a derogation of the Commission's congressional mandate to eliminate all practices which operate to disadvantage the employment opportunities of any group protected by Title VII, including Caucasians."[14] The *McDonald* court concluded that EEOC's interpretations were clearly supported by the legislative history of Title VII, which demonstrates that "discrimination is prohibited as to any individual,"[15] and that the Act covers "white men and white women and all Americans."[16]

The *McDonald* decision, while undoubtedly significant, was not unexpected when viewed against the background of the Court's 1971 ruling in *Griggs v. Duke Power Co.*[17] In *Griggs*, the Court clearly stated that Title VII does not mandate the hiring of any person "simply because he was formerly the subject of discrimination, or because he is a member of a minority group."[18] The *Griggs* Court emphatically declared that "[d]iscriminatory preference for

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13. *See* Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971). *But see* General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), in which the Court noted:

> Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations pursuant to that Title. . . . This does not mean that EEOC guidelines are not entitled to consideration in determining legislative intent, see . . . *Griggs v. Duke Power Co.* . . . But it does mean that courts properly may accord less weight to such guidelines than to administrative regulations which Congress has declared shall have the force of law. . . .

Id. at 141.

14. EEOC Decision No. 74-31, [1973] 2 EMPL. PRAC. GUIDE (CCH) (Empl. Prac. Dec.) ¶ 6404. *See, e.g.*, EEOC Decision No. 75-268, [1975] 2 EMPL. PRAC. GUIDE (CCH) (Empl. Prac. Dec.) ¶ 6452; EEOC Decision No. 74-106, [1974] 2 EMPL. PRAC. GUIDE (CCH) (Empl. Prac. Dec.) ¶ 6427; EEOC Decision No. 74-95, [1974] 2 EMPL. PRAC. GUIDE (CCH) (Empl. Prac. Dec.) ¶ 6432. "The deference due the pertinent EEOC regulations is enhanced by the fact that they were neither altered nor disapproved when Congress extensively amended Title VII in 1972." Washington v. Davis, 426 U.S. 229, 263-64 (1976) (Brennan, J., dissenting).

15. Interpretative Memorandum of Title VII of H.R. 7152 Submitted Jointly by Senators Clark and Case, Floor Managers, 110 CONG. REC. 7212-13 (1964).

16. 110 CONG. REC. 2578 (1964) (remarks of Rep. Celler).

17. 401 U.S. 424 (1971).

18. *Id.* at 431.

any group, minority or majority, is precisely and only what Congress has proscribed."[19] The Act mandates only the elimination of "artificial, arbitrary, and unnecessary barriers to employment [that] operate invidiously to discriminate on the basis of [an] impermissible classification."[20] This language is strong and its meaning should be clear. Special treatment to any group is prohibited because such treatment constitutes the precise evil that the Act was intended to eradicate. *McDonald* thus made clearly actionable the wrong recognized in *Griggs*.

Although establishing that white, male employees, as well as minority employees, may complain under Title VII of discriminatory treatment, *McDonald* did not address the relation between such complaints and the ordering and operation of Title VII affirmative action relief.[21] Nevertheless, the decision clearly indicates trouble for affirmative action orders which would result in liability for reverse discrimination were the court-ordered action taken independently by a private employer.

One recent case before the Court did address a remedial order which caused the Justices substantial concern for the rights and expectations of majority workers. In *Franks v. Bowman Transportation Co.*,[22] the question was whether identifiable black applicants who had initially been denied employment because of their race in violation of Title VII could be awarded seniority status retroactive to the dates of their original employment applications.[23] In a five-three decision, the Court ruled that such status was necessary to effectuate the purpose of Title VII that persons discriminated against be made "whole." The *Franks* decision, while heralded by some as a landmark case, is more significant because of the concern expressed by the dissenting Justices with the rights of other workers than it is for the opinion of the majority.[24] Certainly there can be little quarrel with placing *identifi-*

19. *Id.*

20. *Id.*

21. The Court specifically stated: "Santa Fe disclaims that the actions challenged here were any part of an affirmative action program . . . and we emphasize that we do not consider here the permissibility of such a program, whether judicially required or otherwise prompted." 427 U.S. at 281 n.8.

22. 424 U.S. 747 (1976).

23. The Court did not find it necessary to address petitioner's alternative claim for relief under 42 U.S.C. § 1981 (1970). Section 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

24. *See* Edwards, *supra* note 2, at 623.

able individuals who have been actually discriminated against in as near a position as they would have been in but for the prior unlawful treatment.[25] The significance of the dissent, however, is that it may well foretell the direction in which the Court will move if asked to decide how far an affirmative action program may legitimately be carried. As Justice Powell pointed out in distinguishing between back pay or benefit-type seniority awards and competitive seniority benefits, "[t]he economic benefits awarded discrimination victims [in the latter case] would be derived not at the expense of the employer but at the expense of other workers."[26]

In addition to expressing concern about the rights of white workers, Justice Powell questioned whether Title VII permits any type of remedial relief that has the effect of granting preferential treatment to a particular group. As he put it, "[t]he congressional bar to one type of preferential treatment in section 703(j) [of Title VII[27]] should at least give the Court pause before it imposes upon district courts a duty to grant relief that creates another type of preference."[28]

It is interesting to note that the majority was careful to point out that the relief ordered in *Franks* was directed toward specified discriminatory acts and their victims and that the expectations and rights of other employees were not impaired. Indeed, the majority recited at some length that the particular relief in question did not accrue at the expense of previously hired workers.[29] Inherent in such reasoning is the implication that legitimate expectations, which are not directly predicated on prior unlawful acts, may not be infringed. Thus, it appears that the majority left the door open for a contrary decision in a case where the rights of previously hired employees are more seriously affected.[30]

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25. Granting seniority rights to or hiring a particular individual who has been discriminated against is significantly different from allowing absolute or qualified preferences to an entire group of persons solely on the basis of their race or sex. The first is a necessary and just form of relief to a person who has been unjustly deprived of a position to which he or she was rightfully entitled. Such relief was believed by the *Franks* majority to be required by section 706(g). But the second type of relief gives preference to an entire group of people without regard to whether any of them have actually been the victims of discriminatory treatment. Just as white employees should not be allowed to benefit at the expense of black employees merely because they happen to be the color that an employer prefers, black employees should not be granted a preference over equally qualified white employees solely because of *their* skin color.

26. 424 U.S. at 788-89 (Powell, J., concurring in part and dissenting in part).

27. *See* note 33 *infra*.

28. 424 U.S. at 793 (Powell, J., concurring in part and dissenting in part).

29. *Id.* at 778-79. The majority further recognized, as did Justice Burger in his partial dissent, that such affirmative relief may in some cases give rise to an action for damages to injured employees. *See id.* at 777 n.38, 779-80.

30. The majority stated: "Obviously, however, the concern of the entire thrust of the

Placed in their proper contexts, *McDonald* and *Franks* establish the boundaries of the conflict between reverse discrimination and affirmative relief. *McDonald*, by holding that reverse discrimination of itself violates Title VII, imposes a limit on the permissible extent of remedial orders. *Franks*, by stating that Title VII mandates the correction of prior discriminatory acts against identifiable employment applicants, protects some affirmative action programs from reverse discrimination charges. Neither case, however, provides a resolution for the middle ground: how far can a *Franks* remedy proceed before it subjects the employer to *McDonald* liability? More specifically, does not a quota remedy overstep the limit drawn in *McDonald*? In search of principles delineating the permissible extent of *Franks*, appellate courts have floundered, resorting both to constitutional theory and statutory analysis for a solution. In their search, however, most of the courts have failed to examine properly section 703(j) and Title VII's legislative history.

II. Legislative Intent Underlying Section 703(j)

Title VII specifically authorizes federal district courts to order appropriate affirmative action in situations where the defendant has intentionally engaged in an unlawful employment practice. Once a violation of Title VII is established, the district court possesses broad powers as a court of equity to eliminate the vestiges of past discrimination.[31] This authorization, however, must be read in conjunction with the specific limitation on quota relief imposed by section 703(j).[32] While an argument can be made that section 703(j) prohibits only "racial balancing,"[33] the legislative history makes it clear that the section was meant to operate as a strict limitation on any type of quota relief.

The Civil Rights Act of 1964 was first introduced in a bill presented to the House of Representatives as H.R. 7152. As reported out of the House Judiciary Committee, the bill did not include section 703(j) or any other

dissent—the impact of rightful place seniority upon the expectations of other employees—is in no way a function of the specific type of illegal discriminatory practice upon which the judgment of liability is predicated." *Id.* at 764-65 n.21. *See also* Edwards, *supra* note 2, at 625, where the author commented, "[T]he situations when seniority relief is appropriate may be limited to those cases where the plaintiffs can identify themselves as persons who would have had that seniority but for the illegal discrimination."

31. The express language of § 706(g) and Supreme Court interpretation support this proposition. *See* note 6 *supra*. The court's discretion, however, is reviewable and must be exercised with sound judgment and respect for the legal principles of Title VII. *See* Franks v. Bowman Transp. Co., 424 U.S. at 764-67.

32. 42 U.S.C. § 2000e-2(j) (1970). Section 703(j) is set forth in full in the text accompanying note 39 *infra*.

33. Arguably, § 703(j) does not prohibit the types of quotas which are aimed only

similar section. Indeed, the bill was passed by the House without section 703(j) and was sent directly to the Senate for floor debate.[34]

Senate opposition to the Civil Rights bill centered on fears that the House bill would require a federally administered system of racial quotas.[35] To counter this opposition, the bill's floor leaders submitted an interpretative memorandum which declared that deliberate attempts on the part of employers to maintain racially balanced hiring systems would be violative of Title VII.[36] This memorandum was not sufficiently persuasive to deter opponents of the bill from introducing amendments which specifically articulated the prohibition against quotas.[37] Eventually, while debate continued in the Senate, the Dirksen-Mansfield amendment, actually a series of amendments, was

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at curing past discriminatory practices. The difficulty with this argument is that most quotas do, in effect, correct an imbalance in the percentage of minority workers and the total percentage of minorities in the employment community. The argument therefore merely circumvents the existence of § 703(j) and does not substantively address that subsection. Furthermore, the legislative history of § 703(j) indicates that Congress meant to prohibit race or sex as a qualification for employment. *See* note 36 *infra*.

34. 110 CONG. REC. 2805 (1964).

35. *See, e.g.*, 110 CONG. REC. 7778 (1964) (remarks of Sen. Tower): "Ultimately, I think the effect of the bill would be to compel an employer in a given community to hire a given percentage of people of every nationality or ethnic background in the community."

36. Interpretative Memorandum of Title VII, *supra* note 15. The memorandum stated that in the case of a business that has had a discriminatory hiring policy in the past, the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis: "[The employer] would not be obliged—or, indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of white workers hired earlier." *Id.* at 7213.

Remarks of Senator Harrison Williams, while not part of the Interpretative Memorandum, are also enlightening:

> [T]o hire a Negro solely because he is a Negro is racial discrimination, just as much as a 'white only' employment policy. Both forms of discrimination are prohibited by title VII of this bill. The language of that title simply states that race is not a qualification for employment. . . . Those who say that equality means favoritism do violence to common sense.

110 CONG. REC. 8921 (1964).

Also instructive is the following revealing question and answer exchange submitted by Senator Clark, and referred to by Judge Widener in his concurring and dissenting opinion in Patterson v. American Tobacco Co., 535 F.2d 257, 277 (4th Cir. 1976). The exchange reads:

> Objection: The bill would require employers to establish quotas for nonwhites in proportion to the percentage of nonwhites in the labor market area.
>
> Answer: Quotas are themselves discriminatory.

110 CONG. REC. 7218 (1964).

37. Senator Allott proposed an amendment, to make "it clear that no quota system will be imposed if title VII becomes law." 110 CONG. REC. 9881 (1964). This proposal contained in essence the substance of the present section 703(j).

prepared. It was this amendment which contained the language eventually adopted in section 703(j). The express purpose of this amendment was to allay fears about racial quotas.[38] Section 703(j) provides in pertinent part:

> Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, [or] labor organization . . . subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, . . . admitted to membership or classified by any labor organization, . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.[39]

Thus, while Congress specifically authorized the use of affirmative action programs in section 706(g) of the Act, it limited that broad grant by forbidding the use of quotas in section 703(j).[40]

The legislative circumstances surrounding the passage of section 703(j), therefore, indicate that any type of program, such as a quota system, which grants arbitrary preference to a group of persons solely on the basis of an impermissible classification such as race or sex cannot be sustained. However, several of the circuit courts which have focused their attention on this problem and its many ramifications have held otherwise.[41]

III. Affirmative Action Orders in the Circuit Courts

Initially, it is important to place in proper perspective those circuit court decisions which have granted quota relief. The decisions are usually

38. *See* 110 Cong. Rec. 12,723 (1964) (remarks of Sen. Humphrey, one of the drafters of the amendment). Senator Humphrey previously stated:

> Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power . . . to any court to require hiring, firing, or promotion of employees in order to meet a racial "quota" or to achieve a racial balance.
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> . . . In fact, the very opposite is true. Title VII prohibits discrimination. . . . Title VII is designed to encourage hiring on the basis of ability and qualifications, not race or religion.

110 Cong. Rec. 6549 (1964).

39. 42 U.S.C. § 2000e-2(j) (1970).

40. *See* United States v. Wood Lathers Local 46, 471 F.2d 408, 413 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); United States v. Ironworkers Local 86, 443 F.2d 544, 553 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971).

41. *See* note 46 *infra*.

cast in either constitutional or statutory terms, and sometimes, confusingly, in both contexts. When quota relief is ordered in a constitutional context, such as where governmental employers or federal funding are involved, the issue is whether the equal protection clause of the fourteenth amendment permits the ordering of affirmative relief which in itself discriminates against a particular group. The answer is a qualified "yes." It depends on the extent of the discrimination and the substantiality of the state interest which is furthered by the ordering of such relief. Title VII usually forms the basis for statutory quota relief, giving rise to questions about the scope of the prohibition of section 703(j). Other statutes also authorize a cause of action for reverse discrimination when quota relief is ordered through the medium of those statutes.[42]

Significantly, those courts which have upheld the establishment of quota systems have looked upon quotas with disfavor and have generally viewed such relief as a drastic measure which may be imposed only under the most grievous of circumstances, and then only for a temporary period of time.[43] This viewpoint is easily understandable when one remembers that a quota is a volatile remedy which operates to *exclude* as well as include.[44] A careful

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42. *See, e.g.*, 42 U.S.C. § 1981 (1970). In *McDonald*, the Court declared that § 1981 proscribes racial discrimination in private employment against whites as well as nonwhites. This holding is supported by the statutory language which explicitly protects "all persons." Furthermore, Senator Trumball of Illinois, the sponsor of the Civil Rights Act of 1866, in which the language used in § 1981 first appeared, defended the bill during closing debate in the Senate by stating unequivocally that "this bill applies to white men as well as black men." CONG. GLOBE, 39th Cong., 1st Sess. 599 (1866).

Justice White, joined by Justice Rehnquist, dissented in *McDonald* as to § 1981 for reasons stated in their dissent in Runyon v. McCrary, 427 U.S. 160, 192 (1976). In that dissent, the two Justices stated their belief that § 1981 "reaches only discriminations imposed by state law." *Id.*

While the *McDonald* majority conclusively extended the protection of § 1981 to whites as well as blacks, the Court did not find it necessary to examine what, if any, difference existed between the scope of protection afforded to whites under § 1981 and under Title VII. Nevertheless, the language of § 1981 is both narrower and broader than the scope of Title VII. Section 1981 applies only to racial discrimination and does not extend its protection to discrimination on the basis of religion, sex, or national origin. On the other hand, it is also broader than Title VII in that it applies to certain employers (such as those with less than 15 employees) and other private institutions who are beyond the reach of Title VII. *See, e.g.*, Runyon v. McCrary, 427 U.S. 160 (§ 1981 held applicable to private, commercially operated, nonsectarian schools). Furthermore, some of the burdensome procedural requirements of Title VII may be avoided in a § 1981 action. *See* Edwards, *supra* note 2, at 590. *See generally* Larson, *The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 56 (1972).

43. *See, e.g.*, Carter v. Gallagher, 452 F.2d 315, 330-31 (8th Cir. 1971) (en banc), *cert. denied*, 406 U.S. 950 (1972).

44. *See* Hiatt v. City of Berkeley, 9 Empl. Prac. Dec. ¶ 9969 (Cal. Super. Ct. 1975).

scrutiny of circuit decisions mandating quota relief demonstrates that the courts frequently confuse statutory and constitutional analysis and, therefore, do not adequately justify their conclusions. For purposes of clarity, these decisions are discussed in the statutory or constitutional context in which they arose.

A. Affirmative Relief in a Title VII Context

An examination of the Second Circuit's 1973 opinion in *United States v. Wood Lathers Local 46*,[45] and of other opinions rendered by that court, shows that the Second Circuit has taken the lead in thoroughly discussing the various forms of affirmative relief that courts have generally held to be proper under Title VII.[46] *Wood Lathers* presented a complicated fact pattern in which the United States brought suit against the defendant union, alleging a violation of Title VII through discrimination in work referrals. Under a consent decree entered by the district court, an administrator was appointed to make an objective study of the union's work permit system and recommend whatever changes he found necessary to achieve equal employment opportunity. Following his study, the administrator recommended that the union issue 100 work permits to minority applicants. The district court approved this recommendation.

The factual situation leading to this recommendation presents a different picture from the usual circumstances under which quota orders are issued. In this case, the union had previously terminated its practice of issuing work permits to nonunion members. As the majority of union members were white, that action effectively foreclosed most of the nonwhite laborers from working in the two types of construction industries in which Local 46 had exclusive representation. Following the withdrawal of permits to nonunion

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In *Hiatt*, the California Superior Court struck down a 1972 affirmative action program for the City of Berkeley, holding that "[t]hose portions [of the program] which provide for racial quotas, non-competitive examinations and preferential hiring based on race or sex to the exclusion [of merit and experience] must be deemed to be arbitrary and discriminatory." *Id.* at 7053.

45. 471 F.2d 408 (2d Cir. 1973).

46. In total, eight circuits have upheld the imposition of quotas in an employment context. *See* Rios v. Steamfitters Local 638, 501 F.2d 622, 629 (2d Cir. 1974). *See, e.g.*, United States v. Masonry Contractors Ass'n, 497 F.2d 871 (6th Cir. 1974) (court ordered establishment of hiring quotas); United States v. Wood Lathers Local 46, 471 F.2d 408 (2d Cir. 1973) (minimum of 100 work permits issued to nonwhite workers); Illinois Builders Ass'n v. Ogilvie, 471 F.2d 680 (7th Cir. 1972) (court-approved plan created an employment ratio of minority trainees to journey persons); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972) (one minority fire fighter must be hired for every two white fire fighters who are hired); United States

personnel, the number of nonwhite permit holders declined from 170 to 72, indicating that the union inself did have some nonwhite members. Thus, the district court's order was, in effect, a remedial measure directed primarily toward the 100 nonwhites who had previously held permits. It was not a general type of quota relief directed toward an entire working force.[47]

The Second Circuit, in upholding the issuance of the permits, stated that "while quotas merely to attain racial balance are forbidden, quotas to correct past *discriminatory practices* are not."[48] The difficulty with such a distinction is that it does not take into account that virtually all racial imbalance can be traced to some form of past discrimination. The distinction suggested by the Second Circuit would thus render meaningless the section 703(j) prohibition of quotas to achieve racial balance.

As Supreme Court authority for its reasoning, the court cited *Louisiana v. United States*.[49] *Louisiana* was a voting rights case in which an "interpretation test" was used as a disenfranchising device against black voters. The test was struck down as violative of the fourteenth and fifteenth amendments. This case did not deal with quotas and, in fact, did not accord any type of special treatment to black voters. Instead, what the Court did require in *Louisiana* was that a new, and valid, "citizenship" test be administered to all prospective voters only after all voters in those parishes that had previously utilized the discriminatory "interpretation test" had reregistered. The Court did speak in broad terms about its authority to eradicate discrimination by saying it had the "power . . . to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like dis-

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v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971) (court ordered union to accept 30% blacks in its apprenticeship program, with a minimum number of blacks being hired each year until the 30% quota was reached); Local 53, Int'l Ass'n of Heat & Frost Insulators v. Vogler, 407 F.2d 1047 (5th Cir. 1969) (in order to counteract all white union's nepotistic policies which resulted in exclusion of blacks and Mexican-Americans, court ordered union to develop objective, trade-related membership criteria).

47. Another unique feature of this decision was the fact that since the union had previously agreed to be bound by the changes suggested in the administrator's report, it could not raise § 703(j) as a bar on appeal.

48. 471 F.2d at 413 (emphasis added). In support of this statement, the Second Circuit cited Carter v. Gallagher, 452 F.2d 315, 329 (8th Cir. 1971); United States v. Ironworkers Local 86, 443 F.2d 544, 553 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); Contractors Ass'n of E. Pa. v. Secretary of Labor, 442 F.2d 159, 173 n.47 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971); United States v. Electrical Workers Local 38, 428 F.2d 144, 149 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970); Local 53, Int'l Ass'n of Heat & Frost Insulators v. Vogler, 407 F.2d 1047, 1052 (5th Cir. 1969); United States v. Central Motor Lines, Inc., 325 F. Supp. 478 (W.D.N.C. 1970).

49. 380 U.S. 145 (1965).

crimination in the future."[50] However, the method imposed by the Court to prevent future discrimination insured equal treatment of all voters and did not grant prospective special treatment to black voters. Thus, the language used in this case cannot logically be interpreted to support the ordering of preferences to any particular group.[51]

One year after its 1973 *Wood Lathers* decision, the Second Circuit held that ordering the admission of a stated percentage of nonwhite workers[52] into a union and a joint employer-union apprenticeship program was allowable under Title VII. In *Rios v. Steamfitters Local 638*,[53] the court relied on the rationale used in *Wood Lathers* and declared that section 703(j) prohibits racial balancing only when the racial imbalance that exists is unrelated to discrimination.[54] Such an interpretation cannot reasonably be supported by the statutory language of section 703(j), which does not distinguish between the causes of an existing imbalance.[55] Furthermore, as Judge Hays admonished in his often-quoted dissent in *Rios*, such a reading is contrary to the unambiguous legislative history of the section.[56] The majority did not address the legislative history and, therefore, did not attempt to reconcile its decision with the history of Title VII.

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50. *Id.* at 154.

51. While the relief granted in *Wood Lathers* can be viewed as an attempt to prevent further discrimination against a specific group of 100 persons, the relief ordered in the other cases cited in *Wood Lathers* was much broader and is even less justified by the Supreme Court's decision in *Louisiana*. *See* note 36 *supra*. Furthermore, the *Wood Lathers* court ordered additional relief in the form of 250 permits issued annually on a one-to-one basis (one permit issued to a black for each permit issued to a white) through 1975.

52. The "nonwhite" groups who were involved in this particular suit were black and Spanish-surnamed workers.

53. 501 F.2d 622 (2d Cir. 1974).

54. The *Rios* court contended that while at first a court-ordered racial goal might appear to violate the language of § 703(j), when the imbalance is directly caused by past discriminatory practices, the precise method of remedying past misconduct is left largely to the broad discretion of the district judge. 501 F.2d at 630-31.

55. Judge Hays pointed to this in his dissent when he said:

> The majority's failure to point to any textual justification for its position can be traced to the fact that section 703(j) speaks in sweeping terms, forbidding all preferential treatment.
>
> . . . .
>
> . . . It is not concerned with the causes of imbalance, past, present, or future. It provides for no exception from its broad prohibition for imbalance caused by past discrimination. It simply removes racial preferences from the otherwise broad category of equitable relief available to a district court in a Title VII case.

Id. at 634.

56. *Id.* This dissent was characterized as "powerful" by Judge Feinberg in Patterson

Interestingly, the courts that have dealt with the permissibility of quotas under Title VII have, like the Second Circuit, failed to acknowledge the legislative history and purpose of section 703(j). For example, in *United States v. Masonry Contractors Association of Memphis*,[57] the Sixth Circuit confirmed the district court's finding that the defendant masonry contractors had engaged in a pattern or practice which deprived blacks of employment opportunities in the masonry construction industry. The court found this conduct violative of section 707(a)[58] of the 1964 Civil Rights Act and upheld the hiring quotas imposed upon those contractors found to be "employers" within the meaning of Title VII.[59] Aside from its conclusory assertion that the relief was valid, the court cited only the Second Circuit's *Wood Lathers* opinion in support of its position that affirmative action may include the establishment of hiring quotas. This type of reasoning is an inadequate justification for the imposition of such controversial relief, particularly when the relevant statutory language and history stand in direct opposition to the court's action.

B. Affirmative Relief in the Context of Sections 1981 and 1983

Some plaintiffs have sought affirmative relief by alleging violations of federal statutes other than Title VII. Such plaintiffs enjoy an advantage over those persons bringing Title VII claims in that they are not faced with the specific limitation of section 703(j). For example, in two cases brought under section 1 of the Civil Rights Act of 1871 (section 1983),[60] *Vulcan*

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v. Newspaper Union, 514 F.2d 767, 776 (2d Cir. 1975), and was also cited in EEOC v. Local 638, Sheet Metal Workers, 532 F.2d 821, 827 (2d Cir. 1976).

57. 497 F.2d 871 (6th Cir. 1974).

58. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e-6(c), (d), (e) (Supp. III 1973)). The unamended version of section 707(a) considered by the court provided in pertinent part:

> Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, . . . the Attorney General may bring a civil action in the appropriate court of the United States . . . requesting such relief . . . as he deems necessary to insure the full enjoyment of the rights herein described.

59. Title VII defines "employer" as follows:

> (b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks . . ., but such term does not include (1) the United States . . . or any department or agency of the District of Columbia . . . .

42 U.S.C. § 2000e(b) (Supp. III 1973).

60. 42 U.S.C. § 1983 (1970).

Society v. Civil Service Commission[61] and *Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission*,[62] the Second Circuit allowed hiring quotas for an interim period until valid job-related tests could be formulated by the state. Because these actions were brought under section 1983, the court had no need to recognize the limitation of section 706(j) as had been required in *Wood Lathers*. While the Second Circuit in *Bridgeport Guardians* acknowledged that quotas were discriminatory,[63] it nevertheless cited, as justifications for interim quota relief, the failure of defendants to recruit minority personnel or to recognize the innate cultural bias of examinations that emphasize verbal skills rather than professional skills. Further, the court emphasized the importance of including minorities in the defendant's police department since such inclusion would help decrease racial divisiveness in law enforcement. Among the cases cited by the Second Circuit as sanctioning quota relief was the Eighth Circuit's decision in *Carter v. Gallagher*.[64]

In *Carter*, the Eighth Circuit overturned an order by the district court granting absolute hiring preference to minority applicants for firefighter positions with the Minneapolis Fire Department. Jurisdiction in this case was premised on federal question jurisdiction[65] and the Civil Rights statutes (sections 1981 and 1983)[66] instead of on Title VII.[67] The *Carter* court

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61. 490 F.2d 387 (2d Cir. 1973).

62. 482 F.2d 1333 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975).

63. The Second Circuit stated:

> We agree of course that hiring quotas are discriminatory since they deliberately favor minority groups on the basis of color. . . . While we approve such relief somewhat gingerly, we do not believe that Judge Newman abused his discretion in imposing the quotas on hiring here. Although there was no showing of intentional discrimination, it is also a fact that the defendants were employing an archaic test which was not validated and which, as we have found, was not job related.

482 F.2d at 1340.

64. 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

65. 28 U.S.C. § 1331 (1970). Section 1331 provides in relevant part: "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

66. The Civil Rights statutes involved here were 42 U.S.C. §§ 1981 and 1983 (1970). Jurisdiction was also founded on 28 U.S.C. § 1343(3), (4) (1970). Section 1343 grants original jurisdiction to district courts of any civil action brought

> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. . . .

67. The *Carter* court specifically stated, "[p]laintiffs do not base jurisdiction on Title 7 of the Civil Rights Act of 1964." 452 F.2d at 322. *See also* Morrow v. Crisler, 491 F.2d 1053 (5th Cir.), *cert. denied*, 419 U.S. 895 (1974); Pennsylvania v. O'Neil,

nevertheless considered both Title VII and the fourteenth amendment in assessing the legality of absolute preferences.

The defendants challenged the district court's granting of absolute quotas as violative of the fourteenth amendment because it infringed on the constitutional rights of white persons with superior job qualifications to obtain employment. The appellate court initially agreed with these contentions,[68] pointing out that the Supreme Court has recognized that Congress intended section 1981 to be as broad as the fourteenth amendment,[69] and that both the fourteenth amendment and section 1981 proscribe any racial discrimination in employment, whether the discrimination be against whites or blacks.[70] On rehearing en banc, however, the court ordered the fire department to adopt a one-to-two hiring ratio—that is, one minority applicant was to be hired for every two white persons hired—until twenty qualified minority persons were hired.[71] The court's revision of the panel opinion was premised largely on a concern that minority applicants would be reluctant to apply for vacancies in light of the department's past discriminatory hiring techniques.

In rationalizing the implementation of a modified quota approach, the court of appeals relied largely on two arguments. The first was that section 706(g), which speaks of the "hiring of employees" as a form of affirmative

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348 F. Supp. 1084 (E.D. Pa. 1972), *aff'd in part and vacated in part*, 475 F.2d 1029 (3d Cir. 1973).

68. The court initially stated:

> The fact that some unnamed and unknown White person in the distant past may, by reason of past racial discrimination in which the present applicant in no way participated, have received preference over some unidentified minority person with higher qualifications is no justification for discriminating against the present better qualified applicant upon the basis of race.

452 F.2d at 325.

69. The *Carter* court cited plaintiffs' brief as a proper statement of the law. The pertinent language of plaintiffs' brief read:

> For the past 90 years the Supreme Court has recognized that the Congress intended section 1981 to have as broad a scope as the Fourteenth Amendment where state action is involved. In Strauder v. West Virginia, 100 U.S. 303 . . . (1880), the Court stated with respect to Rev. Stat. 1977 (now section 1981) that "this Act puts in the form of a statute what had been substantially ordained by the Constitutional Amendment." 100 U.S. at 312. . . . On the same day, in Virginia v. Rives, 100 U.S. 313, 317-18 . . . (1880), the Court treated the Civil Rights Act and the Fourteenth Amendment as coextensive in substance. The close relationship between the Civil Rights Act of 1866 and the Fourteenth Amendment has been consistently emphasized by the Court.

452 F.2d at 325.

70. *Id.* *See* note 42 and accompanying text *supra*.

71. 452 F.2d at 325.

action, appears to permit the imposition of such relief.[72] In light of the specific prohibition in section 703(j), however, it it more logical to read the hiring language in section 706(g) as a reference to the specific hiring of identifiable individuals who have themselves been the victims of discriminatory practices. Secondly, the court placed some reliance on *Louisiana v. United States*[73] and *Swann v. Charlotte-Mecklenburg Board of Education.*[74] *Louisiana*, however, is as inapposite to the *Carter* case as it is to *Wood Lathers* because, although the language used in *Louisiana* is broad, the granting of preferential treatment cannot be supported by its holding. Similarly, the *Swann* decision is also distinguishable from cases which involve the issuance of quota relief—whether those cases arise in a statutory or a constitutional context—because the relief ordered in *Swann* did not absolutely deprive any members of a particular race from enjoying equal employment opportunities.[75] Therefore, the Eighth Circuit's grant of quota relief, prompted by its concern with the reluctance of minority applicants to seek employment with the Minneapolis Fire Department, cannot be justified by the *Louisiana* and *Swann* opinions.

C. Affirmative Relief in a Constitutional Context

While Congress has created multiple statutory bases on which some form of affirmative action may be granted, the fifth and fourteenth amendments have also been used to provide a distinct cause of action for such relief. To counter constitutional claims seeking quota relief, defendant-employers have contended that the racial[76] or sexual[77] classifications imposed by such relief are permissible, if at all, only in furtherance of a compelling state interest. Depending on the gravity of the circumstances, equal employment op-

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72. *Id.* at 330.

73. 380 U.S. 145 (1965).

74. 402 U.S. 1 (1971).

75. *See* notes 85 and 86 and accompanying text *infra.*

76. It has long been settled that classifications based on race or national origin are suspect and may only be justified by a compelling state interest. *See, e.g.*, Hirabayashi v. United States, 320 U.S. 81 (1943) (national origin); Strauder v. W. Va., 100 U.S. 303 (1879) (race).

77. It is as yet unsettled whether classifications based on sex are "suspect": *compare* Schlesinger v. Ballard, 419 U.S. 498 (1975) (Court utilized a rational basis test to uphold a statutory scheme granting female naval officers a thirteen year tenure of commissioned service before mandatory discharge for lack of promotion, but requiring discharge of male officers who are twice passed over for promotion even though they have less than thirteen years of commissioned service), *and* Kahn v. Shevin, 416 U.S. 351 (1974) (Court applied a fair and substantial relationship test to validate a Florida statute granting widows, but not widowers, a $500 exemption from property taxation) *with* Frontiero v. Richardson, 411 U.S. 677 (1973) (Court applied a suspect classification

portunity may represent a compelling state interest.[78] The appropriate equal protection analysis also requires, though, almost as a condition precedent to the imposition of discriminatory, quota-type relief, a clear showing that less drastic forms of relief have failed, or would fail, to have the requisite remedial effect.[79] This latter requirement, however, has not always been recognized by those courts which have upheld quota relief against constitutional attack.

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standard of review to strike down statutes providing, for administrative convenience, that spouses of servicemen are dependents but spouses of female members of the armed forces are not dependents unless they are in fact dependent on their wives for over one-half of their support). Gender-based classifications are, however, being subjected to an exacting judicial scrutiny. *See, e.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (Court applied a strict standard of review to invalidate a Social Security Act provision, 42 U.S.C. § 402(g), which discriminated against widowers. The court indicated it might have been willing to uphold the classification had it been tailored to provide for special problems faced only by widows); Reed v. Reed, 404 U.S. 71, 76 (1971) (Court applied a fair and substantial relationship test to invalidate a mandatory provision of the Idaho probate code that gave preference to men over women when persons of the same entitlement class applied for appointment as administrators of decedents' estates). For the Court's most recent statement on the appropriate standard of review of gender-based classifications, see Craig v. Boren, 97 S. Ct. 451 (1976) (Court held that such classifications must be substantially related to the achievement of important governmental objectives).

78. *But see* the dissent of Mr. Justice Douglas in Defunis v. Odegard, 416 U.S. 312 (1974), in which he stated:

> The argument is that a "compelling" state interest can easily justify the racial discrimination [in law school admissions] that is practiced here. . . . The State, however, may not proceed by racial classification to force strict population equivalencies for every group in every occupation, overriding individual preferences. The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized.

Id. at 341-42. *Cf.* McLaughlin v. Florida, 379 U.S. 184, 198 (1964) (Stewart & Douglas, JJ., concurring) (Stewart felt it inconceivable that any legislative purpose justified a criminal statute prohibiting cohabitation by unmarried interracial couples).

79. In Bakke v. Regents of Univ. of Cal., 18 Cal. 3d 34, 553 P.2. 1152, 132 Cal. Rptr. 680 (1976), *cert. granted*, Feb. 22, 1977, the California Supreme Court invalidated a preferential admissions program which served disadvantaged, minority students. The court held that although the university articulated compelling state interests which were furthered by the program, it failed to demonstrate that less burdensome alternatives could not achieve the same result. The court questioned "whether the university [had] established that the special admission program is the least intrusive or even the most effective means to achieve this goal." *Id.* at 56, 553 P.2d at 1167, 132 Cal. Rptr. at 695.

The court suggested that the university consider the use of more flexible admissions criteria as well as the institution of

> aggressive programs to identify, recruit, and provide remedial schooling for disadvantaged students of all races who are interested in pursuing a medical career and have an evident talent for doing so.

In *Southern Illinois Builders Association v. Ogilvie*,[80] the Seventh Circuit sustained a minority recruitment and training plan intended to implement equal employment opportunities in the highway construction industry in two Illinois counties. Constitutional jurisdiction was established on the ground that the industry was partially funded by federal funds. The defendant unions contended that the recruitment plan, which set out an employment ratio of minority trainees to journey persons on highway construction, established a quota hiring system in violation of Title VII and the fifth and fourteenth amendments. The Seventh Circuit disagreed, basing its decision in part on the *Swann* case and *United States v. Montgomery County Board of Education*.[81] In *Montgomery*, the Supreme Court reinstated a district court order setting a goal for faculty assignments of at least two black teachers for every twelve teachers in any given school.[82] Similarly, in *Swann*, the Court rejected the contention that teachers and students must be assigned on a color-blind basis and held that the Constitution allows district courts to use their equity powers to assign both groups in such a manner as to achieve a particular degree of desegregation.[83]

There is an important difference between these education cases and cases such as *Carter* and *Southern Illinois Builders*, which arise in an employment context. Imposing a hiring ratio in an employment case means that the court runs the risk of depriving a qualified white person of a job simply because he or she is white, and therefore, ineligible to be hired if the ratio of employable whites has already been filled. In the educational context, however, desegregation orders run neither the risk of depriving children of an education nor the risk of depriving teachers of employment.[84] The educational effect of such orders is merely that some children will be educated in schools other than those in which they are currently enrolled. Depending

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> Another ameliorative measure which may be considered is to increase the number of places available in the medical schools, either by allowing additional students to enroll in existing schools or by expanding the schools.

Id. at 55, 553 P.2d at 1166, 132 Cal. Rptr. at 894.

80. 471 F.2d 680 (7th Cir. 1972).

81. 395 U.S. 225 (1969).

82. *Id.* at 235-36.

83. 402 U.S. at 19. In the context of student assignments, the Court was careful to add that it did not view this holding as requiring any degree of racial balance or mixing, and that, in fact, such a requirement would be impermissible. Furthermore, the Court treated the use of "mathematical ratios [as] no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement." *Id.* at 24-25.

84. "The judicial theory of school integration has been that children are helped by integration or, at the least, that white children are not harmed by it." Developments in the Law, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1115 (1971).

on the factual circumstances of each case, this may mean that some children will be sent to schools which are inadequately funded or improperly staffed and may, therefore, receive an education inferior to that which they would have received at their former school. While this is a serious and disturbing problem in many communities, it is not an absolute deprivation of education; therefore it may not be an unreasonable price to pay in order to desegregate an entire school system and thus provide equal educational opportunity to all children in the future.

The type of order handed down in *Montgomery* is also significantly less drastic than the quota remedies mandated in *Southern Illinois Builders* and *Carter*. *Montgomery* addressed faculty desegregation and ordered the assignment of teachers to different schools with the goal of providing that "in each school the ratio of white to Negro faculty members is substantially the same as it is throughout the system."[85] As in *Swann*, this order did not deprive any members of a particular race of the opportunity to equal employment, but merely reassigned faculty members, who were already employed by the county, in a manner that furthered desegregation throughout the entire school system.

Furthermore, *Louisiana* and *Swann* are primarily relevant in the context of a constitutional violation in which discrimination is predicated on deliberate conduct.[86] The court in *Southern Illinois Builders* expressly relied on the opinion of the district court, which had cited discrimination statistics as well as the defendant unions' presumed purpose to perpetuate discriminatory membership policies. The lower court, however, did not specify which, if either, of these factors supported a determination of a constitutional violation by the defendant unions,[87] and the appellate opinion cited only the effects of the unions' discriminatory treatment as a basis for ordering quota

85. 395 U.S. at 232.

86. The *Swann* Court specifically stated that "[a]bsent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis." 402 U.S. at 28. A constitutional violation, under the *Swann* holding, necessarily involves intent to discriminate as demonstrated by the following statement: "We do not reach in this case the question whether a showing that school segregation is a consequence of other types of state action, without any discriminatory action by the school authorities, is a constitutional violation requiring remedial action by a school desegregation decree." *Id.* at 23.

87. The district court held that the Ogilvie Plan, which provided a program for the recruitment, placement, and training of minority group members in the highway construction industry, was constitutionally valid and was based on Executive Order No. 11246, which required affirmative action in recruiting, training, and hiring of minority group persons by contractors involved in federally subsidized highway construction programs. 327 F. Supp. 1154, 1160 (1971).

relief. Similarly, the *Carter* panel and en banc opinions recognized the statistical underrepresentation of minorities in the fire department, although the panel opinion also attributed some specific discriminatory intent to the fire chief's hiring practices.[88] However, neither the *Carter* nor the *Southern Illinois Builders* opinion clarifies the extent of discrimination required for a constitutional violation. The opinions leave unsettled whether a constitutional violation can be predicated merely on statistical evidence or whether discriminatory purpose or intent is necessary to support such a violation.

IV. TITLE VII VIOLATIONS VERSUS CONSTITUTIONAL VIOLATIONS AND THE MUDDY WATERS IN BETWEEN

The Supreme Court recently drew a distinction between the standard of review for a constitutional claim of invidious racial discrimination and the standard of review for a cause of action under Title VII.[89] In *Washington v. Davis*,[90] the Court determined that under Title VII, a violation may be found merely from the existence of a disproportionately adverse impact on a particular racial group, while under the constitutional standard, such a showing is insufficient and a discriminatory purpose must also be shown.[91] This distinction is not always articulated by the circuit courts,[92] but can be

88. The *Carter* court relied on statistical evidence cited by the district court to conclude that the all-white fire department resulted from past discriminatory hiring practices and procedures. There was additional evidence on record, however, indicating that the fire chief "took a strong position against recruitment and employment of Blacks." 452 F.2d 315, 323 (8th Cir. 1971).

89. Washington v. Davis, 426 U.S. 229, 239 (1976). The Court stated: "We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today." *Id.*

90. 426 U.S. 229 (1976).

91. The *Davis* Court pointed out that "[u]nder Title VII, Congress provided that when hiring and promotion practices disqualifying substantially disproportionate numbers of blacks are challenged, discriminatory purpose need not be proved . . . ." *Id.* at 246-47. On the other hand, with regard to a constitutional claim, the Court stated that "our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact." *Id.* at 239. The *Davis* Court did not state whether §§ 1981 and 1983 require a showing of intentional discrimination, but at least one circuit court has asserted that neither section "incorporates any requirement that discrimination be wilfull or intentional." Carter v. Gallagher, 452 F.2d 315, 323 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

92. The *Davis* Court noted this fact in a footnote and referred as examples to the cases listed in the District of Columbia Circuit Court's decision in Davis v. Washington, 512 F.2d 956, 958 n.2 (D.C. Cir. 1975). Among the cases cited in the court of appeals decision were Castro v. Beecher, 459 F.2d 725, 733 (1st Cir. 1972); Chance v. Board of Examiners, 458 F.2d 1167, 1169 (2d Cir. 1972); Carter v. Gallagher, 452 F.2d 315,

of substantial significance in determining the appropriateness of quota relief to remedy past discriminatory employment practices. For example, because a constitutional violation requires a finding of discriminatory intent, it is not illogical to impose a more drastic form of relief in such a situation. Courts may justifiably question whether an employer who has intentionally discriminated can be relied upon to make a good faith effort to comply with court-ordered affirmative action programs. Accordingly, a quota might be the only form of affirmative action that would insure equal employment opportunities to women and minorities. This approach would tailor the scope of the remedy to the nature of the wrong complained of, allowing the imposition of quotas when intent to discriminate is actually found. Assuming proper pleadings and procedures, courts might thus be able to avoid the constraints of section 703(j) and order quota hiring in an essentially Title VII-type case where the employer either is a governmental unit, or is receiving federal financial assistance or contract funding, and the violation complained of rises to the level of a constitutional wrong.

The distinction, however, is not so clear in practice.[93] Section 706(g)[94] allows federal courts to order appropriate affirmative action only if "the court finds that the respondent has *intentionally* engaged in or is *intentionally* engaging in an unlawful employment practice . . . ."[95] Thus, under the language of the provision, intentional discrimination must be shown, or at least inferred, before affirmative action, including quotas, may be ordered. While the *Davis* Court required a finding of intent to support a constitutional violation, section 706(g) also expressly requires a finding of intent to sup-

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318 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972). *But see* the concurring opinion of Justice Stevens in *Davis* in which he stated that he is uncertain how the standards established by the Court should be applied, and added: "Specifically, I express no opinion on the merits of the cases listed in n.12 of the Court's opinion." 426 U.S. at 254.

93. In support of this proposition, see Justice Stevens' concurrence in which he suggested that "the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume." 426 U.S. at 254.

94. 42 U.S.C. § 2000e-5(g) (Supp. III 1973).

95. *Id.* (emphasis added). The *Davis* Court did not address the significance of the language of § 706(g), but it did state that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." 426 U.S. at 242. If such an inference may be drawn in the case of a constitutional violation, there would seem to be no reason why such an inference may not also be drawn in the case of a Title VII violation if similar facts are presented. In fact, unless the courts are ignoring the requirement for a finding of intent under § 706(g), they must be drawing such an inference even though they do not always articulate it.

port affirmative relief. Therefore, when the Court stated that "effects" sufficed for a violation of Title VII, it must have been referring to provisions of Title VII other than section 706(g). The question that remains is whether a court may grant quota relief for a violation that rises to a constitutional level when it is prohibited from granting such relief, even for intentional discrimination, under Title VII.[96]

While Congress has restricted the scope of available remedies under Title VII by prohibiting preferential treatment of any particular group, no such absolute restriction exists in the case of a constitutional violation. Federal courts may impose preferential ratios if they find that, under the applicable equal protection analysis, such remedies are justified.[97] If, however, the intentional discrimination referred to in section 706(g) is coextensive with the constitutional standard of intentional discrimination as articulated in *Davis*, then Congress has made it clear by prohibiting quotas in section 703(j), that even intentional discrimination does not warrant relief in the form of quotas.[98] This prohibition should carry more than just a little weight

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96. It is interesting to note that the Supreme Court may already be backing away from the dichotomy it drew in *Davis*. In General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), the Court made a cryptic reference to the necessity of proving intent in a Title VII case. In the face of allegations that disability plans which exclude pregnancy from their coverage violate Title VII, the Court responded by saying: "Even assuming that it is not necessary in this case to prove intent to establish a prima facie violation of § 703(a)(1), but cf. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-806 (1973), the respondents have not made the requisite showing of gender-based effects." *Id.* at 137.

Furthermore, the majority implied that it might indeed be necessary to demonstrate intent even in a Title VII case. *See* note 98 *infra*.

Justices Brennan and Marshall, in their dissent in *General Electric* were scathingly critical of the majority's inferences. The dissenting Justices contended that while *McDonnell Douglas* involved a complaint in which motivation was a key issue, the Court nevertheless "expressly held that a prima facie violation of Title VII could be proved without affirmatively demonstrating that purposeful discrimination had occurred." 429 U.S. at 153 n.6. The dissenters found "[e]qually unacceptable . . . the implication . . . that the Fourteenth Amendment standard of discrimination is coterminous with that applicable to Title VII." *Id.* As the dissenting Justices stated, "Not only is this fleeting dictum irrelevant to the reasoning that precedes it, not only does it conflict with a long line of cases to the contrary, . . . but it is flatly contradicted by the central holding of last Term's *Washington v. Davis*." *Id.*

97. *See* sec. III(C) *supra*.

98. Some support for this position may be found in General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), in which the Court stated in regard to the definition of discrimination as used in section 703(a)(1) of Title VII:

> While there is no necessary inference that Congress, in choosing this language, intended to incorporate into Title VII the concepts of discrimination which have evolved from court decisions construing the Equal Protection Clause of the Fourteenth Amendment, the similarities between the congres-

with the Court even in the context of a constitutional violation.[99] On the other hand, it may be that an *inference*[100] of intentional discrimination is all that is required under section 706(g). If this is the case, the Court need not be constrained by the congressional expression of section 703(j) in considering the appropriateness of quota relief for a constitutional violation which requires more than an inference of intentional discrimination.[101]

Even in the constitutional context, however, quota relief must be justified under an equal protection analysis. To do so, the Court would have to balance the state's supposedly compelling interest in promoting equal employment opportunity for members of groups previously discriminated against with the rights of other workers to benefit from the same equality of opportunity.

The recently expressed concern of Supreme Court Justices with the rights of other workers in *Franks v. Bowman Transportation Co.*[102] may induce the circuits to draw the balance toward such workers by recognizing that equal employment opportunity can be adequately achieved without the imposition of quotas. Two circuits have recently indicated they may indeed move in this direction.

V. Recent Developments Limit the Scope of Affirmative Action

In 1976, the Fourth and Second Circuits struck down two affirmative action programs, thereby sustaining challenges that employers had made employment decisions entirely on the basis of race, sex, or national origin. Focus-

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sional language and some of those decisions surely indicates that the latter are a useful starting point in interpreting the former.

Id. at 133.

99. *See* p. 516 *supra.*

100. A pragmatic analysis of the circuit court decisions demonstrates that the courts do, or at least could, draw an inference of discriminatory intent in most Title VII cases. *See, e.g.*, EEOC v. Local 638, Sheet Metal Workers, 532 F.2d 821, 826-27 (2d Cir. 1976). *See* Kirkland v. Department of Correctional Servs., 520 F.2d 420 (2d Cir. 1975), which sets out a two-pronged test for the imposition of temporary quotas. The first prong is significant to this discussion in that it necessitates a finding of a "clear-cut pattern of long-continued and egregious racial discrimination." *Id.* at 427.

101. In Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 97 S. Ct. 555 (1977), the Supreme Court elaborated on its decision in *Davis.* The Court articulated those factors which it considered helpful in determining the existence of intentional discrimination—a prerequisite for the issuance of constitutional relief. Those factors include: (1) the impact of official action (absent a stark pattern of discrimination, however, impact is not determinative), (2) the historical background of the decision, (3) the specific sequence of events leading to the challenged official action, (4) any departures from the normal procedural sequence, (5) any departures from the normal substantive standards utilized in determining official action, (6) legislative and administrative history, and (7) testimony as to the purpose of the official action. *Id.* at 564-65.

102. 424 U.S. 747, 780, 781 (1976).

ing on the reverse discrimination aspects of affirmative relief granted by the lower courts, both circuits expressed concern over the rights of more experienced and more senior white employees who were deprived of opportunities for promotion by the implementation of affirmative action.

In *Patterson v. American Tobacco Co.*,[103] a Title VII case, the Fourth Circuit held that the district court was not justified in issuing an order allowing black and female employees with greater seniority but lesser job positions to obtain promotions by "bumping" white male employees from their preferred positions. In reaching this decision, the court balanced the benefit accruing to the black and female employees against the harm imposed upon white male employees who were not responsible for the existence of discrimination in the past.[104] The court opined "that full monetary compensation[105] and the removal of barriers to promotion [would] provide adequate relief to minority employees without [disrupting the rights of] other employees and management."[106] In support of this position the court cited a Fifth Circuit case, *Local 189, United Papermakers & Paperworkers v. United States*,[107] for the proposition that Title VII does not impose a duty on the employer or the courts to demote incumbents.[108] Furthermore, the Fourth Circuit pointed out that this viewpoint has been accepted by every appellate court to which the issue has been presented[109] and that Congress approvingly referred to this interpretation while discussing the 1972 amendments to the Civil Rights Act.[110]

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103. 535 F.2d 257 (4th Cir. 1976), *cert. denied*, 429 U.S. 920 (1976).

104. Whatever harm the white male employees might have suffered by being displaced from preferred positions could have been significantly alleviated by the district court's order that all displaced employees must be paid the same amount as in their former jobs.

This case presented a disturbingly ironic factual situation. The court noted that 31 of the 40 employees who would have been bumped were minority employees. 535 F.2d at 268 n.8.

105. Such compensation is available under 42 U.S.C. § 2000e-5(g) (Supp. III 1973). *See* note 6 *supra*.

106. 535 F.2d at 270.

107. 416 F.2d 980 (5th Cir. 1969).

108. 535 F.2d at 267 (quoting 416 F.2d at 988, where the Fifth Circuit stated:

> The Act should be construed to prohibit the *future awarding* of vacant jobs on the basis of a seniority system that "locks in" prior racial classification. White incumbent workers should not be bumped out of their *present* positions by Negroes with greater plant seniority; plant seniority should be asserted only with respect to new job openings.)

109. 535 F.2d at 267 & n.4 (citing EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975)); United States v. N.L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973); United States v. Chesapeake & O. Ry., 471 F.2d 582 (4th Cir. 1972), *cert. denied*, 414 U.S. 868 (1973); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971)).

110. 535 F.2d at 267 n.5.

The Second Circuit, like the Fourth Circuit, has begun to focus on the rights of majority employees, perhaps moving away from its earlier decisions upholding the permissibility of quotas. In *Chance v. Board of Examiners*,[111] the court, in contrast to its decisions in *Rios* and *Wood Lathers*, held that a district court ruling which ordered the New York Board of Education to dismiss supervisory employees according to a procedure which resulted in racial quotas constituted impermissible reverse discrimination.[112] Apparently applying a statutory standard of review,[113] the court unequivocally stated that depriving a senior, more experienced, white employee of seniority benefits guaranteed to him under the New York Education Law in order to retain a less experienced, less senior, black or Puerto Rican employee violated Title VII, and by implication, section 1981.[114] The court of appeals was quick to point out, however, that prior cases which had indicated approval of racial hiring quotas did not support the plaintiff's claim in the instant case.[115] This was so because there was no showing that the promotional practices of the New York City school system were or had been discriminatory.[116] The court did not believe, therefore, that this situation was anal-

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111. 534 F.2d 993 (2d Cir. 1976), *cert. denied*, 45 U.S.L.W. 3806 (U.S. June 14, 1977) (No. 76-344).

112. The Court of Appeals was unimpressed with the plaintiff's classification of the relief ordered by the district court as "short-term interim relief." The appellate court instead expressed concern over the fact that this litigation had remained unresolved despite several decisions on the matter, and that those supervisory personnel who might lose their jobs by November 30, 1977 (the date on which the district court order would terminate) would take small comfort in the knowledge "that it was merely a temporary order that put them out of work." 534 F.2d at 997.

113. The supervisory personnel in this case were proceeding under 42 U.S.C. §§ 1981 and 1983 instead of under Title VII. The court, however, referred to Title VII, 42 U.S.C. § 2000e-2 (Supp. III 1973), as evidence of Congress' approval of seniority systems. The court took this approval to signify that employment seniority systems are not violative of § 1981. 534 F.2d at 998.

114. The Court stated:

> Congress has clearly placed its stamp of approval upon seniority systems in 42 U.S.C. § 2000e-2. Whether this section be considered a repeal by implication of any possible contrary construction of § 1981, or simply a statement of guiding legal principles, we agree with the court in [Waters v. Wisconsin Steel Works of Int'l Harvester Co., 502 F.2d 1309, 1320 n.4 (7th Cir. 1974)] that "having passed scrutiny under the substantive requirements of Title VII, the employment seniority system . . . is not violative of 42 U.S.C. § 1981."

534 F.2d at 998.

115. *Id.* at 1005. *See, e.g.*, Vulcan Soc'y v. Civil Serv. Comm'n, 490 F.2d 387 (2d Cir. 1973); Bridgeport Civil Serv. Comm'n, 482 F.2d 1333 (2d Cir. 1973).

116. This finding is necessarily premised on the conclusion that a facially neutral "last-hired—first-fired" lay off system does not in and of itself constitute discrimination. This issue has yet to be satisfactorily determined. The Third, Fifth, and Seventh Circuits concur with the conclusion adopted by the Second Circuit in this case. *See* Wat-

ogous to prior cases which had involved actual discriminatory hiring practices.[117]

Both *Chance* and *Patterson* illustrate a distinction which the circuits have drawn between hiring and promotion practices. While several circuits have approved hiring quotas, they have been reluctant to enter too deeply into the promotion sphere and have, consequently, declined to order relief in the form of promotion quotas. There are only two apparent rationales for such a dichotomy. First, in enacting Title VII, Congress evidenced reluctance to interfere with valid seniority systems.[118] Accordingly, the courts may be granting more deference to seniority programs than to hiring programs in order to comply with explicit congressional intent. Second, perhaps the courts are viewing the dichotomy from the perspective of the employee. It is arguable that once an employee is hired, he or she acquires a legitimate expectation of being promoted according to standards similar to those in existence at the time of his or her hiring. Conversely, an applicant does not have a right to be hired, no matter how qualified he or she might be. Therefore, if a legitimate expectation of being hired exists at all, it may be less worthy of consideration than the expectation of a present employee in being considered for promotion.[119]

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kins v. Steel Workers Local 2369, 516 F.2d 41 (5th Cir. 1975); Jersey Cent. Power & Light Co. v. Local 327, IBEW, 508 F.2d 687 (3d Cir. 1975), *vacated & remanded sub nom.* EEOC v. Jersey Cent. Power & Light Co., 425 U.S. 984 (1976). Waters v. Wisconsin Steel Works of Int'l Harvester Co., 502 F.2d 1309 (7th Cir. 1974) *cert. denied*, 425 U.S. 997 (1976).

117. It is interesting to note that in an earlier case involving the same parties, the Second Circuit held that disproportionate racial impact without discriminatory purpose was sufficient to show a prima facie violation of the equal protection clause. Chance v. Board of Examiners, 458 F.2d 1167, 1176-77 (2d Cir. 1972). The Supreme Court disagreed, admonishing that "with all due respect, to the extent that those cases rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation, we are in disagreement." Washington v. Davis, 426 U.S. 224, 245 (1976).

118. Congress enacted a specific provision to protect bona fide seniority systems. Section 703(h) 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 . . . .

42 U.S.C. § 2000e-2(h) (Supp. IV 1974).

119. *See* Perry v. Sindermann, 408 U.S. 593, 602 (1972) (de facto tenure program might warrant legitimate claim of entitlement to job tenure depending on particular policies and practices of employer); Edwards, *supra* note 2, at 599.

Congress, however, has addressed itself to every aspect of private employment and does not appear to have accorded bona fide seniority systems more deference than that accorded to bona fide hiring systems based on valid tests.[120] Further, while currently employed persons may enjoy a more legitimate expectation of promotions than prospective employees enjoy as to hiring, an individual stands to lose more by being denied a job than by being denied a promotion.[121]

Whether *Chance* and *Patterson* are merely aberrations or forerunners of future decisions remains to be seen. Certainly, the *Patterson* decision is more consistent not only with the mandate of section 703(j) of Title VII but also with the opinions of the Chief Justice and Justice Powell in *Franks*.[122] If section 703(j) does indeed prohibit the use of quotas as a form of affirmative action, and the Constitution also precludes their use—except, perhaps, as a last resort when less drastic forms of relief have proved futile—then the *Chance* and *Patterson* decisions more accurately reflect the law governing affirmative action relief. Consequently, the availability of other remedies for past discrimination which do not significantly infringe on the rights of other employees takes on more significance. The effect and effectiveness of such remedies becomes crucial: not only must they correct injuries caused by prior discrimination and serve existing social needs,[123] but they must also

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120. Section 703(h), in addition to protecting valid seniority systems, also shields bona fide ability tests:

> Notwithstanding any other provision of this subchapter, it shall not 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. . . .

42 U.S.C. § 2000e-2(h) (Supp. IV 1974).

121. There would not seem to be much merit in a contention that the expectations of incumbent or prospective white or male employees are less legitimate because they result, at least in part, from past discrimination against blacks and women. Justice Powell addressed this point in *Franks* when he said:

> Such reasoning is badly flawed. Absent some showing of collusion, the incumbent employee was not a party to the discrimination by the employer. Acceptance of the job when offered hardly makes one an accessory to a discriminatory failure to hire someone else. Moreover, the incumbent's expectancy does not result from discrimination against others, but is based on his own efforts and satisfactory performance.

424 U.S. at 788-89 n.7. (Powell, J., concurring in part and dissenting in part).

122. *See* 424 U.S. at 780 (Burger, C.J., concurring in part and dissenting in part); *Id.* at 781 (Powell, J., concurring in part and dissenting in part).

123. The Supreme Court has articulated the twin objectives of Title VII as the eradication of "discrimination throughout the economy" and the making whole of persons "for injuries suffered through past discrimination." Albermarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975).

infringe on the legitimate rights and expectations of other workers or applicants to a lesser extent than do quotas.[124] Although affirmative action remedies must indeed be designed to promote this latter purpose, can they nevertheless continue to serve as judicial tools which eradicate employment discrimination?

VI. Equal Employment Opportunity Without the Imposition of Quotas

Various remedies have been fashioned by the courts pursuant to their statutory and general equitable powers to correct the effects of past discrimination and to prevent further discriminatory practices, thereby adequately fulfilling the dual function of quota relief. Flexible use of remedies other than quotas can effectively eliminate discriminatory employment practices without infringing on the rights and expectations of non-minority workers. Such remedies should be used before a court orders quota relief, which inherently and unjustifiably interferes with the rights of other employees.

Several remedies expressly and impliedly authorized by section 706(g) allow courts to rectify the effects of past discrimination. Beyond the Title VII context, judicial equity powers are also available to enforce similar remedies in constitutional and other statutory cases. Under section 706(g), for example, courts may follow the *Franks* remedy of ordering employment of particular individuals and of granting seniority retroactive to the dates of their employment applications. Further, district courts may enjoin continued use of employment or promotion criteria with the purpose and effect of discrimination against certain protected groups.[125] Section 706(g) also allows the awarding of back pay. These remedies are directed specifically toward the correction of past wrongs. Conversely, quotas do not address those wrongs directly and are thus less sufficient as a means of remedying past discrimination.

Other affirmative action relief is specifically designed to prevent future discrimination. Courts may order employers to formulate objective criteria

124. *See* Carter v. Gallagher, 452 F.2d 315, 328 (8th Cir.), *cert. denied*, 406 U.S. 950 (1972); Local 53, Int'l Ass'n of Heat & Frost Insulators v. Vogler, 407 F.2d 1047, 1053 (5th Cir. 1969). "Focusing on individuals rather than on groups in granting relief, as by providing an immediate remedy to identifiable plaintiffs who were themselves discriminatorily denied jobs, can accomplish much without resort to quotas." EEOC v. Local 638, Sheet Metal Workers Int'l Ass'n, 532 F.2d 821, 834 (2d Cir. 1976) (Feinberg, J., concurring).

125. *See, e.g.*, Patterson v. American Tobacco Co., 535 F.2d 257, 273 (4th Cir.) *cert. denied* 429 U.S. 920 (1976); Brown v. Gaston County Dyeing Mach. Co., 457 F.2d 1377, 1383 (4th Cir.) *cert. denied*, 409 U.S. 982 (1972); Rowe v. General Motors Corp., 457 F.2d 348, 358-59 (5th Cir. 1972).

for both hiring and advancement and to publicize these criteria.[126] If such criteria are indeed objective, an employer's main vehicle of discrimination—unfair hiring or promotional practices—is effectively eliminated. The combination of such objective criteria and a court's authority to order special apprentice programs aimed at encouraging minority employment, assures the same degree of equal employment opportunity for minority groups as would be fostered by quotas.

Nevertheless, courts have recognized several valid functions accomplished by the imposition of quotas. For example, in *Rios v. Steamfitters Local 638*,[127] the Second Circuit was concerned that the defendant union had not made adequate progress toward the goal of enrolling minority membership. Implying that the union had exercised bad faith in compliance with the district court injunction ordering greater minority participation,[128] the appellate court imposed a membership quota requiring the union to enroll a certain percentage of minority applicants. The *Carter*[129] court expressed concern that members of minority groups might be understandably reluctant to seek employment with the Minneapolis Fire Department, which had a widely known reputation for discriminatory hiring.[130] Quota relief was believed to encourage minority applications for firefighter positions.

Beyond these considerations, quotas do provide timely relief by assuring immediate entry of minorities into the work force without the delay that may be encountered by the operation of objective, nondiscriminatory hiring practices. Additionally, the injection of a significant number of minority employees into the work force may compel the employment community to adjust to the realization of equal opportunities for minority workers. Unfortunately, though implementing such valid goals, quotas always result in a major unde-

126. *See, e.g.*, United States v. Ironworkers Local 86, 443 F.2d 544, 548 (9th Cir.) *cert. denied*, 404 U.S. 984 (1971).

127. 501 F.2d 622 (2d Cir. 1974).

128. The *Rios* court evidenced its concern with the union's good faith by stating: "Nor has the Union, despite the opportunity afforded after the issuance of preliminary relief, voluntarily 'cleaned house' or taken any meaningful steps to eradicate the effects of its past discrimination. Under the circumstances the imposition of remedial goals was not an abuse of discretion." *Id.* at 631-32.

129. 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

130. In the words of the *Carter* court:

> Given the past discriminatory hiring policies of the Minneapolis Fire Department, which were well known in the minority community, it is not unreasonable to assume that minority persons will still be reluctant to apply for employment, absent some positive assurance that if qualified they will in fact be hired on a more than token basis.

452 F.2d at 331.

sirable side effect—the automatic exclusion of qualified nonminority applicants who were not associated with the wrong the quotas seek to relieve.

Affirmative, non-quota relief can be fashioned to accommodate all the functions served by quotas without injuring other qualified applicants or employees. To insure that an employer is proceeding in good faith toward elimination of discriminatory hiring or promotion practices, a court may order submission of periodic progress reports.[131] Further, the equitable powers of a court allow appointment of an administrator to oversee the implementation of affirmative action relief.[132] Continuing judicial jurisdiction[133] and the contempt powers are available to assure termination of the discriminatory practices.

Moreover, although minority applicants may be reluctant to seek employment with a company or other employer with a discriminatory reputation, there may well be methods, other than quota hiring, of dealing with such a problem. For example, a widely publicized description of a judicial prohibition of discriminatory hiring, coupled with publication of new hiring standards as well as continued jurisdiction over the case by the district court, should be sufficient to encourage minority applications.

Furthermore, there is no reason to believe that hiring in accordance with objective standards results in a less timely introduction of qualified minorities into the work force than is achieved by the operation of quota hiring schemes. On the contrary, quotas may operate as a limitation on minority participation in employment which would not be present in an objective, merit-based system. Finally, while quota orders attempt to foster social acceptance of increased minority representation, it is conceivable that they may have the opposite effect: employers and other workers may resent the forced hiring of persons perceived to have been granted preferential treatment. The quota beneficiaries may themselves have less confidence in their competitive capabilities than if the employment had been achieved under an objective hiring system. These factors should encourage the courts to utilize the variety of available non-quota relief remedies to accomplish the positive benefits of quotas and simultaneously assure that affirmative action does not intrude beyond its legitimate functions into the rights of other applicants or workers.

131. *See, e.g.*, Carter v. Gallagher, 452 F.2d 315, 327 (8th Cir. 1971); United States v. Ironworkers Local 86, 443 F.2d 544, 548 (9th Cir. 1971).

132. *See, e.g.*, Rios v. Steamfitters Local 638, 501 F.2d 622, 626 (2d Cir. 1974). For a thorough listing of remedies constituting "affirmative action" see *id.* at 637 (dissenting opinion of Judge Hays in *Rios*). *See also* EEOC v. Local 638, Sheet Metal Workers, 532 F.2d 821 (2d Cir. 1976).

133. *See* Carter v. Gallagher, 452 F.2d 315, 327 (8th Cir. 1971); United States v. Ironworkers Local 86, 443 F.2d 544, 548 (9th Cir. 1971).

Nevertheless, commentators who remain unpersuaded by the strength and appropriateness of these non-quota remedies have suggested an alternative. Federal courts can utilize their equity powers to provide for both increased minority employment through quotas *and* compensation to other workers who are economically harmed by increased minority hiring and promotions. One of the suggestions is that employers who are required by court order to hire a particular ratio of white to black or male to female employees could also be instructed to provide some type of monetary compensation to qualified white or male applicants who have been passed over for promotion or hiring due to the employer's compliance with a court order.[134] This compensation would continue until further vacancies occur in the employment force, enabling the victims of reverse discrimination to gain their "rightful place." Such compensation does not impose an unreasonable penalty on the employer because the compensation the employer is ordered to pay amounts to a justifiable cost imposed to remedy the effects of past discrimination perpetuated by the employer itself. Chief Justice Burger espoused this position in *Franks* by expressing a preference for "front pay" awards—described by the majority as monetary damages paid by the employer to each employee discriminated against who would otherwise bear some of the burden of past discrimination.[135] The advantage of "front pay" awards, in the opinion of the Chief Justice, is that such awards not only deter the wrongdoer employer or union, but they also protect the rights of innocent employees.[136]

At least one federal district court has indicated an inclination to follow such an approach. In a 1976 decision, *McAleer v. Amercian Telephone and Telegraph Co.*,[137] the United States District Court for the District of Columbia granted an award of monetary damages to the plaintiff, who was characterized as "an innocent employee who had earned promotion but was disadvantaged when AT&T rejected his application in order to rectify its past discrimination against women."[138] The court concluded that since McAleer was not responsible for AT&T's failure to comply with the Civil Rights Act, AT&T, not McAleer, should bear the full brunt of the financial burden of rectifying the results of its previous sex discrimination. In reaching this

134. Such a remedy could be justified "on the ground that it is the employer who has committed the unlawful employment practice and that it is not unreasonable that he be required to protect the job interests of all who suffer from his unlawful conduct, including both job claimants." Walker, *Title VII: Complaint and Enforcement Procedures and Relief and Remedies*, 7 B.C. IND. & COM. L. REV. 495, 517 (1965-66).

135. 424 U.S. at 777 n.38.

136. *Id.* at 781.

137. 416 F. Supp. 435 (D.D.C. 1976).

138. *Id.* at 438.

conclusion, the court relied to a significant extent on what it perceived as a common thread of the various opinions rendered by the Supreme Court Justices in *Franks*. The court believed each of those opinions evidenced a desire to share the burden of eradicating the vestiges of past discrimination among the various parties concerned. The sentiment of the Court as a whole was, as the District of Columbia court saw it, to place the burden on the shoulders of the wrongdoing employer whenever possible.[139]

The district court also found some support for its viewpoint in *NAACP v. FPC*,[140] in which the Supreme Court held that the Federal Power Commission (FPC) had the authority to treat costs incurred by regulatees as a result of their discriminatory practices as an unnecessary cost which could be disallowed in the FPC's ratemaking proceedings.[141] The financial burden of correcting past discrimination would thus be borne by the power companies rather than by consumers who had not participated in the unlawful discrimination. Certainly, the disallowance of costs is not the same as the imposition of costs; nevertheless, the *NAACP* decision indicates that there are certain circumstances when an employer must bear the full expense of past discriminatory practices. It may be that particularly egregious conduct on the part of an employer in the past would warrant ordering that employer to pay money damages to workers who are economically injured as a result of court-imposed quotas. While such liability may be one equitable solution to meritorious reverse discrimination suits, money damages are but a partial substitute for the potential career advancement and personal sense of achievement an applicant or employee loses when he or she is denied hiring or promotion opportunities.

VII. CONCLUSION

The opinions of the Chief Justice and Justice Powell in *Franks v. Bowman Transportation Co.*,[142] indicate the direction in which the law should progress

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139. *Id.* at 439.

140. 425 U.S. 662 (1976) *cited in* 416 F. Supp. at 440.

141. The Court stated:

> The Commission clearly has the duty to prevent its regulatees from charging rates based upon illegal, duplicative, or unnecessary labor costs. To the extent that such costs are demonstrably the product of a regulatee's discriminatory employment practices, the Commission should disallow them. For example, when a company complies with a backpay award resulting from a finding of employment discrimination in violation of Title VII of the Civil Rights Act of 1964 . . . it pays twice for work that was performed only once. The amount of the backpay award, therefore, can and should be disallowed as an unnecessary cost in a ratemaking proceeding.

Id. at 668.

142. 424 U.S. at 780, 781 (1976).

when litigants direct reverse discrimination charges against the implementation of affirmative action programs in private employment situations. In their dissents, both Justices, joined by Justice Rehnquist, expressed concern that certain types of affirmative relief may accrue at the expense of other employees instead of at the expense of the actual wrongdoer—the employer. All three Justices displayed a strong intent to limit remedial action to identifiable individuals previously subject to discrimination.

This limitation would permit only affirmative action programs directed toward compensating specific individuals, unless a broader program would not infringe on the legitimate expectations of other employees. While this was the implicit view of only three Justices in *Franks*, it is not unreasonable to expect a majority of the Court to adhere to such a position when faced with a situation in which quota relief has been granted in spite of Title VII's prohibition against such relief.[143]

The Court's probable response to constitutional challenges to affirmative action programs is less certain. The Court has recognized a dichotomy between the standard of proof necessary to set forth a cause of action under Title VII and under the Constitution.[144] It is arguable that constitutional violations, premised on a finding of intentional discrimination, can be treated most effectively by the imposition of quotas. When an employer has been found guilty of actual intent to exclude certain groups from its work force, a quota may be the only means of insuring equal employment opportunity. If this is the case, the necessity of insuring equal employment opportunity may be a state interest sufficient to warrant court-ordered quotas. Quotas, however, even in a constitutional violation case, should be ordered only after a clear showing of the ineffectiveness of less drastic remedies.

Except in those rare circumstances, quotas generally should not be considered appropriate remedies. Quotas infringe on the equal employment opportunities of certain individuals—usually white males—and are not a completely benign form of relief. They unjustifiably deprive individuals of a chance to be hired or to advance in their employment, and this deprivation is based solely on classifications unrelated to merit or ability to achieve. The operation of quotas constitutes the same type of discrimination that affirmative action programs aim to eradicate.

Stephanie Duncan-Peters

143. *See* Edwards, *supra* note 2, at 625.

144. Washington v. Davis, 426 U.S. 229, 239 (1976). *See* note 91 & accompanying text *supra*.