Washington Law Review

Volume 53 | Number 1

12-1-1977

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Recommended Citation
Kerry Radcliffe, Recent Developments, *The Paradox of Preferential Treatment—Reverse Discrimination—The Implications of Lindsay v. City of Seattle, 86 Wn. 2d 698, 548 P.2d 320, cert. denied sub nom. Brabant v. City of Seattle, 97 S. Ct. 237 (1976)*, 53 Wash. L. Rev. 170 (1977).
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THE PARADOX OF PREFERENTIAL TREATMENT—REVERSE DISCRIMINATION—THE IMPLICATIONS OF *Lindsay v. City of Seattle*, 86 Wn. 2d 698, 548 P.2d 320, *cert. denied sub nom. Brabant v. City of Seattle*, 97 S. Ct. 237 (1976).

On March 1, 1973, the engineering department of the City of Seattle appointed Emilio Ponce to fill a vacancy for signal electrician foreman. Ponce, who was Spanish surnamed, was eligible under the city's affirmative action plan. He was appointed under a civil service selective certification procedure[1] pursuant to a departmental minority hiring goal.[2] The appointment complied with a 1972 executive order[3] and subsequent city ordinance establishing a Seattle-wide affirmative

1. The Seattle Civil Service Commission, established under article XVI of the city charter, adopted the following rule providing for selective certification of "underrepresented" applicants:

> Where a certification of eligibles other than in the normal order is requested in writing by the appointing authority as being necessary to implement the Affirmative Action Program of the City of Seattle by achieving ratios of minority, female and handicapped employees in all classifications of city employment approximately equal to the ratios of these same minorities in the Seattle community, and the secretary determines that the reasons given fully justify the request, a certification may be made of only the highest ranking eligibles of the particular race, creed, color, national origin or sex or the highest ranking handicapped eligibles, as designated in the request.

Seattle Civil Service Laws and Rules, Rule 7.03(j) (Oct. 20, 1971).

The selective certification procedure requires a written request to the Commission by the department head with a justification pursuant to departmental affirmative action plans. The approval of the Secretary of the Commission and the director of the city's Department of Human Rights is then required. SEATTLE, WASH., CODE ch. 1.80 (1969) (Ordinance 97971, establishing Seattle Department of Human Rights).

2. The engineering department had adopted a 1972 policy statement establishing as a departmental goal the achievement of minority ratios in each civil service classification comparable to "the ratios of these same minorities in the Seattle community." An emergency two-year measure (1972–74) stipulated that "the first of every three vacancies from retirement or termination in under-represented classes will be filled by an appropriate minority from the civil service register whenever possible." Seattle, Wash., Engineering Dep't, Policy Statement (June 21, 1972).

3. The executive order issued by the mayor of Seattle described the city's affirmative action plan as

> a program to increase the number of employees of a particular race, color, national origin, or sex employed by the City in order to correct a condition of underrepresentation of such persons caused by present or past practices, customs, or circumstances that have liimited employment opportunities for members of the affected groups.

The order called upon each city department to review and, if necessary, modify rating systems and testing requirements to insure their compliance with standards of job relatedness under federal, state, and local laws. Seattle, Wash., Exec. Order Establishing an Affirmative Action Program for City Employment (Aug. 25, 1972) (on file with the *Washington Law Review*).

action program in municipal employment.[4] As a consequence of selective certification, Wesley Brabant, a non-minority civil service employee who ranked higher on the regular certification register, was rejected in favor of Ponce.[5]

Seeking injunctive relief,[6] Brabant intervened in a suit[7] challenging Seattle's affirmative action program as violating merit selection provisions in the Seattle City Charter.[8] The trial court granted defendant's motion for summary judgment[9] and Brabant appealed. The Washington Supreme Court rejected plaintiff's challenges to the selective certification procedure and unanimously affirmed the summary judgment. *Lindsay v. City of Seattle,* 86 Wn. 2d 698, 548 P.2d 320, *cert. denied sub nom. Brabant v. City of Seattle,* 97 S. Ct. 237 (1976).

In upholding a municipal affirmative action plan, *Lindsay* provides a point of departure for an analysis of the reverse discrimination[10]

4. The Seattle City Council adopted a resolution affirming the mayor's order. Seattle, Wash., Res. 23849 (Oct. 16, 1972). This was later formalized into an implementation ordinance requiring city departments to establish affirmative action plans with goals and timetables to achieve equal workforce representation. SEATTLE, WASH., CODE ch. 1.49 (1972).

5. Brabant had taken the civil service exam for electrician foreman in 1969 and received a score of 88.58, placing him fourth on the promotional register of eligibles. In 1970, he had been appointed as a relief foreman in the engineering department to fill an intermittent vacancy. Ponce had taken the exam in 1969, placing eighth with a score of 81.83. In 1972, he received an identical temporary position. Lindsay v. City of Seattle, 86 Wn. 2d 698, 701–02, 548 P.2d 320, 323–24 (1976).

6. Brabant alleged violation of his rights by the city's refusal to certify his name, and sought an injunction and nullification of Ponce's appointment. Complaint in Intervention, Lindsay v. City of Seattle, No. 757364 (King County Super. Ct., filed Mar. 19, 1973).

7. The original plaintiffs were employed or promoted prior to trial, rendering their complaint moot. The case proceeded pursuant to the complaint of plaintiff-intervenor Brabant. Named defendants were the City of Seattle and its civil service commissioners. Defendants in intervention were the United Construction Workers Association (an organization formed to promote equal employment opportunity and seeking to protect its affirmative action agreement), Robert L. Green (a minority eligible on the civil service register seeking to protect his interest in the affirmative action program), and Emilio Ponce.

8. The Seattle City Charter provides for a single certification procedure: when a department head notifies the civil service commission of a vacancy in a classified position, the commission is to certify to the appointing authority the five highest-scoring applicants or the top 25%, whichever is greater. SEATTLE CITY CHARTER art. XVI, § 9 (1958, amended 1967). While Brabant was eligible for certification under this procedure, Ponce was not. *See* note 5 *supra.*

9. Both plaintiff-Brabant and defendant-City of Seattle had filed summary judgment motions. Defendant's motion was granted and judgment entered. Lindsay v. City of Seattle, No. 757364 (King County Super. Ct., Oct. 5, 1973) (Ringold, J.).

10. For purposes of this note, "reverse discrimination" will refer to situations in which a minority preferential employment program operates to deny employment opportunity to a qualified applicant from a non-preferred group on the basis of race.

questions inherent in such plans. Following a brief history of the development of preferential employment remedies and an examination of the *Lindsay* decision, this note will evaluate preferential relief and reverse discrimination within the framework of *Lindsay,* Title VII of the Civil Rights Act of 1964,[11] and recent court decisions.[12] Applicability of the *Lindsay* methodology to future reverse discrimination cases will be examined in light of apparent Supreme Court approval of a reverse discrimination cause of action under Title VII.[13] Finally, the note will evaluate criteria for the review of preferential employment programs[14] which will enable such programs to combine maximum efficacy with minimal reverse discrimination effects.

I. DEVELOPMENT OF REVERSE DISCRIMINATION CHALLENGES TO AFFIRMATIVE ACTION PROGRAMS

Elimination of racial discrimination in American society has been hampered by the formidable task of developing effective remedial measures. Eradication of present, institutionalized effects of past discrimination has been especially complex, often calling for color-conscious affirmative relief to achieve the ultimate goal of colorblind equality.[15] Such preferential treatment of minority individuals,[16] however, has given rise to allegations of reverse discrimination.

11. 42 U.S.C. §§ 2000e to 2000e-17 (1970 & Supp. V 1975). *See* Part I-*A infra.*

12. Although constitutional arguments under the equal protection clause, U.S. CONST. amend. XIV, § 1, are involved in reverse discrimination complaints and preferential treatment cases, *see* note 19 *infra,* this note will examine the problem within the statutory framework of Title VII. The *Lindsay* court limited its examination to this issue. For discussions of the equal protection issue, see DeFunis *Symposium,* 75 COLUM. L. REV. 483 (1975); Ely, *The Constitutionality of Reverse Racial Discrimination,* 41 U. CHI. L. REV. 723 (1974); *Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065 (1969).

13. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976). *See* Part III-*C infra.*

14. "Affirmative action" connotes a broad concept which encompasses preferential treatment as well as affirmative recruitment efforts and minority training programs. The focus of this note is upon hiring remedies requiring employers to grant racial preferences based upon an administrative, voluntary, or judicially mandated remedial program.

15. One court has provided a succinct justification for not rigidly adhering to strict neutrality principles in fashioning relief:

> The Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes a harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent

A. Equal Employment Opportunity

In recognition of the need to achieve equal opportunity in employment, Congress enacted Title VII of the Civil Rights Act of 1964.[17] Broadly proscribing discriminatory employment practices,[18] Title VII has become the primary basis for employment discrimination litigation.[19] It prescribes an administrative mechanism to handle employ-

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discrimination being perpetuated and to undo the effects of past discrimination. The criterion is the relevancy of color to a legitimate governmental purpose. United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 876 (1967), *aff'd on rehearing*, 380 F.2d 385 (5th Cir.), *cert. denied sub nom.* Board of Educ. v. United States, 389 U.S. 840 (1967). Courts have manifested this "color conscious" approach in several areas. *See, e.g.*, United Jewish Organization, Inc. v. Carey, 97 S. Ct. 996 (1977); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 25 (1971) (affirmative use of mathematical ratios to correct past discrimination in public education); Otero v. New York City Hous. Auth., 484 F.2d 1122 (2d Cir. 1973) (duty to consider impact of public housing programs on racial concentration of area); Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920 (2d Cir. 1968) (race-conscious urban renewal relocation standard required); Brooks v. Beto, 366 F.2d 1 (5th Cir. 1966) (purposeful inclusion of blacks in grand jury selection upheld).

16. The beneficiaries of affirmative action programs under Title VII may include women. For the purposes of this note, however, references will be limited to racial minority groups classified as "underrepresented" targets of affirmative relief.

17. Civil Rights Act of 1964, Pub. L. No. 88–352, §§ 701–716, 78 Stat. 255 (codified at 42 U.S.C. §§ 2000e to 2000e–17 (1970 & Supp. V 1975)). The commerce clause provided the constitutional authorization for Title VII. 110 CONG. REC. 7209–12 (1964).

18. The Act states that it is an "unlawful employment practice":

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e–2(a)(1) to (a) (2) (1970).

The Act covers labor organizations, 42 U.S.C. § 2000e–2(c) (1970 & Supp. V 1975); employment agencies, 42 U.S.C. § 2000e–2(b) (1970); and private sector employers when "engaged in an industry affecting commerce with fifteen or more employees," 42 U.S.C. § 2000e (b) (Supp. V 1975). The Act also protects employees of government, governmental agencies, and political subdivisions, 42 U.S.C. § 2000e–(a) to (f) (1970 & Supp. V 1975) (as amended by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92–261, § 2(1), 86 Stat. 103 (1972)). In Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), the Supreme Court upheld the 1972 amendments as within congressional power to pass appropriate legislation to enforce the 14th amendment. For a history of Title VII and its 1972 amendments, see Sape & Hart, *Title VII Reconsidered: The Equal Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824 (1972).

19. While this note will focus upon Title VII remedies, Title VII is not the exclusive remedy for employment discrimination. Despite the comprehensive nature of Title VII, its legislative history demonstrates congressional intent to allow independent pursuit of employment rights under applicable federal and state statutes. Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974). *See* 110 CONG. REC. 7207 (1964) (Department of Justice memorandum explaining Title VII not meant to

ment discrimination complaints[20] and authorizes civil suits when the preferred method of conciliation proves unsuccessful.[21] Judicial con-

be exclusive employment discrimination remedy); Sape & Hart, *supra* note 18, at 886 (examining parallel remedies).

The 14th amendment equal protection clause supplies supplemental remedies. U.S. CONST. amend. XIV, § 1. Section 5 of the 14th amendment provides: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." Congress passed the Civil Rights Act of 1871 under its 14th amendment enforcement powers. The pertinent section creates a cause of action for deprivation of constitutional and federal rights under color of state law. 42 U.S.C. § 1983 (1970). In addition, a provision of the Civil Rights Act of 1866 has been utilized to challenge private-sector discrimination. 42 U.S.C. § 1981 (1970). The Supreme Court has stated that this statute creates a cause of action for racial discrimination in private employment. Johnson v. Railway Express Agency, 421 U.S. 454 (1975). Sections 1981 and 1983 allow plaintiffs to avoid Title VII procedural requirements (investigation, conciliation, statute of limitations). In addition, § 1981 allows punitive damages and unlimited back pay awards. *See also* Brown v. General Servs. Admin., 507 F.2d 1300 (2d Cir. 1974), *aff'd*, 425 U.S. 820 (1976) (whether exhaustion of Title VII remedies required).

Prior to passage of the 1972 Equal Employment Opportunity Act amendments expanding the coverage of Title VII to public employers, the equal protection clause and related statutes provided the primary bases for employment discrimination charges by public employees. *See, e.g.*, Vulcan Soc'y of the New York City Fire Dep't, Inc. v. Civil Serv. Comm'n, 490 F.2d 387 (2d Cir. 1973); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972). Prior to the Title VII amendments and prior to Washington v. Davis, 426 U.S. 229 (1976), *see* note 24 *infra*, courts would apply equal protection and Title VII standards interchangeably on the rationale that to do otherwise would create an anomalous distinction between public and private discrimination standards. *See, e.g.*, Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333 (2d Cir. 1973); Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972). 42 U.S.C. §§ 1981 and 1983 may apply to employees not covered by Title VII (*i.e.*, those employed by private clubs, religious organizations, or employers with less than 15 employees). Presidential Exec. Order No. 11,246, 3 C.F.R. 169 (1974), *reprinted in* 42 U.S.C. § 2000e app., at 10,294 (1970) (as amended by Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (1967)), mandates affirmative action plans for federal and federally assisted contracts. *See* 41 C.F.R. §§ 60–1.1 to –1.47 and 60–2.1 to –2.32 (1976) (affirmative action guidelines).

Finally, state statutory and constitutional provisions provide additional bases for relief. Indeed, Title VII requires a complainant to pursue state administrative remedies prior to filing a complaint with the EEOC. 42 U.S.C. § 2000e–5(c) to (d) (Supp V 1975). The Act expressly disclaims an intent to preempt state action. *Id.* at § 2000e–7. Washington's statutory scheme is codified at WASH. REV. CODE ch. 49.60 (1976). The Washington Supreme Court has stated that Title VII cases provide "appropriate" precedent under the Washington statute. Stieler v. Spokane School Dist. No. 81, 88 Wn. 2d 68, 558 P.2d 198 (1977). *See also* WASH. CONST. art. 1, §§ 3, 12 (due process and equal protection guarantees).

20. The Act established the Equal Employment Opportunity Commission (EEOC) as its enforcement agency and gave it the power and responsibility to hear allegations of discrimination, conduct investigations, promulgate guidelines, and obtain voluntary compliance. 42 U.S.C. §§ 2000e–4 to 5 (1970 & Supp. V 1975). In a recent sex discrimination case attempting to enforce adherence to EEOC guidelines regarding pregnancy leave, the Supreme Court narrowly construed the agency's rulemaking power as procedural only. General Elec. Co. v. Gilbert, 429 U.S. 125 (1976). Thus, the EEOC rule was not accorded great weight because it was not a contemporaneous interpretation, and because it contradicted earlier agency policy and conflicted with "other indicia of proper interpretation" of sex discrimination provisions of the Act.

struction has been guided by recognition of a dual statutory purpose: "eradicating discrimination throughout the economy, and making persons whole for injuries suffered through past discrimination."[22] Under the "consequences" test of discrimination developed in *Griggs v. Duke Power Co.*,[23] proof of a racially disproportionate impact is sufficient to establish a prima facie Title VII case.[24] Unless the challenged practice can be justified as a business necessity,[25] the Act's remedial provisions authorize affirmative judicial relief.[26]

Generally, the court has accorded great deference to EEOC interpretations. *See, e.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

21. Either the EEOC or the person aggrieved may sue in federal district court. 42 U.S.C. § 2000e–5(f)(1) (Supp. V 1975).

22. Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975) (reviewing conditions requiring an award of backpay relief under Title VII). *See also* Franks v. Bowman Transp. Co., 424 U.S. 747 (1976) (extending *Albemarle* rationale to Title VII cases in which constructive seniority is used to redress discriminatory hiring practices).

23. 401 U.S. 424 (1971). The "consequences" test arises from the Court's statement in *Griggs* that "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation." *Id.* at 432.

24. McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973), set forth the requirements for a prima facie non-class-action complaint involving a racial minority in a hiring situation. In that case, a qualified racial minority member applied for a position and was rejected by an employer who continued to seek applicants with similar qualifications. *Id.* at 802. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976), extended *Green* to a *non*-minority in a discharge case. *See* notes 58–68 and accompanying text *infra*. In International Bhd. of Teamsters v. United States, 97 S. Ct. 1843 (1977), the Court further refined the prima facie case standard in the context of a challenged seniority system. The Court stated that *Green* was not the sole standard and "that any Title VII plaintiff must carry the burden of offering evidence adequate to create an inference that an employment decision was based on discriminatory criterion [*sic*] illegal under the Act." *Id.* at 1866. The term "discriminate," used in defining an "unlawful employment practice," is not defined in the Act. The Court in *Griggs* held that "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation." 401 U.S. at 432. Thus, if a plaintiff can demonstrate that an employment practice has a racially disproportionate impact, "the absence of intent does not redeem employment practices" unrelated to measuring job capabilities. *Id.* at 432. The Court noted that, under Title VII, practices "neutral on their face" and "neutral in terms of intent" are not permissible if they "operate to 'freeze' the status quo of prior discriminatory practices." *Id.* at 430. The Supreme Court recently held that the "consequences" test of *Griggs* does not extend to constitutional claims of equal protection violations under the 14th amendment. *See* Washington v. Davis, 426 U.S. 229 (1976) (plaintiff must establish purposeful discrimination). *See also* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 97 S. Ct. 555, 566 n.21 (1977) (purposeful discrimination must be the causal factor in the challenged action) (dictum).

25. Once a prima facie case is established, the burden is on the employer to "articulate some legitimate, nondiscriminatory reason for the challenged practice." McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). As the Court explained in *Griggs:* "The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." 401 U.S. at 431.

26. Under 42 U.S.C. § 2000e–5(g) (Supp. V 1975), in civil actions by aggrieved

B. *Preferential Relief Measures*

To attain the goal of equal employment, government and private employers have been faced with the task of combatting the present effects of past discrimination. They have therefore implemented the concept of affirmative action through the mechanism of preferential treatment programs.[27] It is not clear that Title VII authorizes such

parties courts are empowered to "order such affirmative action as may be appropriate, which may include . . . reinstatement or hiring of employees, with or without back pay," enjoining the challenged practice, and ordering records and continuing reports. This remedial provision of the Act is premised upon equitable powers. *See, e.g.*, Lindsay v. City of Seattle, 86 Wn. 2d 698, 705, 548 P.2d 320, 325 (1976); *accord*, United States v. Wood, Wire & Metal Lathers Local 46, 471 F.2d 408, 413 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); United States v. Carpenters Local 169, 457 F.2d 210, 216 (7th Cir.), *cert. denied*, 409 U.S. 851 (1972). *Cf.* Carter v. Gallagher, 452 F.2d 315, 328 (8th Cir. 1971) (rehearing en banc), *cert. denied*, 406 U.S. 950 (1972) (dealing with 42 U.S.C. § 1983).

27. Title VII authorizes implementation of affirmative relief measures. *See* note 26 *supra*. *Compare* Title VII *with* 42 U.S.C. §§ 1981, 1983 (1970), which fail to provide such explicit statutory authorization. Eight circuits have construed affirmative action broadly to include preferential treatment of minorities under Title VII and 42 U.S.C. §§ 1981 and 1983: Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); United States v. Wood, Wire & Metal Lathers Local 46, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973) (*but see* Kirkland v. New York State Dep't of Correctional Servs., 520 F.2d 420 (2d Cir. 1975), *cert. denied*, 97 S. Ct. 73 (1976) (limiting the use of quotas)); United States v. Elevator Constructors Local 5, 538 F.2d 1012 (3d Cir. 1976); NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974); United States v. Local 212, IBEW, 472 F.2d 634 (6th Cir. 1973); United States v. Carpenters Local 169, 457 F.2d 210 (7th Cir.), *cert. denied*, 409 U.S. 851 (1972); United States v. N.L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973); United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971). *But see* Harper v. Kloster, 486 F.2d 1134 (4th Cir. 1973) (holding that 1866 Civil Rights Act and 14th amendment did not authorize quotas). In Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir.), *cert. denied*, 427 U.S. 911 (1976), however, the Court of Appeals for the Fourth Circuit limited *Harper*. While holding the instant case presented no compelling need for quota relief, the court stated: "In view of substantial precedent sanctioning preferential relief for unlawful discrimination, we reject the company's argument that Title VII forbids the remedy." *Id.* at 274. *But see* Cramer v. Virginia Commonwealth Univ., 415 F. Supp. 673 (E.D. Va. 1976) (distinguishing the *Patterson* recognition of preferential treatment as dictum).

Under Presidential Exec. Order No. 11,246, *supra* note 19, federal contractors are required to adopt "good faith" efforts to maintain minority hiring goals under area-wide affirmative action plans. Courts have upheld such plans. Southern Ill. Bldrs. v. Ogilvie, 327 F. Supp. 1154 (S.D. Ill. 1971), *aff'd*, 471 F.2d 680 (7th Cir. 1972) (Illinois Plan); Contractors Ass'n v. Secretary of Labor, 311 F. Supp. 1002 (E.D. Pa. 1970), *aff'd*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971) (Philadelphia Plan); Joyce v. McCrane, 320 F. Supp. 1284 (D.N.J. 1970) (Newark Plan); Wiener v. Cuyahoga Community College Dist., 19 Ohio St. 2d 35, 249 N.E.2d 907 (1969) (Cleveland Plan). Some commentators have concluded that the reluctance of the Office of Federal Contract Compliance to enforce executive order affirmative action plans due to perceived "unrealistically high goals" has made such plans "largely ineffective." Edwards & Zahretsky, *Preferential Remedies for Employment Discrimination*, 74 MICH. L. REV. 1, 30 n.149 (1975) (citing Donegan, *The Philadelphia Plan: A Viable Means of Achieving Equal Opportunity in the Construction Industry*

action. Indeed, section 703(j) of the Act at first blush appears to restrict preferential percentage-based remedies.[28] Courts have chosen to construe this section narrowly, however, by limiting its application to instances in which racial imbalances are not attributable to unlawful discriminatory conduct.[29] The broad remedial goals of Title VII are said to justify this interpretation.[30]

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or More Pie in the Sky?, 20 KAN. L. REV. 195, 210 (1972) and Jones, *Federal Contract Compliance in Phase II—The Dawning of the Age of Enforcement of Equal Opportunity Obligations*, 4 GA. L. REV. 756 (1970)).

The Washington statutory scheme, WASH. REV. CODE ch. 49.60 (1976), *see* note 19 *supra*, created the Washington State Human Rights Commission (WSHRC) with the power to promulgate guidelines and regulations. One such guideline defines a "corrective employment program" under the statute as "designed to increase the number of employees of a particular protected class . . . to correct a condition of underrepresentation of such employees caused by present or past practices, customs or usages . . . that have limited employment opportunities." WASH. ADMIN. CODE § 162–18–010 (1974). Corrective employment programs may be used (1) by court or administrative order, (2) by WSHRC consent, or (3) voluntarily, requiring WSHRC approval to depart from W.A.C. guidelines. WASH. ADMIN. CODE § 162–18–050 (1976). As noted in brief for respondent City and Civil Service Commission in *Lindsay*, Seattle's affirmative action program had been transmitted to WSHRC under WASH. ADMIN. CODE § 162–18, and a 1972 memorandum by the attorney general's office indicated probable approval. Brief for Respondents, Lindsay v. City of Seattle, 86 Wn. 2d 698, 548 P.2d 320 (1976). The WSHRC guidelines recognize that a posture of neutrality may not eliminate a pattern of discrimination, and corrective steps may be required. WASH. ADMIN. CODE § 162–18–020 (1976). Thus a corrective employment program in compliance with the chapter will not constitute an unfair practice under the statute. *Id.*

28. Section 703(j) provides in pertinent parts:

> Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of race . . . on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . employed by any employer . . . in comparison with the total number or pecentage of persons of such race . . . in any community, State, section or other area, or in the available work force in any community, State, section or other area.

42 U.S.C. § 2000e–2(j) (1970).

29. Examples of courts upholding preferential treatment under Title VII while reconciling § 703(j) include: Rios v. Steamfitters Local 638, 501 F.2d 622, 630 (2d Cir. 1974); United States v. Wood, Wire & Metal Lathers Local 46, 471 F.2d 408, 413 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); United States v. Local 212, IBEW, 472 F.2d 634 (6th Cir. 1973); United States v. N.L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973) *rev'g* 338 F. Supp. 1167 (E.D. Mo. 1972); United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); United States v. IBEW Local 38, 428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970). *But see* Rios v. Steamfitters Local 638, 501 F.2d 622, 634 (Hays, J., dissenting). *See also* dictum in NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974), *and* Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972) (both cases brought under 42 U.S.C. § 1983 (1970)).

30. In United States v. IBEW Local 38, 428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970), the court stated that any other interpretation would constitute "a complete nullification of the purpose of the Civil Rights Act." *Id.* at 149–50. The court cited legislative history to indicate it was not congressional intent to forbid preferential remedies. However, examination of legislative history fails to establish

The statutory and constitutional validity of affirmative action goals or quotas[31] is far from settled.[32] While the potential for reverse discrimination has been considered by lower courts reviewing preferential programs, there have been few direct reverse discrimination chal-

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conclusively legislative approval of this proposition. In 1964, the Act's floor leader, Sen. Humphrey, remarked:

> A new subsection, 703(j), is added to deal with the problem of racial balance among employees. The proponents of this bill have carefully stated on numerous occasions that Title VII does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group. Since doubts have persisted, subsection (j) is added to state this point expressly.

110 CONG. REC. 12723 (1964). *See also* 110 CONG. REC. 6549 (1964) (the "bugaboo" of requiring a hiring, firing, or promotion to meet a racial quota is "non-existent") (remarks of Sen. Humphrey); 110 CONG. REC. 7213 (1964) (interpretive memorandum of Title VII by floor managers, Senators Clark and Case, stating Title VII does not require a racial balance and "any deliberate attempt to maintain a racial balance would involve a violation of Title VII"); *cf.* 110 CONG. REC. 8921 (1964) (the purpose of § 703(j) was simply to prevent a finding of discrimination on the basis of a racial imbalance).

More recently, Congress rejected an attempt to abolish goal-based relief during consideration of the 1972 Equal Employment Opportunity Act amendments. 118 CONG. REC. 1662–76 (1972) (debate and rejection of an amendment explicitly forbidding goals, quotas, or ranges; opponents cited federal cases in which courts rejected the argument that preferential treatment runs afoul of § 703(j)); 118 CONG. REC. 4918 (1972) (defeat of an amendment which would have extended § 703(j) to executive orders and other federal statutes, thereby cancelling the Philadelphia Plan approach to affirmative action). In light of federal appellate court approval of goal-based preferences, one might infer congressional acquiescence, if not approval. *See* United States v. Local 212, IBEW, 472 F.2d 634 (6th Cir. 1973).

The Supreme Court has yet to interpret § 703(j). *Cf.* International Bhd. of Teamsters v. United States, 97 S. Ct. 1843, 1856 n.20 (1977) (statistical evidence of racial imbalance does not violate § 703(j)). However, in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (holding a denial of backpay justifiable only for reasons in compliance with statutory purposes of Title VII), the Court viewed congressional rejection of amendments to limit judicial power to award backpay as tacit approval of backpay relief. *Id.* at 420. In Franks v. Bowman Transp. Co., 424 U.S. 747 (1976), the Court refused to treat confusing legislative history as a restriction on equitable relief powers under the Act. The Court rejected the argument that § 703(h), 42 U.S.C. § 2000e–2(h) (1970) (protecting "bona fide" seniority systems) was a barrier to constructive seniority relief. *See also* United States v. Elevator Constructors Local 5, 538 F.2d 1012 (3d Cir. 1976) (applying the *Franks* rationale of § 703(h) and the *Albemarle* inference of congressional approval of preferential goals to rebut an argument that § 703(j) applied). The Supreme Court did not draw such an inference, however, in its interpretaton of § 703(h). International Bhd. of Teamsters v. United States, 97 S. Ct. 1843 (1977). In upholding a seniority system which allegedly perpetuated prior discrimination, the Court stated that the views of the 1972 Congress were "entitled to little if any weight." *Id.* at 1864 n.39. This conclusion is contrary to numerous circuit court holdings and EEOC rulings. *Id.* at 1876–77 (Marshall, J., dissenting).

31. Courts have frequently distinguished goals from quotas. *See* note 48 and accompanying text *infra*.

32. Lower federal courts have relied on statutory interpretation and precedent rather than providing a comprehensive constitutional justification for preferential remedies. *See, e.g.*, Oburn v. Shapp, 521 F.2d 142, 150 n.20 (3d Cir. 1975) ("many

lenges.[33] The Supreme Court has consistently denied review of cases involving preferential employment programs,[34] and it has yet to rule on a reverse discrimination challenge to such a plan.[35]

II. REASONING OF THE *LINDSAY* COURT

Plaintiff's primary challenge to Seattle's selective certification process, and to the corresponding affirmative action plan of the city engineering department, was that they violated city charter provisions guar-

judicial authorities"); Patterson v. American Tobacco Co., 535 F.2d 257, 274 (4th Cir.), *cert. denied,* 427 U.S. 911 (1976) ("substantial precedent"); Morrow v. Crisler, 491 F.2d 1053, 1059 (5th Cir. 1974) (en banc) (opinion noting that "overwhelming precedent" constrained concurrence). A more reasoned attempt to analyze constitutional issues in affirmative hiring relief can be found in NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974). Challenges to affirmative action goals or quotas have occurred primarily in the context of appellate review of court-mandated preferential programs to relieve discriminatory employment practices (as opposed to reverse discrimination challenges to program validity). *See* note 27 *supra. See, e.g.,* United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), *cert. denied,* 404 U.S. 984 (1971) (upheld affirmative action percentage requirement for union membership and training programs in a Title VII action); *cf.* Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1974), *cert. denied,* 421 U.S. 910 (1975) (action under 42 U.S.C. § 1981 (1970), upholding hiring ratio until percentage of minorities is equal to population percentage); Contractors Ass'n v. Secretary of Labor, 311 F. Supp. 1002 (E.D. Pa. 1970), *aff'd,* 442 F.2d 159 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971) (upheld imposition of minority hiring goals in area-wide affirmative action plans under presidential executive order) (*see* note 19 *supra*).

33. Absence of proof of racial discrimination rather than denial of standing under Title VII provided the basis for denying reverse discrimination challenges in Mellick v. EEOC, 410 F. Supp. 736 (W.D. Pa. 1976); Smith v. Gunther, 9 Empl. Prac. Dec. 6800 (D.D.C. 1975); Leinster v. Engmann, 8 Empl. Prac. Dec. 6241 (D.D.C. 1974); Bellamy v. Mason's Stores, Inc., 368 F. Supp. 1625 (E.D. Va. 1973). In Weber v. Kaiser Aluminum & Chem. Corp., 415 F. Supp. 761 (E.D. La. 1976) (Title VII action by white employees challenging affirmative action quota system incorporated into collective bargaining agreement), the court held a quota system inappropriate under the factual circumstances and rejected preferential treatment as violating Title VII's "prohibitions against racial discrimination by an employer against *any individual.*" *Id.* at 766 (emphasis added).

34. *E.g.,* Lindsay v. City of Seattle, 86 Wn. 2d 698, 548 P.2d 320, *cert. denied,* 97 S. Ct. 237 (1976); Associated Gen'l Contractors of Mass., Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973), *cert. denied,* 416 U.S. 957 (1974) (state executive order preferential plan); United States v. Wood, Wire & Metal Lathers Local 46, 471 F.2d 408 (2d Cir.), *cert. denied,* 412 U.S. 939 (1973) (Title VII preferential program); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied,* 406 U.S. 950 (1972) (14th amendment and 42 U.S.C. § 1983 preferential program); Contractors Ass'n v. Secretary of Labor, 311 F. Supp. 1002 (E.D. Pa. 1970), *aff'd,* 442 F.2d 159 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971) (executive order affirmative action plan).

35. *See* notes 32 & 33 *supra.* In DeFunis v. Odegaard, 416 U.S. 312 (1974), the Supreme Court vacated and remanded as moot a reverse discrimination challenge to the constitutional validity of a law school preferential admissions program. In dissent, Justice Douglas reached the merits, stating, "There is no constitutional right for any race to be preferred . . . . Whatever his race, [the reverse discrimination plaintiff]

anteeing merit selection.[36] The *Lindsay* court approached this argument within a Title VII framework by analogizing to the statutory requirements and applying Title VII precedent.[37] The court stated that a major purpose of Title VII is employment equality and that the city's selective certification process was designed to achieve that goal.[38] Then the court examined the conditions which were thought to make the affirmative action program necessary. The court concluded that statistical evidence of the disproportionate racial composition of the city's work force established a prima facie case of past employment discrimination under *Griggs*.[39]

The preferential relief measure adopted by the city was then examined to determine if the measure was necessary and appropriate to alleviate discrimination in municipal employment. The court pointed

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had a constitutional right to have his application considered in a racially neutral manner." *Id.* at 320, 336–37. *See generally* Morris, *Equal Protection, Affirmative Action and Racial Preferences in Law Admissions:* DeFunis v. Odegaard, 49 WASH. L. REV. 1 (1973). The California Supreme Court recently held a somewhat similar medical school minority admissions program to be an unconstitutional violation of the rights of non-minority applicants under the equal protection clause. The Supreme Court has granted certiorari. Regents of the Univ. of Cal. v. Bakke, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *cert. granted,* 97 S. Ct. 1098 (1977). *But see* Alevy v. Downstate Medical Ctr., 39 N.Y.2d 376, 348 N.E.2d 537, 384 N.Y.S. 2d 82 (1976). The effect upon Title VII preferential plans of a Supreme Court affirmance in *Bakke* will be dependent upon the breadth of the Court's opinion. A blanket disapproval of the preferential relief measure under the equal protection clause might also be applicable to Title VII. On the other hand, the Court could limit the holding to the facts of the case, without disturbing programs approved under Title VII. The Court has indicated an interest in limiting the decision to a statutory basis. It has requested briefs on Title VI of the 1964 Civil Rights Act, which bars race discrimination in federally assisted programs, 42 U.S.C. §§ 2000d to 2000d–6 (1970). 46 U.S.L.W. 3261 (Oct. 17, 1977).

36. Brief for Appellant at 6, Lindsay v. City of Seattle, 86 Wn. 2d 698, 548 P.2d 320 (1976). Appellant argued that article XVI, § 9 of the city charter, authorizing appointment of the top five or 25% of applicants, was the exclusive method of appointment and that the civil service commission lacked the power to supplement it contrary to the charter.

37. 86 Wn. 2d at 701, 548 P.2d at 324 (noting that the City of Seattle was an "employer" under the Act).

38. *Id.* at 702–03, 548 P.2d at 323–24. The selective certification rule was adopted in conjunction with a resolution recognizing that

> civil service tests have had the effect, in some cases, of discriminating against minority applicants among those deemed eligible for appointment . . . [and that the] results [of the tests] tend to cause the minority applicants to be placed at the lower end of the eligible registers and therefore have little or no chance of being employed.

Id. at 703–04, 548 P.2d at 324–25.

39. *Id.* at 704, 548 P.2d at 325. The following factors were considered relevant justifications for Ponce's selective certification: (1) of the three signal electrician foremen in the department, none was a minority; (2) only 6% of all department foremen were minorities; (3) of unskilled laborers in the department, 36.7% were minorities;

out that an employer could not be indifferent and thereby perpetuate past racial inequalities.[40] Although recognizing the paradox of "resorting to preferences or devices premised on inequality" to attain equality,[41] the court nevertheless failed to discuss section 703(j) of Title VII, which purports to restrict preferential remedies.[42] Drawing an analogy from other contexts, the court noted that the "need or merit of a certain individual provides a politically and economically justifiable basis for preferential treatment."[43] Seattle's voluntary implementation of an affirmative action plan was specifically approved as consistent with the tenor of Title VII.[44]

The court concluded that without the selective certification rule the city charter would actually violate Title VII by perpetuating inequality via its merit provisions.[45] For this reason, the court invoked the federal supremacy clause to approve the preferential program,

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and (4) 12.7% of city employees were minorities. *Id.* The court relied on statistics provided by the city's director of the Department of Human Resources comparing minority employment in the city with minority census figures for the city. For an examination of the data and its accuracy as an indicator of past discrimination, see note 73 *infra* (*i.e.*, a 14.7% minority census figure for 1970 was compared to a 7.6% employment figure for 1969, increasing to 12.7% by 1972). An additional consideration cited by the court was the fact that the EEOC had formally charged Seattle with violating Title VII for using unvalidated tests with a disproportionate impact on minorities. *Id.* at 703, 548 P.2d at 324. *See also* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

40. 86 Wn. 2d at 705–06, 548 P.2d at 326.

41. *Id.* at 707, 548 P.2d at 326.

42. Conceivably, the *Lindsay* court did not feel obligated to discuss the issue either because of the accepted judicial construction limiting its applicability, *see* notes 28–30 and accompanying text *supra,* or because of the absence of a direct Title VII claim.

43. 86 Wn. 2d at 707, 548 P.2d at 326. The court referred to veterans' preferences in public employment and general preferential treatment for the handicapped as examples of accepted societal preferences. For additional examples, see 16 WASHBURN L.J. 421, 425 (1977). *See also* Massachusetts v. Feeney, 46 U.S.L.W. 3237 (Oct. 11, 1977), in which the Supreme Court vacated and remanded a decision finding an equal protection violation under a state law granting preferences to military veterans applying for public jobs. The Court relied on its earlier decision in Washington v. Davis, 426 U.S. 229 (1976), holding discriminatory intent necessary to find a constitutional violation.

44. 86 Wn. 2d at 706, 548 P.2d at 326.

45. *Id.* at 708, 548 P.2d at 327. Other courts have also upheld quota relief despite merit-based civil service laws. *See, e.g.,* Vulcan Soc'y of the New York City Fire Dep't, Inc. v. Civil Serv. Comm'n, 490 F.2d 387 (2d Cir. 1973) (holding that discriminatory impact of civil service exam justified one-for-three quota); Carter v. Gallagher, 452 F.2d 315, 331 (8th Cir. 1971) (rehearing en banc), *cert. denied,* 406 U.S. 950 (1972) (denying absolute preference but upholding one-for-two hiring ratio). Courts which have ruled against affirmative relief measures have noted the conflict with merit-based civil service laws. *See, e.g.,* Kirkland v. New York State Dep't of Correctional Servs., 520 F.2d 420 (2d Cir. 1975), *cert. denied,* 97 S. Ct. 480 (1976) (denying enforcement of permanent promotional quota to remedy discriminatory

allowing Title VII's mandate to override any conflict with local civil service laws.[46] The court cautioned that approval of such relief was conditional, however, and would terminate upon achievement of a "fair approximation" of minority representation in city employment.[47]

The court quickly disposed of plaintiff's remaining objections to the city's program. Brabant contended that the program was overly broad in scope, even if otherwise justifiable. The court responded by distinguishing Seattle's permissible goal-based program from the apparently more constitutionally suspect "absolute quota" system,[48] citing federal

effect of state civil service exams); Board of Educ. v. Nyquist, 341 N.Y.S.2d 441, 293 N.E.2d 819 (1973) (finding state education commissioner acted arbitrarily in requiring permanent appointment of a minority who had failed a civil service exam previously found discriminatory in federal court); Fraternal Order of Police v. City of Dayton, 35 Ohio App. 2d 196, 301 N.E.2d 269 (1973) (upholding a challenge to city affirmative action promotional plan as violative of city charter civil service provisions).

46. 86 Wn. 2d at 708, 548 P.2d at 327. *See also* Carter v. Gallagher, 452 F.2d 315, 327, 328 (8th Cir. 1971) (rehearing en banc), *cert. denied,* 406 U.S. 950 (1972). In *Carter,* the court acknowledged that state and local law required civil service examination procedures, but held that this requirement "must give way to the Supremacy Clause of Article 6 of the United States Constitution," and therefore must yield to the national policy of equal economic opportunity. *See also* Associated Gen'l Contractors of Mass., Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973). In *Altshuler,* challengers to a state-imposed affirmative action program invoked the supremacy clause. The court held, however, that the federal plan in Title VII does not preempt states from implementing their own affirmative action plans.

47. The fair approximation standard, although potentially ambiguous in application, is significant because it enunciates the Washington standard for review of the durational validity of preferential treatment goals. It reflects the limitation generally imposed by federal courts approving temporary employment quotas. *See, e.g.,* Morrow v. Crisler, 491 F.2d 1053, 1056 (5th Cir. 1974) (en banc) (measuring the termination point at which the effects of past discrimination are "effectively offset" with the caveat that population proportions need not be mirrored); NAACP v. Allen, 493 F.2d 614, 621 (5th Cir. 1974) ("temporary" duration); Carter v. Gallagher, 452 F.2d 315, 327, 330 (8th Cir. 1971) (rehearing en banc), *cert. denied,* 406 U.S. 950 (1972) ("fair approximation" of minority representation consistent with population mix of the area). *See generally* Blumrosen, *Quotas, Common Sense and Law in Labor Relations: Three Dimensions of Equal Opportunity,* 27 RUTGERS L. REV. 675, 695 (1974).

The Supreme Court's language in Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 31–32 (1971) (approving quotas to remedy education discrimination) has been applied to employment discrimination cases to emphasize that "mathematical precision" is not required. *See, e.g.,* Rios v. Steamfitters Local 638, 501 F.2d 622, 630 (2d Cir. 1974). The significance of the "termination" limitation to preferential programs is demonstrated in Kirkland v. New York State Dep't of Correctional Servs., 520 F.2d 420 (2d Cir. 1975), where the permanence of a quota caused the court to bar its imposition, characterizing it as reverse discrimination. The same circuit had earlier upheld a quota system which the *Kirkland* court distinguished as "interim." *See* Vulcan Soc'y of the New York City Fire Dep't, Inc. v. Civil Serv. Comm'n, 490 F.2d 387, 398 (2d Cir. 1973).

48. In *Lindsay,* the court stated that "[a] goal, as opposed to an absolute quota

court decisions authorizing goal-based relief.[49] The court briefly dismissed plaintiff's argument that the selective certification rule violated the state's delegation-of-powers doctrine.[50] As for Brabant's allegation

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or preference, does not subject an employer to sanction. An employer is not expected to displace existing employees or to create unneeded positions to meet his goal." Lindsay v. City of Seattle, 86 Wn. 2d at 711, 548 P.2d at 328. Courts upholding preferential treatment have recognized the distinction between "goals" and "quotas" as one of duration:

> We use "goals" rather than "quotas" throughout this opinion for the reason that while to some the two words may be synonymous, the term "quotas" implies a permanence not associated with "goal." For our purpose the significance of the distinction lies in the fact that once a prescribed goal is achieved the [defendant] will not be obligated to maintain it, provided, of course, the [defendant] does not engage in discriminatory conduct.

Rios v. Steamfitters Local 638, 501 F.2d 622, 628 n.3 (2d Cir. 1974). *See also* R. O'NEIL, DISCRIMINATING AGAINST DISCRIMINATION 68 (1975) ("[a] goal simply declares an objective, which will be met only if a sufficient number of qualified persons apply [*sic*], while a quota specifies the number to be admitted from a given group regardless of the pool of qualified applicants."). Other observers are skeptical of any meaningful differentiation. 118 CONG. REC. 1663 (1972) (remarks of Sen. Ervin dismissing the goal/quota distinction as "specious"); *see* Comment, *Hiring Goals: California State Government and Title VII: Is This Numbers Game Legal?*, 9 PAC. L.J. 49, 70 (1977) (labeling the goal/quota distinction as "semantics not substance"). For purposes of this note, the characteristics of duration and flexibility which have been recognized as distinguishing "goals" from "quotas" will be examined independently rather than subsumed under a definitional distinction.

49. *See* 86 Wn. 2d at 711, 548 P.2d at 329 and cases cited therein. All citations were to public employment cases brought under the 14th amendment and 42 U.S.C. § 1983 (1970), and decided prior to Washington v. Davis, 426 U.S. 229 (1976), *see* note 32 *supra*. The *Lindsay* court had noted earlier in its opinion that the "test of the validity of employee selection procedures under [Title VII] is comparable to the test of their validity over the long run under the Fourteenth Amendment." 86 Wn. 2d at 705, 538 P.2d at 325. This position was subsequently rejected by the Supreme Court in Washington v. Davis, 426 U.S. 229 (1976).

50. Plaintiff had challenged the delegation of responsibility, under the selective certification rule, to the secretary of the Seattle Civil Service Commission to certify names of eligible candidates upon request from an appointing authority. 86 Wn. 2d at 709, 548 P.2d at 327. The court upheld the delegation under Washington's lenient delegation-of-power test as set forth in Barry & Barry v. Department of Motor Vehicles, 81 Wn. 2d 155, 159, 500 P.2d 540, 542–43 (1972). Although the Washington test diminished the strength of the plaintiff's argument in *Lindsay*, another state court upheld an unlawful delegation of power challenge. Wisconsin v. Department of Ind., Labor & Human Rights, 12 Fair Empl. Prac. Cas. 1447 (Wis. Cir. Ct. 1976) (activities of affirmative action unit established under executive order usurped legislative power).

More often, imposition of ratio hiring and promotions by administrative bodies has been invalidated as exceeding statutory power under state fair employment legislation. In a case decided after *Lindsay*, the Washington court held that the Higher Education Personnel Board had exceeded statutory power in adopting administrative affirmative action procedures relating to seniority. Washington Fed'n of State Employees v. Higher Educ. Personnel Bd., 87 Wn. 2d 823, 557 P.2d 336 (1976). The court confined its holding to this narrow issue, stating: "We make no determination as to the propriety of a dual-seniority layoff system and do not intend for this holding to affect the position taken by this court in Lindsay v. Seattle . . . or DeFunis v. Odegaard . . . ." *Id.* at 827, 557 P.2d at 339 (citations omitted). In Lige v. Town of Montclair, 134 N.J. Super. 277, 340 A.2d 660 (1975), *aff'd*, 72 N.J. 5, 367 A.2d 833

that he had been denied equal protection of the law, the court held that this issue was precluded from appellate review on procedural grounds.[51]

III. *LINDSAY*'S METHODOLOGY AND ALTERNATIVE APPROACHES TO TITLE VII CLAIMS OF REVERSE DISCRIMINATION

A. The Precedential Value of Lindsay

Lindsay presented a classic reverse discrimination situation, characterized by a clear causal relationship between the challenged preferential program and the alleged discrimination. The court upheld selective certification as mandated by *Griggs* and Title VII, although plaintiff's challenge on appeal was limited to the conflict with civil service merit provisions. Thus, *Lindsay* supports the proposition that Title VII standards govern state or local reverse discrimination cases,[52] even when the reverse discrimination victim does not allege that enforcing the preferential program violated his rights under Title VII. Developments subsequent to *Lindsay* reinforce the availability of a reverse discrimination cause of action under Title VII.[53]

(1976), the court upheld a challenge to a one-to-one hiring and promotional ratio imposed under a state fair employment law because the plan exceeded statutory power and violated the state constitution. *See also* Associated Gen'l Contractors of Mass., Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973), *cert. denied,* 416 U.S. 957 (1974).

51. Prior to trial, the parties had stipulated that the case raised no constitutional questions of equal protection because of the decision of the Washington Supreme Court in DeFunis v. Odegaard, 82 Wn. 2d 11, 508 P.2d 158 (1973). Brief for Respondent at 27, Lindsay v. City of Seattle, 86 Wn. 2d 698, 548 P.2d 320 (1976). The court noted that "[u]nder familiar principles of law, issues not considered by the trial court need not be considered on appeal." *Id.* at 708, 548 P.2d at 327. Plaintiff-Brabant unsuccessfully contended that because respondent-city had argued the constitutional issue to the trial court and because the summary judgment stated that the "city of Seattle has a legal duty to take affirmative action . . . under the 14th amendment," *id.,* the issue was properly before the supreme court. Reply Brief for Appellant at 8–9, Lindsay v. City of Seattle, 86 Wn. 2d 698, 548 P.2d 320 (1976). In *DeFunis,* the Washington Supreme Court upheld a preferential law school admission program because it served a "compelling state interest." Following oral arguments, the United States Supreme Court remanded the case as moot, 416 U.S. 312 (1974), because DeFunis had been allowed to attend school and would soon graduate. On remand, a divided court was unable to rule on a motion to reinstate the original decision. 84 Wn. 2d 617, 529 P.2d 438 (1974).

52. *See* Stieler v. Spokane School Dist. No. 81, 88 Wn. 2d 68, 558 P.2d 198 (1977) (use of Title VII precedent under Washington's anti-discrimination law). *See* note 19 *supra.*

53. *See* Part III–*C infra.*

B. Lindsay*'s Methodology*

Uncertainties pervade any examination of reverse discrimination challenges to preferential affirmative action programs. The difficulties inherent in evaluating reverse discrimination challenges are augmented by the absence of a clear statutory or constitutional justification for preferential programs.[54] Despite numerous obstacles, a decision-making process for reverse discrimination controversies must be defined. The *Lindsay* approach emphasizes the goal of eradicating past discrimination against members of minority groups by adjudicating solely on the merits of the preferential employment process.[55] Under this analysis, a court reviews the challenged program, and if it is justified under applicable standards,[56] reverse discrimination is permitted as an inevitable byproduct of equal employment goals.[57] Initially, this approach ignores the merits of the reverse discrimination claim itself, and thus may have to be modified in light of *McDonald v.*

54. Courts have struggled to rationalize imposing preferential treatment under Title VII even though § 703(j) of the Act purports to withdraw such authorization. *See* notes 28–30 *supra*. Some courts, including *Lindsay*, have ignored the limitation. *See, e.g.*, United States v. N.L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973). *See also* note 32 *supra* (reliance on precedent in the absence of a comprehensive constitutional justification). One consequence of providing alternative and frequently overlapping remedies has been the compounding of various pleas with "inextricably interwoven" standards of judicial review. *See* 8 Loy. Chi. L.J. 225, 226 (1976). For example, 42 U.S.C. §§ 1981 and 1983 (1970) were frequently pleaded together in claims against government employers; therefore, § 1981 standards (with a 13th amendment basis) were explained under the 14th amendment standards applied to § 1983. *See* 8 Loy. Chi. L.J. 225, 233 n.34.

55. A constitutional rationale for such an approach was stated in NAACP v. Allen, 493 F.2d 614 (5th Cir. 1975): "Until the selection procedures . . . have been properly validated, it is illogical to argue quota hiring produces unconstitutional 'reverse' discrimination . . . ." *Id.* at 618. The *Lindsay* opinion established a justification for preferential treatment under Title VII, invoking the supremacy clause to foreclose reliance on civil service merit procedures. *See* notes 40–46 and accompanying text *supra*. The court avoided express reliance on the fact that the city's testing device was not validated. *See* note 39 *supra*. As noted in the Brief for Respondent in Intervention (Legal Services) at 2, Lindsay v. City of Seattle, 86 Wn. 2d 698, 548 P.2d 320 (1976), the city charter certification procedure "eliminates from consideration a disproportionate number of minority applicants who, having achieved a passing exam score, are presumptively qualified for employment." The Washington court reiterated the need to establish job qualifications to maintain an individual action under state anti-discrimination laws in Stieler v. Spokane School Dist. No. 81, 88 Wn. 2d 68, 558 P.2d 198 (1977). *See* note 19 *supra*.

56. Standards to consider when reviewing preferential programs are developed in Part IV *infra*.

57. *See* notes 40–43 and accompanying text *supra*. *See also* DeFunis v. Odegaard, 82 Wn. 2d 11, 508 P.2d 158 (1973), *vacated and remanded as moot*, 416 U.S. 312 (1974).

Santa Fe Trail Transportation Co.,[58] a recent United States Supreme Court decision.

C. *The Impact of* McDonald v. Santa Fe Trail Transportation Co.

In *McDonald,* the Supreme Court stated that Title VII prohibits discrimination against whites as well as blacks.[59] The case involved the dismissal of white employees charged with misappropriating property from their private-sector employer, while a black employee, similarly charged, was retained. The Court upheld the claim of reverse discrimination pursuant to Title VII.[60] The implications of the *McDonald* holding for preferential programs remain in doubt. The Court noted that the employer had specifically denied that its challenged disciplinary action related to an affirmative action program.[61] Thus, the *McDonald* ruling could be narrowly construed to authorize white challenges against non-remedial discrimination.[62] The Court might still determine that Title VII was not designed to deal with claims of reverse discrimination against preferential programs.[63] Indeed, it

58. 427 U.S. 273 (1976).

59. Although the issue of white standing under Title VII has not received considerable attention in lower federal courts, conflicting decisions have arisen. Cases supporting white standing include Parks v. Brennan, 389 F. Supp. 790 (N.D. Ga. 1974), *rev'd on other grounds sub nom.* Parks v. Dunlop, 517 F.2d 785 (5th Cir. 1975). Cases concluding that whites lack standing include Haber v. Klassen, 10 Fair Empl. Prac. Cas. 1446 (N.D. Ohio 1975); Mele v. United States Dep't of Justice, 10 Empl. Prac. Dec. 5066 (D.N.J. 1975); United States v. International Longshoremen's Ass'n, 334 F. Supp. 976 (S.D. Tex. 1971), *rev'd on other grounds sub nom.* EEOC v. International Longshoremen's Ass'n, 511 F.2d 273 (5th Cir. 1975) (dictum).

60. 427 U.S. at 285. The Court was unanimous as to the Title VII issue. The general proposition that whites are protected under Title VII was conceded by respondents, Brief for Respondents at 16, and the standing issue was not argued below. The lower court had found that petitioners had failed to state a claim on which Title VII relief could be granted. The Supreme Court failed to reach the merits and remanded the case to allow plaintiffs an opportunity to demonstrate their dismissal was prompted by an impermissible racial motive. The Court also extended standing to whites under the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1970), a position generating vigorous dispute. *See* 427 U.S. at 296 (White, J., dissenting) (citing his dissent in Runyon v. McCrary, 427 U.S. 160, 192 (1976)).

61. The Court stated: "[W]e emphasize that we do not consider here the permissibility of [an affirmative action] program, whether judicially required or otherwise prompted." 427 U.S. at 280 n.8.

62. Such an interpretation would restrict *McDonald* to its facts and acknowledge white standing to obtain redress for a form of discrimination "which Title VII was most clearly intended to remedy." 42 Mo. L. Rev. 100, 104 (1977).

63. Respondents argued that while they were willing to concede the general proposition that whites are protected under Title VII, the "Court should consider

could simply define "discrimination" prohibited under the Act to exclude inequitable treatment resulting from preferential relief measures.[64]

Such a holding, however, would mark a retreat from the Court's language in *McDonald*. The Court concluded: "We therefore hold today that Title VII prohibits racial discrimination against the white petitioners in this case upon the *same standards* as would be applicable were they Negroes and [the non-discharged Negro employee] white."[65] A mechanical application of the Court's "same standards" rationale would sustain a reverse discrimination challenge to a preferential relief program[66] and trigger the Act's remedial provisions.[67] At the very least, the *McDonald* holding establishes that reverse discrimination cannot be ignored as a viable cause of action under Title VII.[68]

D. Alternatives to the Lindsay *Approach*

After *McDonald,* the methodology of the *Lindsay* court would ap-

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the impact of such a ruling on the various forms of 'affirmative action' programs" before ruling Title VII required that "each and every employment decision . . . be absolutely colorblind." Brief for Respondent at 16, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976). The Court's ruling did not encompass such a broad holding; however, the general precedent and legislative history relied upon will make it difficult for the Court to conclude that whites have no standing under Title VII to challenge preferential programs.

64. Because "discrimination" is not defined in Title VII, courts have defined the term by analogy on an ad hoc basis. The Court has recently stated that the meaning of discrimination for 14th amendment equal protection purposes provides guidance for its Title VII statutory meaning. General Elec. Co. v. Gilbert, 429 U.S. 125 (1976). Under *Washington v. Davis,* however, the fourteenth amendment has more stringent standards than Title VII for a prima facie violation. 426 U.S. 229 (1976). *See* note 24 *supra.*

65. 427 U.S. at 280 (emphasis added). In reaching this conclusion, the Court gave "great deference" to an EEOC interpretation. *Id.* at 279 (1976). *But cf.* General Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (Court refused to accord deference to EEOC interpretations regarding pregnancy leave under the Act). *See* note 20 *supra.* In Cramer v. Virginia Commonwealth Univ., 415 F. Supp. 673 (E.D. Va. 1976), a court had an opportunity to examine a reverse discrimination claim in the affirmative action context. The court held that the plaintiff need not establish that "but for" the preferential program he would have been hired. A prima facie case could be established by showing discrimination because of sex.

66. For a discussion of the prima facie standard, see note 24 *supra.*

67. *See* note 26 *supra.*

68. The *McDonald* Court relied heavily upon Griggs v. Duke Power Co., 401 U.S. 424 (1971), and the prima facie standard of McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973), *see* 427 U.S. at 281–85. Given the Court's reliance on prior Title VII cases, one author observed that "it is reasonable to argue that other Title VII decisions should be available to white plaintiffs seeking Title VII relief." 42 Mo. L. Rev. 100, 104 (1977).

pear inappropriate under Title VII because it does not examine the possible weight of the reverse discrimination claim. There are two alternative approaches to reverse discrimination challenges, however, which could satisfy *McDonald*.

The first alternative is to authorize remedial measures for reverse discrimination regardless of the propriety of the preferential program. Allowing injunctive relief against such programs once a reverse discrimination claim has been established would discourage the adoption of preferential relief measures, however limited or supervised. If we are to retain the option of using such programs to promote equal employment opportunity goals, therefore, this approach must be rejected.

A better approach is to use a two-step process. First, the court could examine the reverse discrimination claim;[69] if that claim is meritorious, the court could then evaluate the preferential employment practice. The formulation of relief measures would turn on a comparison of plaintiff's right to non-discriminatory employment and defendant's attempt to comply with Title VII. The following section attempts to delineate the contours of this interest-balancing approach by examining standards to be employed in judging the validity of preferential treatment programs.

IV. DETERMINING THE VALIDITY OF PREFERENTIAL RELIEF PROGRAMS UNDER TITLE VII

A. Evidence of Past Discrimination

The general rationale advanced to support imposition of preferential treatment is the eradication of present effects of past discrimination.[70] Thus, documentation of past discrimination is an important element in justifying a preferential treatment program.[71] The generally accepted use of statistical data to establish this historical predicate

69. Thus, cases in which reverse racial discrimination could not be proved would still be eliminated. *See* note 33 *supra*.

70. *See* Part I–*B supra*. For an excellent general discussion of criteria which have been used to determine the validity of preferential relief programs, see Edwards & Zahretsky, *supra* note 27, *passim*.

71. *See, e.g.*, United States v. N.L. Indus., Inc., 479 F.2d 354, 361 (8th Cir. 1973); United States v. Local 212, IBEW, 472 F.2d 634, 636 (6th Cir. 1973); United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971). Evidence of past discrimination is not a requisite finding in Title VII actions;

and substantiate the prima facie case, as in *Lindsay,* should be examined carefully. Although a general racial population disparity may be sufficient to establish a prima facie case,[72] greater precision in detailing labor force composition and skills may be called for at the remedial stage[73] to ensure adequate scope and durational limitations upon program implementation.[74]

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nevertheless, it may serve to justify preferential treatment. *See* Porcelli v. Titus, 431 F.2d 1254 (3d Cir. 1970), *cert. denied,* 402 U.S. 944 (1971). When courts have struck down preferential quotas as violative of Title VII, they have found that the programs could not be justified as corrective of past discriminatory practices. *See, e.g.,* Kirkland v. New York State Dep't of Correctional Servs., 520 F.2d 420 (2d Cir. 1975), *cert. denied,* 97 S. Ct. 480 (1977); Anderson v. San Francisco Unified School Dist., 357 F. Supp. 248 (N.D. Cal. 1972) (enjoining goal-based hiring program, even though conditioned on qualified applicants, because not corrective of past discrimination); Hiatt v. City of Berkeley, 9 Empl. Prac. Dec. 7047 (Cal. Super. Ct. 1975) (invalidating city affirmative action plan due to lack of documented past discrimination in city hiring); *accord,* Brunetti v. City of Berkeley, 11 Empl. Prac. Dec. 7363 (N.D. Cal. 1975).

72. *See* note 24 *supra.*

73. This point was recognized in Rios v. Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974), in which the court found that statistics showing racial imbalance in union membership may establish a prima facie case of discrimination. The court cautioned against the uncritical use of statistics in developing quota relief:

> [Courts] should be guided by the most precise standards and statistics available in view of the delicate constitutional balance that must be struck in the use of such goals or quotas between the elimination of discriminatory effects, which is permissible, and the involvement of the court in unjustifiable "reverse racial discrimination," which is not.

Id. at 633. The court also noted the preference for use of work force statistics or labor force figures rather than general population statistics on racial composition. It should be noted, however, that establishing goals for union membership and training programs, as opposed to hiring goals, should not be restricted to work force ratios, as long-term discrimination has prevented equal opportunity to attain the necessary skills. *See also* United States v. Wood, Wire & Metal Lathers Local 46, 471 F.2d 408, 412 n.7 (2d Cir.), *cert. denied,* 412 U.S. 939 (1973) (in the absence of a reliable basis upon which to approximate minority participation in the industry but for discrimination, total population figures are allowable); Vulcan Soc'y of the New York City Fire Dep't, Inc. v. Civil Serv. Comm'n, 490 F.2d 387, 398–99 (2d Cir. 1973) (necessity required authorizing a ratio figure that does not "purport to rest on any scientific basis"); League of United Latin Am. Citizens v. City of Santa Ana, 410 F. Supp. 873 (D. Cal. 1976).

The *Lindsay* court did not examine for accuracy the cited supportive statistics which compared minority population and employment figures. 86 Wn. 2d at 704, 548 P.2d at 325. *See* note 39 *supra.* In addition, the selective certification rule and engineering department implementation, notes 1 & 2 *supra,* established a goal approximating the minority ratio in the community, while the executive order, note 3 *supra,* called for a ratio corresponding with the minority work force.

74. In dictum, the Supreme Court has indicated that statistics showing a racial imbalance between work force composition and the general population are "probative" as a "telltale sign of purposeful discrimination" (*i.e.,* Title VII liability). International Bhd. of Teamsters v. United States, 97 S. Ct. 1843, 1856 n.20 (1977). Such statistical evidence, however, would not require a racially balanced work force under Title VII; after the liability phase, additional proceedings and evidence are relevant to fashion appropriate relief. *Id.* at 1856 n.20.

B. *Voluntary Versus Mandatory Preferential Programs*

In *Lindsay,* the court refused to adopt a different standard for reviewing voluntary programs from that appropriate for reviewing court-mandated affirmative action plans.[75] While a primary purpose of Title VII is to encourage voluntary compliance,[76] an argument has been advanced for closer judicial scrutiny of voluntary programs because the extraordinary character of preferential relief demands judicial supervision.[77] This concern, however, is more accurately addressed to the deference to be accorded an independent determination of a need to rectify past discriminatory practices. Faced with a reverse discrimination challenge, the voluntary character of a preferential

75. "The fact that the City voluntarily has sought to achieve equality of employment opportunity in the public sphere rather than by court order does not detract from or lessen the legal validity and necessity of its affirmative action program under [Title VII]." 86 Wn. 2d at 706, 548 P.2d at 326.

76. As noted in *Lindsay,* "Voluntary compliance, rather than court ordered relief, is the congressionally preferred method of achieving equality of employment opportunity." *Id. Accord,* Alexander v. Gardner Denver Co., 415 U.S. 36, 44 (1974). *See also* 110 CONG. REC. 6549 (1964) (remarks of Sen. Humphrey). It has been suggested that courts are more reluctant to disturb quotas imposed under voluntary affirmative action plans, Porcelli v. Titus, 431 F.2d 1254 (3d Cir. 1970); EEOC settlements, Patterson v. Newspaper & Mail Deliverers' Union, 514 F.2d 767 (2d Cir. 1975); and consent decrees, United States v. Wood, Wire & Metal Lathers Local 46, 471 F.2d 408 (2d Cir.), *cert. denied,* 412 U.S. 939 (1973). *See* 7 RUT.-CAM. L.J. 506 (1976). *See also* EEOC v. American Tel. & Tel. Co., 419 F. Supp. 1022 (E.D. Pa. 1976) (culmination of protracted AT&T litigation imposing an affirmative action override in a consent decree); Davidson, *Preferential Treatment and Equal Opportunity,* 55 ORE. L. REV. 53, 73 (1976). Any reluctance to disturb voluntary quotas might be offset, however, by the additional consideration that a court-ordered quota is based upon a showing of discrimination and limited by a termination point. Because these safeguards are lacking in voluntary preferential remedies, courts are more likely to be justified in characterizing such remedies as a violation of § 703(a) or (j) of Title VII, and requiring more intensive judicial review. *See* Goldman, *The Next Ten Years: Title VII Confronts the Constitution,* 20 ST. LOUIS L.J. 308, 328 (1976).

77. In Weber v. Kaiser Aluminum & Chem. Corp., 415 F. Supp. 761 (E.D. La. 1976), the court distinguished between voluntary quota systems and court-imposed quota systems, stating that Title VII's proscriptions of discrimination were applicable only to the former. The court enjoined the employer from implementing a minority racial quota in a collective bargaining agreement, finding that such a quota violated Title VII absent a showing of past discrimination and need for affirmative relief. The court listed the following as "logical and compelling reasons" for the voluntary/mandatory distinction:

> First, because relief of this nature should be imposed with extreme caution and discretion and only in those limited cases where necessary to cure the ill effects of past discrimination. . . . Further, the administration of such relief by the courts tends to assure that those remedial programs will be uniform in nature and will exist only as long as necessary to effectuate the purpose of the Civil Rights Act.

Id. at 767–68.

program should not determine the applicable standard of review. Conversely, prior judicial approval under a court-mandated program should not be conclusive validation without an independent examination of the program's continuing necessity and record of performance.

C. *Employment Levels*

The employment level at which preferential quotas are imposed has been another consideration. Courts have demonstrated an inclination to uphold entry-level hiring quotas while striking quotas imposing promotional preferences.[78] This tendency probably reflects the courts' recognition that reverse discrimination is more discernible under promotional preferential programs than entry-level plans.[79] Although *Lindsay* technically involved a promotional situation, plaintiff's failure to claim a violation of seniority interests blurred any distinction between this case and an initial-hiring situation. Consequently, the *Lindsay* court did not consider this distinction.

Beyond the hiring-promotion variable, greater judicial deference has been accorded to quotas in union training and referral programs.[80] In addition, courts have been more reluctant to impose quotas upon white-collar positions than blue-collar positions.[81] This difference may reflect the limited capacity of courts to measure job abilities. Although

78. Problems inherent in quota relief assume different parameters in the promotional context. *See, e.g.*, International Bhd. of Teamsters v. United States, 97 S. Ct. 1843 (1977) (validation of seniority system established under a union bargaining agreement despite the perpetuation of pre-Act discrimination); Kirkland v. New York State Dep't of Correctional Servs., 520 F.2d 420 (2d Cir. 1975), *cert. denied*, 97 S. Ct. 73 (1976) (denied affirmative relief to offset discriminatory impact of promotional exam); Patterson v. Newspaper & Mail Deliverers' Union, 514 F.2d 767, 774 (2d Cir. 1975) (imposed goal on union membership but suggested court-ordered relief be limited to "entry level positions"); Oburn v. Shapp, 521 F.2d 142 (3d Cir. 1975) (upheld hiring quota on low-level entry positions); Pennsylvania v. O'Neill, 473 F.2d 1022 (3d Cir. 1973) (divided court upheld affirmative hiring quota but declined to uphold promotional quota under 42 U.S.C. § 1981); Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333 (2d Cir. 1973) (same under 42 U.S.C. § 1983). *See also* 7 RUT.-CAM. L.J. 506, 519 (1976).

79. Reverse discrimination resulting from promotional programs is more evident because, in most work settings, seniority and layoff priorities are explicitly or implicitly in effect. Explicit priorities are an integral part of civil service employment, and are generally incorporated in labor contracts. Implicit priorities arise because of the societal expectation that workers with more experience ought to be the first to receive job advancements.

80. *See, e.g.*, Barnett v. International Harvester, 11 Empl. Prac. Dec. 7538 (W.D. Tenn. 1976); Rios v. Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir. 1971).

81. *See, e.g.*, United States v. N.L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973)

adherence to this distinction may promote short-term acceptability of preferential relief, the long-term goal of employment equality may be delayed by restricting preferential remedies to blue-collar positions. This differentiation may also fuel opposition from blue-collar workers.

D. Identifiable Victims

An "identifiability" criterion has emerged in cases reviewing preferential programs absent a claim of reverse discrimination. This factor requires evidence that a proposed quota will not produce "identifiable reverse discrimination."[82] Courts which adopt this prerequisite for approval of preferential plans are more likely to approve entry-level programs than promotional plans. Potential reverse discrimination victims of the former are frequently unidentifiable members of a general hiring pool.[83] Potential reverse discrimination victims of promotional preferential treatment plans are more readily identifiable under seniority systems or other ranking procedures. A rigid requirement that there be no identifiable victims of reverse discrimination in such cases would foreclose use of preferential promotional plans to alleviate discrimination.

In *Franks v. Bowman Transportation Co.*,[84] the Supreme Court

(quota upheld for hiring foremen but denied for white-collar hiring); Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972) (approving denial of racial quota for laying off supervisory personnel). In Edwards & Zahretsky, *supra* note 27, at 36–37, the authors state that "there does not appear to be any legitimate justification for this distinction."

82. For example, in Kirkland v. New York State Dep't of Correctional Servs., 520 F.2d 420 (2d Cir. 1975), a two-pronged test for quota relief was advanced which required: (1) proof of "a clear cut pattern of long continued and egregious racial discrimination" (*see* notes 70 & 71 *supra*), and (2) evidence that the quota would not result in "identifiable reverse discrimination." 520 F.2d at 427. Inevitably, any preferential treatment program diminishes the opportunities of non-minority individuals. As noted by Judge Mansfield, dissenting to a denial of rehearing in *Kirkland:*

> [R]eferences to "identifiable" Whites, while perhaps placing the consequences of a goal into sharper focus, do not add to the reality that, irrespective of the identifiability of the Whites, a goal inevitably serves to benefit some at the expense of others . . . . The wisest and fairest course that we could follow is not to reject this remedy but to specify the smallest quota in terms of percentage and duration necessary to correct the past discrimination.

531 F.2d 5, 10 (1975). *See* Part IV–*G infra*.

83. *See* notes 8 & 36 *supra*. Although *Lindsay* involved an entry-level program, plaintiff was able to base his challenge on the results of the civil service exam. This test, however, lacked EEOC validation, and a passing score arguably was indicative of presumptive qualification. *See* notes 39 & 55 *supra*.

84. 424 U.S. 747 (1976).

held that a preferential treatment program granting constructive seniority to minority discriminatees was appropriate,[85] despite the existence of potentially identifiable reverse discrimination victims.[86] Thus, under *Franks,* the existence of identifiable victims of reverse discrimination will not alone invalidate a preferential plan. Although *Franks* was not a reverse discrimination challenge to a preferential plan, extending the Court's reasoning to such cases could validate plans that operate to diminish "the expectations of other, arguably innocent, employees."[87] A reverse discimination challenge presupposes at least one alleged victim, and the existence of other possible reverse discrimination victims is a factor which a court should not discount.

E. Public Versus Private Employment

The *Lindsay* court relied upon public employment precedent; however, it did not emphasize the fact that *Lindsay* was a public employment case.[88] Although some courts consider the imposition of quotas upon public employers less objectionable,[89] the distinction between public and private employment should not be given weight in adjudi-

85. While *Franks* granted relief to job applicants, a subsequent seniority case extended relief under *Franks* to non-applicants. International Bhd. of Teamsters v. United States, 97 S. Ct. 1843 (1977). The scope of such relief was limited to victims of post-Title VII discrimination; § 703(h) validated the seniority system as to pre-Act discriminatees, *see* note 30 *supra. Teamsters* involved a union bargaining agreement with a seniority system which allegedly perpetuated racial discrimination. The court resolved the status of nonapplicants, left open by the decision in *Franks,* in deciding that "failure to apply for a job is not an inexorable bar to retroactive seniority." Presumptive entitlement must be proved, however. *Id.* at 1869.

86. 424 U.S. at 774–75. *Franks* involved a racially discriminatory hiring system. The Court held that constructive seniority was appropriate relief for job applicants subjected to past discrimination. The seniority they would have had "but for" the discrimination could be denied only for reasons which would not frustrate the statutory purposes of Title VII. *See* note 22 and accompanying text *supra. See also* International Bhd. of Teamsters v. United States, 97 S. Ct. 1843, 1874 (1977) ("Although not directly controlled by the Act, the extent to which the legitimate expectations of nonvictim employees should determine when victims are restored . . . is limited by basic principles of equity.").

87. 424 U.S. at 774. The *Franks* Court stated that to deny relief solely on this basis would "frustrate the central 'make-whole' objective of Title VII." *Id.*

88. The court relied on decisions requiring public agencies to institute affirmative hiring relief. 86 Wn. 2d at 711, 548 P.2d at 329. *See* note 49 *supra.*

89. *See, e.g.,* Rios v. Steamfitters Local 638, 501 F.2d 622, 634, 638 (2d Cir. 1974) (Hays, J., dissenting). *See also* Lige v. Town of Montclair, 72 N.J. 5, 367 A.2d 833 (1976). *But see* NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974); Pennsylvania v. O'Neill, 473 F.2d 1029 (3d Cir. 1973); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied,* 406 U.S. 950 (1972).

cating the validity of preferential treatment plans.[90] The "consequences" test of Title VII focuses upon the victim's injury,[91] not the employer's status; therefore, it encompasses both public and private discrimination.[92]

F. Availability of Alternatives

The *Lindsay* court limited its examination to the preferential program adopted; it did not discuss alternative methods of achieving equality in city employment.[93] Nevertheless, other courts have given consideration to the existence of alternatives, especially in equal protection analysis.[94] Frequent emphasis upon the extraordinary character of preferential remedies[95] suggests a partiality toward effective alternatives. In order to ensure that an alternative measure promotes equality without sacrificing efficacy, however, a court should closely scrutinize the proposed alternative rather than merely suggest that it is conceivable.[96]

90. Fourteenth amendment protection against a denial of equal protection requires state action. Thus, the "public" factor is of significance in a constitutional challenge which is raised in the context of governmental preferential treatment as an impermissible racial classification. In NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974), hirings under a preferential affirmative action order failed to "transgress either the letter or the spirit of the Fourteenth Amendment," despite an assumption that enforcement by state officials under a federal judicial order constituted state action. *Id.* at 619. It remains questionable whether private employers acting under court-ordered affirmative action plans have a sufficient "nexus" or significant involvement to satisfy state action requirements under Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961), and Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). *See* Slate, *Preferential Relief in Employment Discrimination Cases,* 5 LOY. CHI. L.J. 315, 338 n.73 (1974).

91. *See* note 23 *supra.*

92. *See, e.g.,* Rios v. Steamfitters Local 638, 501 F.2d 622, 631 (2d Cir. 1974) ("Since the harm caused by private violations can be at least as serious as that resulting from conduct of public bodies or officials, the relief must be commensurate with the injury to be remedied.").

93. *See* notes 37–47 and accompanying text *supra.*

94. *See, e.g.,* DeFunis v. Odegaard, 416 U.S. 312, 320 (1974) (Douglas, J., dissenting); Kirkland v. New York State Dep't of Correctional Servs., 520 F.2d 420 (2d Cir. 1975), *cert. denied,* 97 S. Ct. 73 (1976); Morrow v. Crisler, 491 F.2d 1053 (5th Cir. 1974) (en banc); Bakke v. Regents of the Univ. of Cal., 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976) (suggesting alternative to preferential admissions program).

95. *See, e.g.,* Morrow v. Crisler, 491 F.2d 1053 (5th Cir. 1974) (en banc); Weber v. Kaiser Aluminum & Chem. Corp., 415 F. Supp. 761 (E.D. La. 1976).

G. *Durational Limits*

Judicial acceptance of goal-based programs as opposed to "absolute quota" systems indicates a preference for durational and achievement flexibility in program administration. The *Lindsay* "fair approximation" standard reflects the concern that preferential programs not become permanent fixtures.[97]

V. CONCLUSION

If preferential treatment is to be constitutionally and statutorily justified, as well as publicly and judicially accepted, its imposition must be carefully specified and its implementation limited. Accepting the desirability of equal economic opportunity, which may call for the imposition of short-term color-conscious relief measures to attain long-term colorblind goals, the current need is for some degree of predictability and uniformity so that employers are not subject to shifting liabilities. The *Lindsay* decision, while limited in its direct precedential effect, is indicative of continuing Washington support for affirmative action programs. Future reverse discrimination lawsuits are likely to challenge the justifications for preferential treatment set forth by Justice Finley in *Lindsay*.

The Supreme Court's avoidance of intervention in the area has not only failed to promote lower-court resolution, but has contributed to

96. Justice Tobriner, in his *Bakke* dissent, wrote: "If alternative remedies are relevant to the constitutionality of the program at all, the party attacking the validity of the program should bear the burden of demonstrating the realistic availability of alternative methods of achieving the medical school's numerous objectives." Bakke v. Regents of the Univ. of Cal., 18 Cal. 3d 34, 89, 553 P.2d 1152, 1190, 132 Cal. Rptr. 680, 718 (1976). The dissent criticized the suggested alternatives advanced by the majority as "either disingenuous or impractical or both." *Id. See also* dissent from denial of rehearing in Kirkland v. New York State Dep't of Correctional Servs., 531 F.2d 5 (2d Cir. 1975) (majority had denied use of preferential goal-based relief):

> When one considers the other alternative remedy that might be employed to provide more effective relief [voiding all promotions under nonvalidated test], the use of a temporary goal or quota looks even more attractive . . . .
>
> Faced with a choice of relief measures, the district court wisely chose to select the imposition of temporary goals as the less drastic remedy.

Id. at 9 (Mansfield, J., dissenting).

97. *See* note 47 *supra*. The viability of such limitations, however, may be challenged. The likelihood of dismantling a preferential plan is questionable in light of the entrenched nature of bureaucratic programs. Abandonment may also be a function of the presence of identifiable reverse discrimination victims challenging the program. *See* Part IV–*D supra*.

uncertainty and conflicting results. Because an increase in reverse discrimination litigation can only be counterproductive in achieving affirmative action goals, some accommodation of interests is necessary. The use of Title VII as both a defensive and offensive weapon in such suits requires clarification of both substantive and procedural standards for review of preferential treatment programs.[98] The mode of analysis outlined in this note is offered to aid in the prevention and resolution of future conflicts.

Kerry Radcliffe

98. A more precise delineation of appropriate standards for validation of preferential treatment programs would minimize potential liability for reverse discrimination. It would not, however, eliminate the possibility of reverse discrimination claims. One district court has attempted to compensate the reverse discrimination victim without debilitating the challenged preferential program. McAleer v. American Tel. & Tel. Co., 416 F. Supp. 435 (D.D.C. 1976). The case involved a sex discrimination challenge to an affirmative action promotional plan in which the employer asserted an EEOC consent decree as a defense. In his opinion, Judge Gesell extended the Supreme Court's reasoning in Franks v. Bowman Transp. Co., 424 U.S. 747 (1976). *See* note 86 *supra*. While the reverse discrimination victim was not entitled to a promotion because that would perpetuate the effects of past discrimination, he was allowed compensation in damages under Title VII. The plaintiff had to prove, however, that he would have been promoted but for the affirmative action plan. The remedial provision of Title VII invests courts with broad equitable powers which have been invoked to impose affirmative relief. Awarding compensatory relief to challengers of racial hiring preferences under the *McAleer* rationale, however, would deter voluntary programs.