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PREFERENTIAL REMEDIES FOR EMPLOYMENT DISCRIMINATION

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It is no secret that throughout our history discrimination against minorities and women has been a hallmark of American society. Although some effort has been made to abrogate existing discrimination and eliminate the effects of two hundred years of inequity, we are still far from the goal of equality for all. Over twenty years ago, in *Brown v. Board of Education*,[1] the Supreme Court struck down the doctrine of "separate but equal" and declared that the Constitution requires "color blindness" in dealing with people of different races. More specifically, the Court held that forced racial segregation of children in public schools (and, by implication, in any other state activity) was unconstitutional. As an abstract idea, the principle of color blindness—that factors such as race cannot be used as indicators of merit or worth—is extremely attractive. However, in the two decades since *Brown* it has become obvious that the goal of racial equality will never be reached solely through adherence to this neutral principle.[2] While the principle of color blindness is just, it has failed to effectively alter long-standing patterns of race and sex discrimination in this country. This failure is due, at least in part, to the difficulty involved in proving noncompliance with an order to act in a "neutral" or "nondiscriminatory" fashion. More importantly, ordering an offender to discontinue a discriminatory practice has simply proved ineffectual without supporting *affirmative* relief. The inherent limitations of the principle of color blindness and the need for more definite affirmative relief are best seen in the context of employment discrimination.

When Congress passed title VII of the Civil Rights Act of

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1. 347 U.S. 483 (1954).

2. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (school segregation); Morrow v. Crisler, 491 F.2d 1053 (5th Cir. 1974) (employment discrimination). *See generally* Blumrosen, *Quotas, Common Sense, and Law in Labor Relations: Three Dimensions of Equal Opportunity*, 27 RUTGERS L. REV. 675 (1974).

1964,[3] it plainly recognized equal employment opportunity as an essential national goal. To effectuate this goal, the courts and various federal agencies in the past decade have developed the notion of "affirmative action."[4] Efforts to implement a policy of equal employment opportunity through the use of affirmative action programs received great support until many people realized that equal rights for minority members and women would mean increased competition for limited job opportunities. This realization has led to cries of "reverse discrimination" in response to affirmative action and to calls for applying the principle of color blindness that in reality may be disguised attempts to keep minorities and women from gaining in the job market. The current recession has caused increased interest in the legal, economic, and moral issues surrounding the legitimacy of affirmative action; since the number of available jobs has become more limited, an employer may in fact be forced to hire a minority member or female for a position formerly reserved for a white male.[5]

A basic thesis of this article is that much of the current concern about alleged "reverse discrimination" in employment ignores the reality of the situation. In Part I it will be contended that although color blindness is a laudable long-run objective, it alone will not end discrimination; thus, it will be argued that some form of "color conscious" affirmative action must be employed in order to achieve equal employment opportunity for minorities and women. The most effective form of affirmative action is temporary preferential treatment,[6] and it will be asserted in Part II that such relief can be justified under the Constitution. Similarly, in Part III, it will be argued that preferential remedies can be justified under present statutory provisions governing employment discrimination. Finally, in Part IV, two conclusions will be drawn: first, that while it is accurate to suggest that some minority persons or women who currently benefit from preferential remedies might not have been hired *but for*

3. 42 U.S.C. § 2000e to -17 (1970), *as amended*, (Supp. III, 1973).

4. "Affirmative action" and "preferential remedies" are distinguishable concepts; the latter is subsumed by the former. "Affirmative action," in a general sense, includes a number of remedies for employment discrimination, such as governmental agency prods to get employers to make good faith efforts to hire or promote more minorities or women, special training programs for minorities and women, and preferential hirings or promotions for minorities or women. Only the last-cited remedy, *i.e.*, preferential hirings and promotions, positively *requires* an employer to give *preference* to qualified minority persons or women (usually over white males) when hiring, promoting, or retaining employees in certain designated job positions.

5. *See* authorities cited in note 161 *infra*.

6. *Cf.* note 4 *supra*.

their race or sex, this does not mean that these individuals are not qualified, and second, that the opponents of preferential remedies have grossly exaggerated the impact of such remedies by failing to recognize that, in reality, the cases in which preferential remedies have been ordered have generally involved small numbers of positions and have imposed the remedy for relatively short periods of time.

Before proceeding, however, it is necessary to point out that this article will take a broad approach, sometimes sacrificing specificity in an attempt to provide an overview to the problem of preferential remedies. It is hoped that this overview will demonstrate that the true value of the preferential remedy is in raising the consciousness of the community and encouraging voluntary affirmative action programs that will, by putting people together in the workplace, teach that all are equal.

I. THE NEED FOR PREFERENTIAL REMEDIES

Despite the Supreme Court's mandate of color blindness in *Brown*[7] and the sweeping civil rights legislation that followed ten years later,[8] statistics demonstrate that Blacks are still far behind white males in the employment market. For example, in 1973 the median income for black families was only $7,269, compared to $12,595 for white families.[9] The ratio of median family income of Blacks to Whites decreased in the period 1969-1973 from 0.61 to 0.58,[10] indicating that income differentials actually increased as we entered the seventies. In almost every major occupational category, the income of black males trails that of white males;[11] furthermore, Blacks have a disproportionately low percentage of the more desir-

7. *See also* Bolling v. Sharpe, 347 U.S. 497 (1954).

8. Civil Rights Act of 1964, 28 U.S.C. § 1447, 42 U.S.C. §§ 1971, 1975a-75d, 2000a to 2000h-6 (1970), *as amended*, 42 U.S.C. §§ 2000e to -17 (Supp. III, 1973).

9. U.S. BUREAU OF THE CENSUS, DEPT. OF COMMERCE, CURRENT POPULATION REPORTS, SPECIAL STUDIES, SERIES P-23, No. 48, THE SOCIAL AND ECONOMIC STATUS OF THE BLACK POPULATION IN THE UNITED STATES 1973, at 17 (1974) [hereinafter 1973 CURRENT POPULATION REPORTS]. The Bureau of the Census recently reported that the jobless rate for Blacks in 1974 was 13.7 per cent, while the rate for Whites was 7.6 per cent. It was also reported that the median income for a black family was $7800 in 1974, an increase of 7.4 per cent over 1973. But, after adjusting for the effects of inflation, actual purchasing power of black families declined by 3.2 per cent. U.S. BUREAU OF THE CENSUS, DEPT. OF COMMERCE, CURRENT POPULATION REPORTS, SPECIAL STUDIES, SERIES P-23, No. 54, THE SOCIAL AND ECONOMIC STATUS OF THE BLACK POPULATION IN THE UNITED STATES 1974, at 24, 53 (1975).

10. 1973 CURRENT POPULATION REPORTS, *supra* note 9, at 1.

11. *Id.* at 59. Some of the disparities may be attributable to differences in age, education, and job experience of Blacks and Whites. *Id.* at 52.

able jobs in our economy.[12] In addition, the proportion of Blacks below the low-income level seems to have increased; in 1959 about one quarter of the persons below the low-income level were Black, while in 1973 Blacks made up approximately one third of this group.[13] A comparison of unemployment rates further evidences our lack of progress toward equalizing the employment situation of Blacks and Whites. In 1960, the ratio of black unemployed workers to white was 2.1 to 1. By 1970 this ratio had decreased to 1.8 to 1, but by 1973 it was again 2.1 to 1.[14] Although part of this trend is attributable to changes in family structure and other sociological factors,[15] it nevertheless suggests that the progress toward equal employment opportunity made in the sixties has slowed, if not stopped, in the seventies.

Considerable disparity is also evident between the economic status of women and that of white males. In 1972, the median income for full-time female workers was $5,903, compared to $10,202 for males.[16] In 1970, the median income for women was 59.4 per cent of the median income for men, a gap considerably wider than that existing in 1955 when the median income for women was 63.9 per cent of the median income for men.[17] Furthermore, in 1970, 13.5 per cent of full-time male workers earned at least $15,000 per year, while only 1.1 per cent of full-time female workers were in that salary range.[18] Even in general occupational groups, women earn considerably less than their male counterparts.[19] Although this disparity in large part reflects the fact that women hold the lower-level jobs within most of these groups,[20] women also tend to lag in

12. *See id.* at 56 (Table 40, *Occupation of the Employed Population: 1973*).

13. *Id.* at 29.

14. *Id.* at 45.

15. *See id.* at 1. ("[T]he changes in the overall (income) ratio reflect, in part, the changes in the mix of the population, such as changes in the proportion of husband-wife families with wives in the paid labor force, the proportion of families headed by women, the number of earners in a family, occupational distribution, and work experience patterns").

16. EMPLOYMENT STANDARDS ADMN., WOMAN'S BUREAU, DEPT. OF LABOR, HIGHLIGHTS OF WOMEN'S EMPLOYMENT AND EDUCATION 1 (1974).

17. EMPLOYMENT STANDARDS ADMN., WOMAN'S BUREAU, DEPT. OF LABOR, FACT SHEET ON THE EARNINGS GAP 1 (1971) [hereinafter 1971 FACT SHEET].

18. *Id.* at 3.

19. *Id.* at 2.

20. In public elementary and secondary schools, women were less than 20 per cent of the principals, superintendents, deputy, associate, and assistant superintendents, and other central office administrators in 1970-1971.

Among professional and technical workers in business, women are concentrated in the class B and class C computer programer positions, while men are more frequently employed in the higher paying class A positions. Similarly, women are usually in the lowest category of draftsmen and engineering techni-

earnings when compared to men employed in the same jobs.[21] In addition, the failure of women to enter the higher paying jobs in many occupational groups may be attributable to the lack of opportunity caused by sex discrimination.

It is clear, then, that the problem of employment discrimination is still very serious twenty years after the policy of racial neutrality was stated in *Brown* and ten years after the passage of title VII of the Civil Rights Act of 1964. In one sense this should not be surprising—practices that have been in existence for two hundred years do not disappear easily. Discrimination has become engrained as a way of life in this country and, although much of the conscious discrimination has ceased, the habitual, unconscious patterns of discrimination remain with us today. White males still receive preferences in a number of positions, and minority persons and women still believe that there are many jobs for which they will not be given serious consideration. The "old boy" system of favoritism has worked well for years to keep white males in preferred job positions.

The continued existence of long-standing myths about the inherent inability of Blacks and women to perform certain work[22] has contributed to their exclusion from meaningful positions in the job market.[23] Until recently, Blacks and women have not been accepted in the prestigious university graduate programs that serve as the training ground for many important professional jobs. In addition,

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cians.

Among managers and proprietors, women frequently operate small retail establishments, while men may manage manufacturing plants or wholesale outlets.

In the manufacturing of men's and boys' suits and coats, women are likely to be employed as hand finishers, thread trimmers and basting pullers, and sewing machine operators—jobs where their average hourly earnings are less than $2.70—while men are likely to be employed as finish pressers (hand or machine), underpressers, cutters, and markers—with average hourly earnings of $3.50 to $4.25.

In the service occupations, women are likely to be cooks, nurses' aides, and waitresses, while men are likely to be employed in higher paying jobs as bartenders, guards, custodians, firemen, policemen, and detectives.

Id. at 4.

21. *See, e.g., id.* at 5 (Table, *Median Salary of Full-Time Employed Civilian Scientists, by Sex and Field, 1970*).

22. *See* Murphy, *Sex Discrimination in Employment—Can We Legislate a Solution?*, 17 N.Y.L.F. 437, 444 (1971). *See generally* M. GOLDSCHMID, BLACK AMERICANS AND WHITE RACISM 138-86 (1970); RACIAL DISCRIMINATION IN THE UNITED STATES 137-283 (T. Pettigrew ed. 1975).

23. *See, e.g.*, Duncan, *Patterns of Occupational Mobility Among Negro Men*, in RACIAL DISCRIMINATION IN THE UNITED STATES, *supra* note 22, at 167; Johnson & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. REV. 675, 738-41 (1971); Lieberson & Fuguitt, *Negro-White Occupational Differences in the Absence of Discrimination*, in RACIAL DISCRIMINATION IN THE UNITED STATES, *supra*, at 187. *See generally* Ginzberg & Hiestand, *Employment Patterns of Negro Men and Women*, in THE AMERICAN NEGRO REFERENCE BOOK 205-50 (J. Davis ed. 1966).

discriminatory employment tests have been used to perpetuate the fable of white male superiority, and employer recruitment and training practices have been effectively used to screen out qualified Blacks and women from jobs in both the public and private sectors. These types of discriminatory practices will not be effectively defeated by neutral policies; progress under the color blindness concept has been slow and halting, defeating the promise of equal employment opportunity made in the Civil Rights Act of 1964. Given the evidence at hand, it is clear that some forms of preferential remedies that consider race and sex as factors in employment decisions are necessary to break the habit of employment discrimination.[24]

This is not to say that Blacks or women must be thrust into positions for which they are not qualified.[25] However, when the choice is between qualified white males and other qualified individuals, we should open the available positions to those who formerly could not occupy them. Because of the overt preference historically shown for white males in the job market, this group has been conditioned to expect and receive a preference over qualified Blacks and women. This cycle can only be broken by reversing the preference temporarily until people learn to work with completely neutral criteria.

Several arguments can be put forward to support the claim that the use of preferential remedies is both illogical and unjust. First, it can be argued that regardless of the traditional preference shown white males in the job market, to now prefer Blacks and women unfairly "punishes" innocent white males for the misdeeds of their predecessors. Second, it can be contended that white male employees should not suffer in today's job market merely because certain employers were guilty of race and sex discrimination in the past. Finally, it has been argued that because the Blacks and women who may now benefit from job preferences are not the same individuals who were victims of discrimination in the past, they are being rewarded for the wrongs done to their ancestors.

These arguments, however, fail to place the preferential remedy in its proper perspective. For one thing, it should be noted that court-ordered or legislatively imposed preferential remedies are not nearly as widespread as the current debates over affirmative action might suggest. There are relatively few situations in which preferences have been mandated and effectively enforced, and in these

24. *See, e.g.*, NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974); Morrow v. Crisler, 491 F.2d 1053 (5th Cir. 1974). *See also* Blumrosen, *supra* note 2.

25. In fact, the cases almost invariably note that only *qualified* minority persons or females may receive any preference in employment decisions. *See, e.g.*, NAACP v. Allen, 493 F.2d 614, 618 (5th Cir. 1974).

few situations the preferential remedies have been carefully circumscribed.[26] Furthermore, while there may be an element of unfairness in the preferential remedy, some price must be paid to overcome the long-standing and pervasive patterns of race and sex bias in this nation. The minor injustice that may result from the use of narrowly circumscribed preferential remedies is, on balance, outweighed by the fact that temporary preferential remedies appear to be the only way to effectively break the cycle of employment discrimination and open all levels of the job market to all qualified applicants.

The arguments against the use of preferential remedies also overlook an obvious but crucial factor—preferential remedies are designed to foster, not inhibit, equal employment opportunity. This characteristic distinguishes preferential remedies from the traditional overt discrimination in favor of white males; preferential remedies only temporarily favor one group in order to place all individuals on a par. This characteristic also obviates the apparent inconsistency in the argument that in order to end one preference (in favor of white males), other preferences (in favor of minorities and women) must be introduced. Preferential remedies granted to end employment discrimination may be likened to starting one controlled forest fire in order to bring a raging one under control. At first the idea may seem illogical, but the remedial principle is sound. And, of course, if the goal of equal employment opportunity is to be achieved then we must find remedies that work.[27]

In dealing with employment discrimination cases, the courts have begun to demonstrate a growing awareness that the goal of equal opportunity cannot be implemented effectively solely through neutral employment practices. It would seem obvious that even if all employers hereafter hired on a nondiscriminatory basis, it would still be years before Blacks and women reached a status in the job market comparable to that of white males. Thus, if the pattern of discrimination is to be broken, the present effects of past discrimination must be eliminated.[28] In the context of public school desegregation,

26. *See* R. SMITH, H. EDWARDS & R. CLARK, LABOR RELATIONS IN THE PUBLIC SECTOR 1179-81 (1974).

27. Green v. County School Bd., 391 U.S. 430 (1968). *Cf.* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974).

28. *See, e.g.*, the figures cited in NAACP v. Allen, 493 F.2d 614, 621 (5th Cir. 1974), on the effectiveness of quota relief in that case. The district court in NAACP v. Dothard, 7 BNA Fair Emp. Prac. Cas. 129 (M.D. Ala. 1974), compared the progress in hiring Blacks in two cases, one of which used quotas and the other of which

the Supreme Court has noted that the courts must develop remedies that promise "realistically to work, and . . . to work *now*."[29] This dictum is equally applicable in the employment context; discrimination simply must be ended in the most expeditious manner feasible.[30] When a company, a government agency, or a union has discriminated against a segment of society for many years, a mere resolve to adopt neutral policies will not resolve the problem *now*. Some means of bringing the discriminated-against group up to the level it would have been *but for* the discrimination must be employed.[31]

A number of different remedies have been authorized by Congress and utilized by the courts to end employment discrimination. Injunctions have been issued against further discrimination[32] and against strikes or other interferences with plans to end discrimination.[33] Additionally, courts have ordered employers to disseminate job information specifically aimed at the discriminated-against group,[34] keep detailed records to ensure nondiscriminatory hiring,[35] hire and provide back pay for individuals who have been the victims of discrimination,[36] provide pre-test tutoring for job applicants,[37] expand apprenticeship and training programs,[38] and pay punitive damages.[39] Nevertheless, in certain cases it has been found that these

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denied quotas, and found that significant progress was made only when quotas were ordered.

29. Green v. County School Bd., 391 U.S. 430, 439 (1968). *Accord* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 13 (1971).

30. *See, e.g.*, NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974); Morrow v. Crisler, 491 F.2d 1053 (5th Cir. 1974).

31. *See* Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969).

32. *See, e.g.*, Rios v. Steamfitters Local 638, 501 F.2d 622, 625 (2d Cir. 1974); NAACP v. Allen, 493 F.2d 614, 617 (5th Cir. 1974); United States v. Ironworkers Local 86, 443 F.2d 544, 548 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971).

33. *See, e.g.*, United States v. Carpenters Local 169, 457 F.2d 210, 220 (7th Cir.), *cert. denied*, 409 U.S. 851 (1972).

34. *See, e.g.*, Morrow v. Crisler, 491 F.2d 1053, 1056 (5th Cir. 1974); United States v. N.L. Indus., Inc., 479 F.2d 354, 377-78 (8th Cir. 1973); United States v. Ironworkers Local 86, 443 F.2d 544, 548 (9th Cir. 1971).

35. *See, e.g.*, Morrow v. Crisler, 479 F.2d 960, 967 (5th Cir. 1973); *affd. on rehearing*, 491 F.2d 1053 (5th Cir. 1974); United States v. N.L. Indus., Inc., 479 F.2d 354, 380-82 (8th Cir. 1973); United States v. Ironworkers Local 86, 443 F.2d 544, 548 (9th Cir. 1971).

36. *See, e.g.*, United States v. Ironworkers Local 86, 443 F.2d 544, 548 (9th Cir. 1971); Heat & Frost Insulators Local 53 v. Vogler, 407 F.2d 1047, 1053 (5th Cir. 1969).

37. *See, e.g.*, Carter v. Gallagher, 452 F.2d 315, 319 (8th Cir. 1971), *modified on rehearing*, 452 F.2d 327 (8th Cir.) (en banc), *cert. denied*, 406 U.S. 950 (1972).

38. *See, e.g.*, Rios v. Steamfitters Local 638, 501 F.2d 622, 627 (2d Cir. 1974); United States v. Ironworkers Local 86, 443 F.2d 544, 552-54 (9th Cir. 1971).

39. Plaintiffs have been permitted to seek punitive damages only in a few district court cases. *See, e.g.*, Dessenberg v. American Metal Forming Co., 6 BNA Fair

remedies are often unsatisfactory methods of eliminating the effects of proscribed employment bias. In particular, a number of courts have held that some form of preferential remedy is the most effective means of enforcing equal employment opportunity when the facts show a long history of discrimination against a protected class.[40]

Remedial preferences have been used in a number of different ways. For example, courts have required employers to hire according to ratios of minority to white employees.[41] The employer may be ordered to use the ratio until minority workers comprise a certain percentage of the total work force,[42] or the court may demand that the employer adhere to the ratio until he hires a certain number of minority workers.[43] Another form of preferential remedy is fictional seniority, which provides less-senior minority workers protection against layoffs, or gives them preferences in promotions or transfers, by awarding them more seniority than they would have ordinarily accumulated under existing employment practices.[44] In each instance, the preferential remedy is by definition temporary and is used only until the discrimination pattern is broken.

II. Constitutional Issues: The Problem of Reverse Discrimination

Whether preferential remedies are constitutional is an issue that has not been fully resolved;[45] moreover, few courts have analyzed

Emp. Prac. Cas. 159 (N.D. Ohio 1973); Tooles v. Kellogg Co., 336 F. Supp. 14, 18 (D. Neb. 1972). *But see* EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975).

40. *See* Rios v. Steamfitters Local 638, 501 F.2d 622, 631-32 (2d Cir. 1974); NAACP v. Allen, 493 F.2d 614, 620-21 (5th Cir. 1974); Morrow v. Crisler, 491 F.2d 1053, 1056 (5th Cir. 1974). *See generally* Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 Nw. U. L. Rev. 363 (1966).

41. *See, e.g.*, Erie Human Relations Commn. v. Tullio, 493 F.2d 371, 373 (3d Cir. 1974); Morrow v. Crisler, 491 F.2d 1053, 1056 (5th Cir. 1974); United States v. Lathers Local 46, 471 F.2d 408, 412-13 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973).

42. *See, e.g.*, NAACP v. Allen, 493 F.2d 614, 621 (5th Cir. 1974).

43. *See, e.g.*, Bridgeport Guardians, Inc. v. Bridgeport Civ. Serv. Commn., 482 F.2d 1333, 1341 (2d Cir. 1973); United States v. N.L. Indus., Inc., 479 F.2d 354, 377 (8th Cir. 1973).

44. *See* Delay v. Carling Brewing Co., 10 BNA Fair Emp. Prac. Cas. 164 (N.D. Ga. 1975); Watkins v. United States Steelworkers Local 2369, 369 F. Supp. 1221 (E.D. La. 1974), *affd.*, 516 F.2d 41 (5th Cir. 1975). *Cf.* Meadows v. Ford Motor Co., 510 F.2d 939 (6th Cir. 1975). *But see* Jersey Cent. Power & Light Co. v. IBEW Local 327, 508 F.2d 687 (3d Cir. 1975); Waters v. Wisconsin Steel Works of Intl. Harvester Co., 502 F.2d 1309 (7th Cir. 1974). *See also* Note, *Last Hired, First Fired Layoffs and Title VII*, 88 Harv. L. Rev. 1544, 1547-49 (1975).

45. The Supreme Court declined to deal with the issue in DeFunis v. Odegaard, 416 U.S. 312 (1974). *DeFunis* involved the constitutionality of preferential admis-

the problem in a comprehensive fashion. Most courts that have approached the issue have merely cited the Supreme Court's dictum in *Swann v. Charlotte-Mecklenburg Board of Education*[46] that "mathematical ratios" may serve as a "useful starting point in shaping a remedy to correct past constitutional violations."[47] These courts have generally been content to emphasize that preferential remedies are merely temporary[48] and that, in the cases where they are utilized, they are the only realistic means of overcoming the effects of past discrimination.[49]

This approach has certain advantages—it is concise, yet vague enough to permit the use of preferential remedies with a minimum of legal debate. However, one of the difficulties with this approach is that it is likely to provoke a hostile and often irrational "backlash" by those persons who are adversely affected by preferences in favor of Blacks and women. The attitudes and reactions of many members of the academic community provide a good example of this phenomenon.[50] Many minority persons and women perceive academe as a stronghold of racism and sexism, commanded by white males under the tattered banners of elitism and tradition.[51] This percep-

sions to law school. The Court ruled that the issue was moot because DeFunis was graduating from law school during the term when the opinion was rendered.

46. 402 U.S. 1 (1971).

47. 402 U.S. at 25.

48. *See* Southern Ill. Builder's Assn. v. Ogilvie, 471 F.2d 680, 686 (7th Cir. 1972); Carter v. Gallagher, 452 F.2d 315, 330 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); Local 53, Heat & Frost Insulators v. Vogler, 407 F.2d 1047, 1055 (5th Cir. 1969).

49. *See* Rios v. Steamfitters Local 638, 501 F.2d 622, 631-32 (2d Cir. 1974).

50. *See* H. LIVESEY, THE PROFESSORS—WHO THEY ARE, WHAT THEY DO, WHAT THEY REALLY WANT AND NEED 309-22 (1975). Although the reaction to "affirmative action" in academe is often hostile, it is nevertheless frequently without warrant because very little has been achieved pursuant to federally mandated affirmative action plans. In a recent report issued by the United States Comptroller General, it was found that HEW has made but "minimal progress" in making sure that colleges and universities have acceptable affirmative action programs on employment and are in compliance with Exec. Order No. 11246, 3 C.F.R. 339 (1974), 42 U.S.C. § 2000e (1970). The report reveals that, as of Dec. 9, 1974, only 29 colleges and universities had HEW-approved affirmative action programs. Between 1100 and 1300 colleges and universities are subject to the program and most are required to have affirmative action plans. The report also indicates that HEW has not consistently sent required "show-cause" notices to colleges and universities whose affirmative action programs are found to be in noncompliance, "nor has it begun sanctions against these institutions." Government Employee Relations Rep. No. 621, at B-10, Sept. 1, 1975.

51. This attitude of cynicism is hardly surprising, given situations like the recent one at The University of Michigan involving Dr. Jewel Cobb. *See* Washington Post, May 17, 1975, § 1, at 3, col. 1. Dr. Cobb, who has had a distinguished career as a teacher, research scholar, and university administrator, was tentatively selected by the Board of Regents of The University of Michigan to serve as Dean of the College of Literature, Science, and the Arts. However, within a few days after her selection,

tion is the result of the persistent exclusion of women and minorities from teaching and administrative positions at the university level. Some proponents of the existing system attempt to explain the failures of affirmative action and the failures of universities to hire minorities and women by claiming that very few "qualified" minority persons and women are available to fill the existing administrative and teaching positions in academe. Other individuals who oppose affirmative action argue that minorities and women are relatively unqualified (as compared with white males), and therefore no special effort should be made to place them in important jobs within the academic community. This latter view was appropriately criticized by commentators Moore and Wagstaff as follows:

> Philosopher Charles Frankel goes even further when he says ("Faculty Backlash," 1972, 127): "If you hire unqualified women [and by inference we think he also means minorities], bright white males don't get jobs." Maybe Frankel is right. However, many of those, like the authors, who challenge the rationale for such a statement believe that Frankel would be on sounder ground if he offered evidence to substantiate the reason for his concern. What is disturbing is his chauvinism. Hiring unqualified persons of either sex and of any race would result in a number of bright white males, bright white females, and bright minorities of both sexes not getting as many of the available positions. Frankel, however, seems only concerned about "bright white males."[52]

Affirmative action is neither an effort to lower the standards of excellence within the university community (or in any other job situation), nor an effort to promote a concept of "reverse discrimination."[53] Affirmative action is a simple and straight-forward commitment to increase the number of minorities and women in jobs from which they have been formerly excluded. Affirmative action in general, and preferential remedies in particular, can and does co-exist with the maintenance of professional standards in job hiring and retention. Once this point is understood, certain legal and moral ques-

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the Zoology Department, without ever having met Dr. Cobb, voted to deny her academic tenure. As a consequence, negotiations were broken off between Dr. Cobb and the University, and she was never officially appointed to the position. A committee of seven faculty persons and one professional administrator at The University of Michigan subsequently investigated the situation and reported, in part, that the tenure "procedures used to evaluate [Dr. Cobb] were manifestly inadequate." Affirmative Action Comm., Academic Affairs Advisory Council, The University of Michigan, Report on the LS&A Deanship Search, Selection, and Negotiations April 4, 1974-Jan. 31, 1975, at 32 (April 25, 1975).

52. W. MOORE & L. WAGSTAFF, BLACK EDUCATORS IN WHITE COLLEGES 79 (1974).

53. This is true where "reverse discrimination" is used in a perjorative sense. The term is also used in a more neutral sense to mean all preferential remedies.

tions raised in connection with preferential remedies may become more manageable in the context of traditional constitutional analysis.

Among the most difficult questions that must be answered in reply to those who oppose preferential remedies on constitutional grounds are (1) under what circumstances should preferential remedies be imposed, (2) by whom should such remedies be imposed, (3) for how long should such remedies be imposed, (4) what quality of evidence should be required to sustain the use of a preferential remedy, and (5) should the standard of scrutiny used to judge the constitutionality of the imposition of a preferential remedy be less stringent when the preference is legislatively, as opposed to judicially, mandated. Unfortunately, the courts to date have done little to respond to these issues; rather, the judicial opinions dealing with preferential remedies appear to have taken a strictly result-oriented approach.[54] These opinions have often become mired in traditional constitutional jargon, seemingly in order to reconcile or distinguish prior holdings of the Supreme Court, and thus frequently obscure the truly difficult and significant issues raised by preferential remedies. As a consequence, no uniform legal principles or policy imperatives have emerged to lend some enlightened consistency and coherence to these opinions. However, while there is no clear pattern to the judicial opinions, it is still possible to analyze some of the current judicial thinking and predict the general direction in which the courts appear to be heading in the area of preferential remedies.

Although it is clear that racial classifications are not unconstitutional per se,[55] they traditionally have been considered suspect and are generally subjected to strict judicial scrutiny.[56] This means that if the government wishes to employ a racially based preference, it must demonstrate that this preference serves a compelling governmental interest and that its use is the least drastic means of accomplishing the desired end. As a practical matter, and as a general

54. *See, e.g.*, United States v. Lathers Local 46, 471 F.2d 408 (2d Cir. 1973); United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir. 1971).

55. *E.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Loving v. Virginia, 388 U.S. 1, 11 (1967); Porcelli v. Titus, 431 F.2d 1254, 1257 (3d Cir. 1970).

56. Loving v. Virginia, 388 U.S. 1, 11 (1967). Sex is apparently not a suspect classification, Schlesinger v. Ballard, 419 U.S. 498, 509 (1975); Kahn v. Shevin, 416 U.S. 351, 355 (1974); Frontiero v. Richardson, 411 U.S. 677, 692 (1973) (Powell, J., concurring), although at least four Justices would treat it as suspect. *See* Schlesinger v. Ballard, 419 U.S. 498, 511 (1975) (Brennan, J., dissenting); Frontiero v. Richardson, 411 U.S. 677 (1973). At present, therefore, preferences involving sex classifications may only have to pass the rational basis test. *See, e.g.*, Kahn v. Shevin, 416 U.S. 351 (1974). *Cf.* Feinerman v. Jones, 356 F. Supp. 252 (M.D. Pa. 1973).

proposition, it may be assumed that any remedy that seeks to achieve equal employment opportunity among persons of different races will always serve a compelling governmental interest.[57] However, it is more difficult to show that there are no less drastic alternative remedies that would break the cycle of discrimination. Although a few courts have denied preferential remedies on the ground that there are less drastic means of ending employment discrimination,[58] several courts have implicitly found that some form of preferential remedy is necessary to eliminate the effects of past discrimination,[59] and at least one court has explicitly stated this conclusion.[60]

In *NAACP v. Allen*,[61] the Fifth Circuit used statistics to demonstrate that a neutral remedy alone was not sufficient to end discrimination. The court noted that an injunction against further race discrimination issued to the Alabama Department of Public Safety had not resulted in the hiring of a single black state trooper; indeed, the court found that it was not until the district court ordered preferential relief, some eighteen months after the original injunction was ordered, that Blacks were finally hired.[62] The court also noted that, aside from the obvious effect of providing jobs for black applicants, the preferential remedy "promptly operates to change the outward and visible signs of yesterday's racial distinctions and thus, to provide an impetus to the process of dismantling the barriers, psychological or otherwise, erected by past practices."[63] The court thus recognized that breaking both those who discriminate and those who expect to be discriminated against of the "habit" of racial discrimination is an integral part of the task of ending employment discrimination and that some form of preferential remedy is necessary to break the discrimination cycle. Similar reasoning will hold true in most cases where there is a long history of discrimination; in these cases a preferential remedy should be able to survive strict judicial scrutiny.

57. *See, e.g.*, Porcelli v. Titus, 431 F.2d 1254 (3d Cir. 1970) (goal of equal opportunity so compelling that school board may not only be permitted, but may be required, to prefer Blacks in hiring).

58. *See, e.g.*, Harper v. Mayor & City Council, 359 F. Supp. 1187, 1214 (D. Md.), *affd. sub nom.* Harper v. Kloster, 486 F.2d 1134, 1136 (4th Cir. 1973); Arrington v. Massachusetts Bay Transp. Auth., 306 F. Supp. 1355, 1359-60 (D. Mass. 1969).

59. *See* Rios v. Steamfitters Local 638, 501 F.2d 622, 631-32 (2d Cir. 1974); NAACP v. Allen, 493 F.2d 614, 620-21 (5th Cir. 1974); Morrow v. Crisler, 491 F.2d 1053, 1056 (5th Cir. 1974).

60. NAACP v. Allen, 493 F.2d 614, 620-21 (5th Cir. 1974).

61. 493 F.2d 614 (5th Cir. 1974).

62. 493 F.2d at 621.

63. 493 F.2d at 621.

It can be argued, however, that preferential remedies involving racial or gender-based classifications should be subjected to the less rigid rational basis test, rather than to strict scrutiny.[64] There are two related arguments that support this proposal. First, it can be contended that the strict scrutiny approach was judicially developed to prevent only those classifications that stigmatize some segment of society. Although most government classifications tend to favor one group over another, they are generally used to further neutral policies of convenience or necessity; they do not intend to stigmatize the disfavored group and they do not have that effect. In such cases, the government need only show that there is some rational basis for the classification. Certain classifications, however, tend to have no legitimate public purpose and involve groups that have traditionally been disadvantaged in our society. If this is the case, a suspicion is raised that the classification is based on the same irrational prejudices that caused the group to be disfavored in the past; accordingly, the classification should be strictly scrutinized. However, when the classification is benign, favoring an historically disadvantaged group, the suspicion of irrational prejudice against the group is not present;[65] therefore, the argument concludes, there is no need to strictly scrutinize such a classification.

Professor Ely has suggested a second and related argument for applying the rational basis test to benign classifications.[66] When the dominant group in the legislature acts to its own benefit while disadvantaging a disfavored minority, the classification is suspect and should be strictly scrutinized. However, when the dominant group acts to its own detriment while benefiting a minority, the classification is not suspect and need have only a rational basis. Thus, according to Professor Ely, when a white legislature approves a preference that works to the advantage of Blacks and to the detriment of Whites, there has been no "suspicious" act. It is unlikely that the dominant group would disadvantage itself in relation to a nondominant group because of any of the irrational reasons that his-

64. *See, e.g.*, 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, 1107-08 (1969) [hereinafter *Developments*].

65. The argument is that only those classifications that stigmatize a class should be suspect. However, it can be argued that even a preference in favor of Blacks stigmatizes them by implying that they could not "make it" without such assistance. *See, e.g.*, DeFunis v. Odegaard, 416 U.S. 312, 343 (1974) (Douglas, J., dissenting). For a similar argument with respect to women, see Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 16-23 (1975).

66. Ely, *supra* note 64. *See also Developments*, *supra* note 64, at 1125-26.

torically led to discrimination against the minority.[67] Similarly, the dominant group is almost certain to choose the least drastic (to itself) means of benefiting the disadvantaged group. These built-in safeguards abrogate the need for strict scrutiny, and the rational basis test provides sufficient assurance of fair treatment for all.[68]

It appears that the courts may in fact be distinguishing between those preferences mandated by the legislature and those ordered by the courts and scrutinizing benign preferences less strictly when they originate in the legislature. It may be that the courts find it easier to accept the use of legislatively authorized preferential remedies because, unlike the judiciary, the legislature is directly accountable to the voters, who can show their disapproval at the ballot box. While the exact rationale being utilized is unclear, the opinions do suggest that something similar to a rational basis test is being applied to benign preferences that have been mandated by the legislature, while stricter scrutiny is applied when there is no clear legislative mandate.

In *Kahn v. Shevin*[69] the Supreme Court held that a Florida statute that provided a property tax exemption to widows, but offered no analogous benefit to widowers, did not violate the equal protection clause. The Court did not consider whether a compelling state interest was present or less drastic means possible; it required only a rational basis for the preference. In part, it found this basis by reasoning that because "the job market is inhospitable to the woman seeking any but the lowest paid jobs,"[70] the state may pass a tax law "reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden."[71]

It could be argued that the rational basis test was applied in *Kahn* because sex has not yet been declared a suspect classification by a majority of the Supreme Court, and therefore that the case is not a statement about the proper standard for benign preferences. However, the majority opinion was written by Justice Douglas, who concurred in the plurality opinion in *Frontiero v. Richardson*;[72] the plurality in *Frontiero* found that sex was a suspect classification. This

67. Ely, *supra* note 64, at 735.

68. If the rational basis test is applied to benign preferences, they should easily pass constitutional muster since the elimination of the effects of discrimination is certainly a valid governmental interest that benign preferences would conceivably further.

69. 416 U.S. 351 (1974).

70. 416 U.S. at 353.

71. 416 U.S. at 355.

72. 411 U.S. 677 (1973).

seems to indicate that at least Justice Douglas is willing to use the rational basis test in considering legislatively declared benign preferences involving otherwise-suspect classifications.[73] The three dissenting Justices in *Kahn* (Brennan, Marshall, and White) would seemingly require strict scrutiny even for benign preferences. Pursuant to this view, they argued in *Kahn* that the state could ease the financial impact of spousal loss without discriminating between men and women.[74]

Kahn may have been narrowed recently by the Court's opinion in *Weinberger v. Wiesenfeld.*[75] In *Wiesenfeld,* the Court found that the mother's insurance benefits section of the Social Security Act,[76] which provided benefits to the widow of a worker with eligible children in her care but made no corresponding provision for a similarly situated widower, unjustifiably discriminated against female wage earners by providing their survivors with less protection than the survivors of male wage earners. The government had argued that the scheme was "designed to compensate women beneficiaries as a group for the economic difficulties which still confront women who seek to support themselves and their families."[77] However, the Court noted that "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme."[78] The Court found that in this case the scheme was not based on any special needs of women, but on the premise that women, unlike men, would want to remain at home with their minor children. The Court found this premise to be entirely irrational, since either parent might want to remain at home upon the other's death.

As in *Kahn,* the challenged statutory scheme drew a sex-based line, allowing widows a benefit not available to widowers. Yet in *Wiesenfeld,* the Court held that the statutory preference could not meet the rational basis test. This holding may indicate that the Court intends in the future to scrutinize preferences for women more carefully. However, the Court may simply have decided that the

73. This interpretation finds support in the means by which Justice Douglas distinguished *Kahn* from *Frontiero.* Unlike the statutes in *Kahn,* Justice Douglas found that the legislation in *Frontiero* was "not in any sense designed to rectify the effects of past discrimination against women." 416 U.S. at 355 n.8, *quoting* Frontiero v. Richardson, 411 U.S. 677, 682 n.22 (1973).

74. 416 U.S. at 357-60 (Brennan, Marshall, JJ., dissenting); 416 U.S. at 360-62 (White, J., dissenting).

75. 420 U.S. 636 (1975).

76. 42 U.S.C. § 402(g) (1970), *as amended,* (Supp. III, 1972).

77. 420 U.S. at 648.

78. 420 U.S. at 648.

classification in *Wiesenfeld* was not an attempt to aid women disadvantaged in the working world, but represented a perpetuation of the myth that women want to stay home with their children while men want to work. If the Court in *Wiesenfeld* was concerned with the legislative use of stereotypes, it failed to point out why the basis of the preference for widows in *Kahn* was more justifiable than that in *Wiesenfeld*. However, the type of preference at issue in both cases was very different from those preferences at issue in the employment cases. Preferential remedies in the employment area allow minority members and women to work and support themselves while the preferences at issue in *Kahn* and *Wiesenfeld* reinforced the image of women as the weaker sex. Thus, it is likely that some proponents of remedial preferences in employment discrimination cases will oppose the preferences in *Kahn* and *Wiesenfeld*. This opposition, however, goes to the issue whether a preference is actually benign rather than whether benign preferences should be permitted. A preference that has the effect of stigmatizing a class of people by suggesting that they are incapable of caring for themselves may not be benign.[79]

In both *Kahn* and *Wiesenfeld*, the standard of review used to determine both whether the preference at issue was benign and whether it should be permitted was the rational basis test.[80] In *Morton v. Mancari*,[81] the Court also seemed to accept the rational basis test for a benign legislative preference where Indians were the preferred class. In *Morton*, the Court unanimously upheld the Indian Preference Statute[82] which provides a preference for Indians seeking employment with the Bureau of Indian Affairs. The Court found that because the preference was "reasonably designed to further the cause of Indian self-government and make the BIA more responsive to the needs of its constituent groups," it was "reasonably and directly related to a legitimate, nonracially based goal."[83] Although

79. *See* note 65 *supra*.

80. While the Court appeared to use the rational basis test throughout both *Kahn* and *Wiesenfeld*, it is not clear that this is the only approach it could have used. A court might want to use more than a mere rationality test when determining whether a preference was actually, as opposed to "conceivably," benign. Thus, a statute that appears benign under the rational basis test might turn out to have invidious aspects under stricter scrutiny. *See, e.g.*, Wiesenfeld v. Secretary of Health, Educ. & Welfare, 367 F. Supp. 981 (D.N.J. 1973). This raises a fascinating question about the proper initial approach to "benign" legislation that unfortunately is beyond the scope of this article.

81. 417 U.S. 535 (1974).

82. Indian Reorganization Act, 25 U.S.C. § 472 (1970).

83. 417 U.S. at 554.

the Court may have considered the preference nonracially based in the sense that it encouraged long-run equality, it was clearly racially based in the sense that Indians were preferred for employment with the BIA solely because they were Indians.

In considering the Indian preference, the Court did not require a showing of compelling governmental interest and, although it noted that the statute was narrowly drawn to include in the preferred class only those Indians affected by the BIA (that is, those living on or near reservations), it did not consider whether there were less drastic means of promoting Indian self-government. This could be attributable in part to the Court's reliance on two clauses of the Constitution that seem to single Indians out for special treatment;[84] however, it appears that the Court was also influenced by the fact that it was dealing with a benign preference, aiding a minority group that historically had been discriminated against.

The rational basis test has also been used in considering the constitutionality of statutes mandating preferences for veterans. These statutes generally grant persons extra points on competitive civil service exams solely because they are veterans.[85] In *Feinerman v. Jones*,[86] the district court held that because there is no fundamental right "to be fairly considered for public employment,"[87] the state may prefer veterans so long as there is a rational basis for the preference. The court postulated three factors that support this rational basis: military training makes veterans more disciplined, loyal, and experienced; veterans should be rewarded for serving in the military; and the preference aids in rehabilitating and relocating veterans whose lives were disrupted by military service. Because the plaintiff failed to prove any discriminatory impact, the court rejected the claim that the preference discriminated against women. Furthermore, the court stated that even if there was such a discriminatory impact, the statute would still be constitutional because a rational basis for the preference existed.

Finally, in *Porcelli v. Titus*,[88] the Third Circuit used a rational basis test to uphold the abolition of a promotional list being used by the Newark School Board that tended to perpetuate the low representation of Blacks among school administrators. In order to in-

84. U.S. CONST. art. I, § 8, cl. 3 (power to "regulate Commerce . . . with the Indian Tribes"); U.S. CONST. art. II, § 2, cl. 2 (power to make treaties).

85. *See, e.g.*, N.Y. CIV. SERV. LAW § 85 (McKinney 1973); MICH. COMP. LAWS § 38.413 (1970); PA. STAT. ANN. tit. 51, § 492.3 (Purdon 1969).

86. 356 F. Supp. 252 (M.D. Pa. 1973).

87. 356 F. Supp. at 258.

88. 431 F.2d 1254 (3d Cir. 1970).

crease the number of Blacks who could be selected as principals or vice-principals, the court approved the use of race as one criterion to be used in the selection process. In fact, the court not only found that the school board was permitted to prefer minority applicants, but indicated that the board may have had an affirmative duty to do so in order to integrate school faculties.[89]

In each of these cases involving the use of legislatively authorized preferential treatment, the courts seemed content merely to rubber-stamp what they perceived as benign legislative action;[90] there was little or no consideration of the existence of a compelling state interest or a less drastic means. The courts have not required that the preferences be limited to the end of correcting the effects of past discrimination, and thus no time limits or goals have been mentioned that would make the preferences temporary. It appears, therefore, that the courts may be willing to accept the principle that benign racial or gender-based classifications, when directly ordered by a legislative body, are not suspect and need not be strictly scrutinized.

There is a hybrid class of preference cases, a cross between legislatively ordered and court ordered preferences, in which either an administrative agency or a court orders a remedial preference on the basis of an implied legislative authorization. For example, under Executive Order 11246,[91] the Secretary of Labor is authorized to promulgate programs that, as a condition for receiving government contracts, require government contractors to undertake affirmative action to ensure nondiscriminatory employment. One such program, the "Philadelphia Plan," required federal contractors to make good faith efforts to meet specific goals for minority employment in six construction trades and had the effect of preferring minority applicants over white males. The "Philadelphia Plan" was approved in *Contractors Association of Eastern Pennsylvania v. Secretary of*

89. 431 F.2d at 1257-58.

90. *But see* Anderson v. San Francisco Unified School Dist., 357 F. Supp. 248 (N.D. Cal. 1972), where the court overturned a school board's policy of preferring minority applicants.

91. 3 C.F.R. 169 (1974), 42 U.S.C. § 2000e (1970). *See* Associated Gen. Contractors of Mass., Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974); Southern Ill. Builders Assn. v. Ogilvie, 471 F.2d 680 (7th Cir. 1972); Contractors Assn. of Eastern Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir. 1971). The President is likely to be somewhat less responsive to the public will than the legislature and somewhat more responsive than the courts. Unlike individual legislators, the President's constituency is generally very broad and is not likely to leave him over an individual issue. This gives him more flexibility than the legislature. However, unlike federal judges, the President is elected and must still consider the wishes of his constituents to some extent. Thus, the Executive Order cases seem to fall somewhere between pure legislative and pure judicial preferences.

Labor.[92] The court in *Contractors* emphasized that the plan carefully considered employment trends and industry needs in order to interfere as little as possible with nonminority workers.[93] In addition, the court noted that the plan was designed only to implement the participation of minority tradespeople in the construction labor pool and was shaped to meet the specific problems of the affected area; thus, it implied that it felt the preference would cease as soon as these goals were reached.[94]

In taking into account the employment needs in the industry and the temporary nature of the preference, the *Contractors* court seemed to indicate that the plan was as narrowly drawn as possible. However, because the court did not consider whether there was a less drastic alternative than a preference that would achieve equal opportunity, it can be inferred that the court was scrutinizing the preference less strictly than is done in suspect classification cases. Nevertheless, the scrutiny applied was stricter than in the benign legislative preference cases.

This strict-but-not-too-strict level of scrutiny is also apparent in the Washington supreme court's analysis in *DeFunis v. Odegaard*.[95] In that case, the court upheld the University of Washington's preferential admissions program under which minority applicants received some preference over Whites. The court rejected the argument that because the racial classification was benign, the rational basis standard of scrutiny should be applied. In its view, because of the disparate effect such classification had on nonminority applicants, a more rigid standard of scrutiny was required.[96] Using what it considered strict scrutiny, the court found that a compelling state interest was served by integrating law schools, acquainting law students with all segments of society, and increasing the number of minority lawyers. Furthermore, the court found that a preference for minority students was the least drastic means of achieving integration in the law school.[97] However, it is significant that the court failed to mention whether the preferential remedy was limited—that is, whether it would automatically end when the problem ended. The court also

92. 442 F.2d 159 (3d Cir. 1971).

93. 442 F.2d at 176-77. *But see* Kahn v. Shevin, 416 U.S. 351 (1974), where the Court approved a legislative preference that was seemingly broader than necessary to accomplish the desired goal.

94. 442 F.2d at 176-77.

95. 82 Wash. 2d 11, 507 P.2d 1169 (1973), *vacated as moot*, 416 U.S. 312 (1974).

96. 82 Wash. 2d at 32, 507 P.2d at 1182.

97. 82 Wash. 2d at 32-35, 507 P.2d at 1182-84.

failed to make a finding that the law school had historically discriminated against minorities. Because these two factors are generally considered in court-ordered preference cases,[98] the failure to take them into account in *DeFunis* may indicate that the level of scrutiny was somewhat less rigid.

The less rigid standard of scrutiny applied by the Washington supreme court would seem to be appropriate in a case like *DeFunis*. Some legislative approval of the preferential admissions policy can be inferred from the fact that the legislature continued to appropriate funds without questioning the policy. Furthermore, professional schools may be in a better position than either legislatures or courts to make judgments about preferential admissions programs. The legislature, as a political body, may find the issue too complex and politically sensitive to handle efficiently, while the courts have neither the time nor the expertise to second-guess each admissions decision. In addition, since there are no objective tests that have been shown to measure perfectly a student's potential performance in law school or practice, the school ought to be allowed some margin for experimentation in its admissions policy, particularly when a legitimate social end (such as the training of more minority and women attorneys) is being served. Finally, the school should be given some leeway in determining the goals of its admissions policy. For example, some law schools might choose students based on their potential for becoming outstanding legal scholars, while other schools might value more highly the potential for becoming a successful local practitioner; similarly some schools might prefer foreign over American applicants in selecting persons for graduate law study or graduate fellowships. Few people have questioned the advisability of allowing law schools leeway in deciding such questions, even though a class of potential students might be excluded by the policies adopted. Thus, if the school perceives a need to bring more minority or women students into the profession, it is at least arguable that it should be permitted to do so.

It can be legitimately contended that if too much discretion is given to nonlegislative agencies such as law schools, these agencies may be able to employ malign as well as benign preferences. This can be prevented, however, by requiring the agency to justify its "hiring" goals as was done in *DeFunis*. In other words, although the agency should be allowed considerable discretion, it would of course be limited by statutory or constitutional constraints against invidious discrimination.

98. *See* text at notes 164-66, 178 *infra*.

When *DeFunis* reached the Supreme Court, the Court found the case to be moot and refused to rule on the controversial preference.[99] Justice Douglas dissented from the finding of mootness and indicated that, although he would be willing to give school officials considerable discretion in admissions decisions, he would not uphold a policy that gave some applicants a preference based solely on their race. Justice Douglas called for a very strict standard of review and implied that he would not favor preferential treatment for minority applicants.

Justice Douglas' dissent in *DeFunis* would seem to clash directly with his opinion in *Kahn v. Shevin.* Although Douglas did not attempt to reconcile the opinions,[100] two factors may have influenced the conflicting results. First, in *Kahn* there was a clear legislative mandate for the preference, while in *DeFunis* the mandate was more vague and uncertain. Justice Douglas may have been more willing to defer to the judgment of a legislature than the decisions of a quasi-administrative body. Second, and probably more persuasive, in *DeFunis* the preference was benign toward minority applicants but it was malign toward white applicants—white applicants were directly and adversely affected by the preference. In *Kahn,* however, any adverse effect on males was less direct, and in fact, the burden of the preference was spread over most of the taxpaying population of the state, both male and female. Justice Douglas thus may have been willing to allow a preference only when no clearly defined group is directly and adversely affected by the benefit granted to the preferred group.[101]

This reasoning, however, would seem to conflict with the Supreme Court's decision in *Morton v. Mancari.* In that case, non-Indian applicants were directly disadvantaged by the Indian preference. The Court's reliance, at least in part, on those sections of the Constitution that seem to give Indians some special status may account for Justice Douglas' different attitude toward the preference in *Morton.* Nevertheless, these conflicting decisions seem to indicate that Justice Douglas would have strictly scrutinized a preference that is not mandated by the legislature and that adversely affects a

99. DeFunis v. Odegaard, 416 U.S. 312 (1974). DeFunis was admitted to law school pursuant to the order of the trial court, which had found in his favor. Since the parties had agreed that regardless of the outcome of the case DeFunis would be allowed to graduate, the Court found the case to be moot. 316 U.S. at 316-20.

100. *DeFunis* was decided on April 23, 1974. 416 U.S. at 312. *Kahn* was decided the following day. 416 U.S. at 351.

101. Compare *Wiesenfeld,* where one group of women (those working and making Social Security payments) were directly and adversely affected by a preference designed to compensate another group of women. *See* text at notes 75-78 *supra.*

particular group, while he would have been more likely to use the rational basis test in cases involving a legislatively mandated preference, especially if the preference spreads any accompanying burden widely over the population.

The strictest judicial scrutiny seems to be applied in cases in which the courts order preferences without any explicit legislative mandate. For example, in *Swann v. Charlotte-Mecklenburg Board of Education*,[102] the Court held that "mathematical ratios" are "useful starting point[s] in shaping a remedy"[103] for unconstitutional segregation of students and faculty in a school district. However, the Court noted that the use of ratios is not to be ordered lightly, and that here the district court had found both a history of segregation and failure by the school board to propose workable alternative means of integrating the schools.[104] The Court emphasized that the ratio is only a starting point and that there is no constitutional right to a fixed racial balance in every school equal to that in the school system as a whole.[105]

The *Swann* case is only one in a long line of cases seeking to enforce the constitutional right to attend integrated schools.[106] Although state-imposed school segregation was declared unconstitutional almost seventeen years before *Swann*, deliberate resistance on the part of many school boards impeded the effort to enforce the constitutional guarantee.[107] The Court realized in *Swann* that color-blind remedies could not effectively eliminate segregation and that affirmative relief was necessary. When a school board defaults on its obligation to integrate the schools, the courts have a duty to order such relief (including that based on ratios) as is necessary to end the pattern of segregation.

The Court approved the use of ratios in faculty assignments in *United States v. Montgomery County Board of Education*,[108] in which the Court recognized that the ratios would be necessary in order to assure that faculties would be integrated with the greatest possible speed. While this case did not involve hiring and firing, it nevertheless involved the use of color in the employment-related

102. 402 U.S. 1 (1971).

103. 402 U.S. at 25.

104. 402 U.S. at 24.

105. 402 U.S. at 23-24.

106. *See, e.g.*, United States v. Montgomery County Bd. of Educ., 395 U.S. 225, 228 (1969).

107. *See, e.g.*, United States v. Montgomery County Bd. of Educ., 395 U.S. 225, 228 (1969).

108. 395 U.S. 225 (1969).

decision concerning where the teachers' work would be done. It therefore forms a bridge between the school desegregation and employment cases.

In the school desegregation cases, both the compelling governmental interest in integration and the absence of workable, less drastic means are well documented, making it easy for the Supreme Court to apply strict scrutiny to desegregation orders and yet allow the lower courts a great deal of discretion.[109] Court-ordered preferential remedies in the absence of explicit legislative mandate have also been used in the employment context under the Civil Rights Acts of 1866[110] and 1871,[111] but the strict scrutiny applied in these cases requires an individual finding that a compelling governmental interest is served and no less drastic means are available. For instance, in *NAACP v. Allen*, the court approved a one-Black-to-one-White hiring ratio to be in effect until twenty-five per cent of the Alabama state troopers and support personnel were Black. Although the court appeared willing to assume that there was a compelling governmental interest in providing equal opportunity to be hired for these jobs,[112] it emphasized that there was no less restrictive means of achieving the goal and stressed that by making the order temporary, the district court had imposed the most narrowly drawn remedy possible to accomplish the purpose.[113]

These decisions suggest that there may be a continuum in the level of scrutiny accorded a preferential remedy that depends on the degree of legislative approval of that remedy. Scrutiny seems to be most lenient when there is an explicit legislative mandate. When the mandate is only implied, the scrutiny is more strict, and it intensifies as the implication becomes less clear. The strictest scrutiny is applied when there is not even an implied legislative mandate. This strictness manifests itself in the degree to which the courts require a consideration of both alternative means and limits on the duration of the remedy. In the employment context, where there are at most only implied legislative mandates for preferential remedies, this means that to withstand constitutional attack, a preferential remedy must be found to be the least drastic means of remedying discrimina-

109. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 11-12 (1971); United States v. Montgomery County Bd. of Educ., 395 U.S. 225, 226 (1969).

110. 42 U.S.C. § 1981 (1970).

111. 42 U.S.C. § 1983 (1970).

112. The defendants had, however, objected on appeal only to the affirmative remedy, not to the finding of a duty not to discriminate. *See* 493 F.2d at 617.

113. 493 F.2d at 621.

tion in the particular situation, must be drawn narrowly enough to limit its effect to remedying past discrimination, and must automatically terminate when the goal is accomplished. These limitations assure that the volatile remedy will be used sparingly.[114] Since only carefully circumscribed preferences are likely to receive judicial approval, the furor over preferential remedies in the employment context is based on a misconception of the power and inclination of the courts to so affect the employment relationship.

III. The Existing Legislation on Employment Discrimination

Title VII of the Civil Rights Act of 1964[115] makes it an unlawful employment practice to discriminate against any individual on the basis of the individual's race, color, religion, sex, or national origin.[116] When a violation of the Act is found, the district court may, *inter alia*, "order such affirmative action . . . or any other equitable relief as the court deems appropriate."[117] However, section 703(j) of the Act forbids the use of preferential treatment to remedy an imbalance between minority and nonminority employees.[118]

Notwithstanding section 703(j), a number of courts have found that preferential treatment may be an acceptable remedy for a violation of title VII when there is a history of discrimination, whether the discrimination was intentional[119] or de facto.[120] While some of

114. There are good reasons why the use of racial criteria should be strictly scrutinized and given legal sanction only where a compelling need for remedial action can be shown. Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920, 931-32 (2d Cir. 1969). Government recognition and sanction of racial classifications may be inherently divisive, reinforcing prejudices, confirming perceived differences between the races, and weakening the government's educative role on behalf of equality and neutrality. It may also have unexpected results, such as the development of indicia for placing individuals into different racial categories. Once racial classifications are imbedded in the law, their purpose may become perverted: a benign preference under certain conditions may shade into a malignant preference at other times. Moreover, a racial preference for members of one minority might result in discrimination against another minority, a higher proportion of whose members had previously enjoyed access to a certain opportunity.

Associated Gen. Contractors of Mass., Inc. v. Altshuler, 490 F.2d 9, 17-18 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974).

115. 42 U.S.C. § 2000e to -17 (1970), *as amended*, (Supp. III, 1973).

116. 42 U.S.C. § 2000e-2 (1970).

117. 42 U.S.C. § 2000e-5(g) (Supp. III, 1973).

118. 42 U.S.C. § 2000e-2(j) (1970).

119. *See, e.g.*, United States v. Masonry Contractors Assn. of Memphis, Inc., 497 F.2d 871 (6th Cir. 1974); Rios v. Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); United States v. N.L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973); United States v. Lathers Local 46, 471 F.2d 408 (2d Cir. 1973); United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir. 1971).

120. *See, e.g.*, NAACP v. Beecher, 504 F.2d 1017, 1028 (1st Cir. 1974); United

these opinions fail to mention section 703(j),[121] others reason that the section was not intended to prohibit the use of a preferential remedy where an imbalance is a result of past unlawful discrimination. This is so, say these courts, since it "would allow complete nullification" of the statute to eliminate as a possible remedy what is often the only effective means of overcoming past discrimination.[122]

Thus far, it appears that only two courts of appeals have approved actual hiring preferences for minority employees under title VII. Finding a history of discrimination in the promotion of foremen, the court in *United States v. N. L. Industries, Inc.*,[123] ordered a one-Black-to-one-White hiring ratio until fifteen Blacks (out of one hundred positions) were promoted. However, the court rejected a government request for a recruiting campaign designed to effect a goal of one-third black hires into office, clerical, and technical positions notwithstanding that there was a history of discrimination in that area. Similarly, in *EEOC v. Detroit Edison Co.*,[124] the court upheld the use of hiring ratios where the district court had found a long history of discrimination against black job applicants and employees by both the company and the unions involved. The other decisions by courts of appeals under title VII in which preferences have been ordered have usually involved preferences for union membership or referrals.[125] However, these may be tantamount to job preferences since employers in certain private industries give preference to union members over nonmembers in hiring and placement.[126]

States v. IBEW Local 212, 472 F.2d 634 (6th Cir. 1973); United States v. Carpenters Local 169, 457 F.2d 210 (7th Cir. 1972); United States v. IBEW Local 38, 428 F.2d 144 (6th Cir. 1970); Local 53, Heat & Frost Insulators v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

121. *E.g.*, EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975); United States v. Masonry Contractors Assn., 498 F.2d 871 (6th Cir. 1974); United States v. N.L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973); United States v. Carpenters Local 169, 457 F.2d 210 (7th Cir. 1972).

122. *See* Rios v. Steamfitters Local 638, 501 F.2d 622, 631 (2d Cir. 1974); United States v. Lathers Local 46, 471 F.2d 408, 413 (2d Cir. 1973); United States v. Ironworkers Local 86, 443 F.2d 544, 552-54 (9th Cir. 1971); United States v. IBEW Local 38, 428 F.2d 144, 149-50 (6th Cir. 1970); Local 53, Heat & Frost Insulators v. Vogler, 407 F.2d 1047, 1054 (5th Cir. 1969).

123. 479 F.2d 354 (8th Cir. 1973).

124. 515 F.2d 301 (6th Cir. 1975).

125. *See* cases cited in notes 119-20 *supra*.

126. *See* United States v. Carpenters Local 169, 457 F.2d 210, 219 (7th Cir. 1972) ("Where, as here, the union members refuse to work with nonmembers who are working without union approval, the union in fact exerts effective control over employment in the trade by controlling membership and issuance of permits, notwithstanding contractual provisions purportedly permitting employment without regard for

Notwithstanding section 703(j), there is an implied legislative mandate for the use of preferential remedies under title VII. Section 703(j) was added to the Civil Rights Act of 1964 as a compromise measure to emphasize that the Act would not require employers to achieve or maintain specific racial balances through the use of preferential treatment. However, at no point in the consideration of the Act did the sponsors indicate that temporary preferential remedies could not be used to overcome the effects of past discrimination.[127] In considering the 1972 amendments to the Act, Congress impliedly recognized the importance of preferential remedies by rejecting a number of proposed amendments that would have eliminated their use. Senator Javits, one of the sponsors of the bill, in arguing against an amendment that would have enjoined all federal officials from requiring preferential remedies, pointed out that the amendment would not only eliminate an important judicial remedy for employment discrimination, but would also preclude effective consent decrees and affirmative action under Executive Order 11246.[128] The Senate rejected the proposed amendment, thereby implying its approval of preferential remedies as employed by the courts.[129]

Despite this implied legislative approval, the courts have continued to subject preferential remedies in title VII cases to very strict judicial scrutiny,[130] similar to that applied in the court-ordered preference cases.[131] This can be attributed to two factors. First, although section 703(j) has not been interpreted to ban all preferential remedies,[132] the section may indicate that Congress was concerned about the possibility of abuse of such remedies; therefore

union membership or approval"); United States v. Ironworkers Local 86, 443 F.2d 544, 547 (9th Cir. 1971); Local 53, Heat & Frost Insulators v. Vogler, 407 F.2d 1047, 1049 (5th Cir. 1969).

127. The sponsors did indicate that title VII would not require the maintenance of a racial balance, *see, e.g.*, 110 CONG. REC. 12,723 (1964) (remarks of Senator Humphrey); 110 CONG. REC. 7213 (1964) (memorandum by Senators Clark and Case), but that is quite different from a temporary preferential remedy used solely to overcome the effects of past discrimination.

128. *See* 118 CONG. REC. 1664 (1972). *See also* 118 CONG. REC. 1661-76 (1972); 118 CONG. REC. 4917-18 (1972).

129. Since Congress specifically considered the issue of preferential treatment and refused to eliminate its use as a remedy under title VII, the refusal is at least some evidence of its approval of court interpretations. *See* Laycock v. Kenney, 270 F.2d 580 (9th Cir. 1959), *cert. denied*, 361 U.S. 933 (1960). *Cf.* Flood v. Kuhn, 407 U.S. 258 (1972).

130. *See, e.g.*, Rios v. Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); United States v. Lathers Local 46, 471 F.2d 408 (2d Cir. 1973).

131. *See* text at notes 45-114 *supra*.

132. *See* text at notes 119-22 *supra*.

courts may feel that they should not be ordered lightly. Second, Congress has neither affirmatively approved such remedies nor defined the situations in which it might consider their use proper. Preferential treatment is a volatile remedy, and without any specific guidance from the legislature, it is reasonable that the courts would carefully limit the use of these remedies under title VII.

Employment discrimination is also proscribed by the Civil Rights Acts of 1866[133] and 1871.[134] The Civil Rights Act of 1866, now 42 U.S.C. § 1981, has recently been interpreted to provide a remedy for private acts of employment discrimination.[135] This section is narrower than title VII in that it only applies to race discrimination cases, but it is also broader in that it applies to employers who cannot be reached under title VII.[136] In addition, some of the procedural requirements of title VII, particularly the time-consuming and cumbersome investigation and conciliation procedures, may be avoided under section 1981.[137] Finally, the relevant state statute of limitations is applied to section 1981 actions, allowing some actions that might otherwise be foreclosed by the statute of limitations contained in title VII.[138]

The Civil Rights Act of 1871, now 42 U.S.C. § 1983, proscribes any deprivation of constitutional rights under color of state authority and has been interperted to provide a remedy for public sector employment discrimination based on race, sex, or national origin.[139] Since, unlike section 1981, section 1983 requires that state action be shown, it does not cover most discrimination in the private sector. As under section 1981, some of the procedural requirements of title

133. 42 U.S.C. § 1981 (1970).

134. 42 U.S.C. § 1983 (1970).

135. *See, e.g.*, Caldwell v. National Brewing Co., 443 F.2d 1044, 1046 (5th Cir. 1971); Young v. IT&T, 438 F.2d 757, 760 (3d Cir. 1971). *See also* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

136. For instance, title VII excludes employers of fewer than fifteen employees, 42 U.S.C. § 2000e(b) (Supp. III, 1973), the federal government, 42 U.S.C. § 2000e (b)(1) (Supp. III, 1973), private membership clubs, 42 U.S.C. § 2000e(b)(2) (Supp. III, 1973), and religious associations, 42 U.S.C. § 2000e-1 (Supp. III, 1973).

137. *See, e.g.*, Caldwell v. National Brewing Co., 443 F.2d 1044, 1046 (5th Cir. 1971); Young v. IT&T, 438 F.2d 757, 761-64 (3d Cir. 1971); Larson, *The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 56, 68-74 (1972).

138. *E.g.*, Young v. IT&T, 438 F.2d 757, 763 (3d Cir. 1971); Boudreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011, 1017 n.16 (5th Cir. 1971); Larson, *supra* note 137, at 76-83.

139. *See, e.g.*, Erie Human Relations Commn. v. Tullio, 493 F.2d 371 (3d Cir. 1974); Vulcan Soc. of the N.Y.C. Fire Dept., Inc. v. Civil Serv. Commn., 490 F.2d 387 (2d Cir. 1973); Bridgeport Guardians, Inc. v. Bridgeport Civ. Serv. Commn., 482 F.2d 1333 (2d Cir. 1973); Pennsylvania v. O'Neill, 473 F.2d 1029 (3d Cir. 1973) (en banc).

VII can be avoided in a section 1983 suit, and the state statute of limitations is applied.[140]

Neither section 1981 nor section 1983 contains any explicit legislative mandate for ordering preferential remedies. Nevertheless, both statutes have been interpreted to permit,[141] and perhaps to require,[142] preferential remedies when there is an intentional[143] or de facto[144] history of employment discrimination. A very strict standard of review is applied, and a preferential remedy is allowed only when there are no alternative means of overcoming the effects of discrimination and only for a period sufficient to break the pattern of discrimination. Although some concern has been expressed in the opinions for the problem of reverse discrimination, the courts seem to have accepted narrowly drawn preferential remedies[145] as necessary to end discrimination.

The necessity for affirmative action to end discrimination has also been recognized under Executive Order 11246,[146] which prohibits employment discrimination on the basis of race, color, religion, sex, and national origin by all contractors and subcontractors engaged in federal and federally assisted construction projects. It has been interpreted to require preferential treatment as a condition to the award of government contracts when minorities or women are being

140. *See, e.g.*, Madison v. Wood, 410 F.2d 564 (6th Cir. 1969); Henig v. Odorioso, 385 F.2d 491 (3d Cir. 1967), *cert. denied*, 390 U.S. 1016 (1968).

141. *See, e.g.*, NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974); Erie Human Relations Commn. v. Tullio, 493 F.2d 371 (3d Cir. 1974); Vulcan Soc. of the N.Y.C. Fire Dept., Inc. v. Civil Serv. Commn., 490 F.2d 387 (2d Cir. 1973); Bridgeport Guardians, Inc. v. Bridgeport Civ. Serv. Commn., 482 F.2d 1333, 1340-41 (2d Cir. 1973); Pennsylvania v. O'Neill, 473 F.2d 1029 (3d Cir. 1973) (en banc); 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). *But see* Harper v. Mayor & City Council, 359 F. Supp. 1187 (D. Md.), *affd. sub nom.* Harper v. Kloster, 486 F.2d 1134, 1136-37 (4th Cir. 1973).

142. *See* Morrow v. Crisler, 491 F.2d 1053 (5th Cir. 1974).

143. *See, e.g.*, Erie Human Relations Commn. v. Tullio, 493 F.2d 371 (3d Cir. 1974).

144. *See, e.g.*, Vulcan Soc. of the N.Y.C. Fire Dept., Inc. v. Civil Serv. Commn., 490 F.2d 387 (2d Cir. 1973); Porcelli v. Titus, 431 F.2d 1254 (3d Cir. 1970).

145. For instance, in NAACP v. Allen, 493 F.2d 614, 621 (5th Cir. 1974), the court stated:

> [Quota relief] is a temporary remedy that seeks to spend itself as promptly as it can by creating a climate in which objective, neutral employment criteria can successfully operate to select public employees solely on the basis of job related merit . . . . It is a form of relief which should be reserved for those situations in which less restrictive means have failed or in which the chancellor could reasonably foresee that they would fail.

See Carter v. Gallagher, 452 F.2d 315, 330-31 (8th Cir. 1972) (absolute preference modified to one-to-two ratio to reduce infringement on nonminority group applicants).

146. 3 C.F.R. 339 (1974), 42 U.S.C. § 2000e (Supp. V, 1970).

"underutilized" by the contractor or when there are discriminatory barriers to equal opportunity.[147] Under this order, a number of local plans requiring good faith efforts to reach set goals for minority hiring have been instituted,[148] but unlike the title VII preferences, the plans have been largely ineffective.[149] This may be due in part to the establishment of unrealistically high goals, which contractors frequently fail to reach.[150] Also, the Office of Federal Contract Compliance (OFCC) seems reluctant to implement the available sanctions, such as cancelling contracts or debarring offenders from future federal contracts; it prefers instead to enter into compromises that tend to water down the plans.[151] Nevertheless, the programs have received judicial approval in a number of cases[152] and seem to have had some effect on minority hiring and public recognition of the problem.

The Executive Order received implied legislative approval during the consideration of the 1972 amendments to the Civil Rights Act of 1964. In the debates over a proposed amendment designed to eliminate preferential treatment, Senator Javits read *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*[153] into the record, and the rejection of the proposed amendment arguably implies acceptance of the reasoning of that case.

Programs under Executive Order 11246 are specifically designed to minimize the problem of reverse discrimination. Before affirmative action plans are established, such factors as the availability of minorities and women for employment, whether those who are available have the requisite skills, and the existence of training programs,

147. Guidelines to this effect have been issued by the Office of Federal Contract Compliance. *See* 41 C.F.R. §§ 60-2.1 to .32 (1974). The guidelines apply to each nonconstruction prime or subcontractor who has 50 or more employees and a contract of $50,000 or more. 41 C.F.R. §§ 60-1.40, -2.1 (1974). *See generally* Nash, *Affirmative Action Under Executive Order 11,246*, 46 N.Y.U. L. REV. 225 (1971).

148. *See generally* 41 C.F.R. §§ 60-5.1 to .30 (Washington Plan), -6.1 to .30 (San Francisco Plan), -7.1 to .30 (St. Louis Plan), -8.1 to .30 (Atlanta Plan), -10.1 to .30 (Camden Plan), -11.1 to .23 (Chicago Plan) (1974).

149. *See, e.g.*, Donegan, *The Philadelphia Plan: A Viable Means of Achieving Equal Opportunity in the Construction Industry or More Pie in the Sky?*, 20 KAN. L. REV. 195 (1972); Jones, *Federal Contract Compliance in Phase II—The Dawning of the Age of Enforcement of Equal Employment Obligations*, 4 GA. L. REV. 756 (1970).

150. *See, e.g.*, Donegan, *supra* note 149, at 210.

151. *Id.*

152. *See, e.g.*, Associated Gen. Contractors of Mass., Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974); Southern Ill. Builders Assn. v. Ogilvie, 471 F.2d 680 (7th Cir. 1972); Contractors Assn. of Eastern Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir. 1971).

153. 442 F.2d 159 (3d Cir. 1971).

are to be considered.[154] When dealing with the construction industry, the OFCC has encouraged labor, management, and the minority community in certain geographic localities to develop and agree upon an acceptable "hometown" affirmative action plan that, when approved by the OFCC, will prevent the imposition of a mandatory plan.[155]

Thus, preferential remedies have been recognized and enforced pursuant to title VII, the Civil Rights Act of 1866, the Civil Rights Act of 1871, and Executive Order 11246. Whether or not the Supreme Court ultimately rules that quota or preferential remedies under title VII are barred by section 703(j), the issue may be moot from a practical standpoint. First, preferential remedies are available in race discrimination cases under the Civil Rights Act of 1866, now section 1981. Second, preferential remedies are also available in the public sector under the Civil Rights Act of 1871, now section 1983, in cases involving race, sex, and national origin employment discrimination.[156] The most significant group of cases in which no preferential remedy could be granted if title VII is construed to forbid the use of such remedies, would be sex discrimination claims in the private sector. However, there is no logical reason to differentiate between these cases.[157] By using title VII cases as support for preferential remedies in cases based on Executive Order 11246 and sections 1981 and 1983 (and vice versa), a number of judicial opinions have already suggested that the cases should be treated in a similar manner.[158] It therefore appears that although the Supreme Court has yet to rule on the issue, the Senate debates and the overwhelming majority of lower court decisions support the conclusion that preferential remedies, in one form or another, are permissible under all of the existing laws regulating employment practices in the United States.

IV. The Employment Discrimination Cases: A Search for Some Unifying Principles

As noted above,[159] it has been argued that preferential remedies

154. *See* 41 C.F.R. §§ 60-2.11 to .12 (1974); Nash, *supra* note 147, at 231.

155. Nash, *supra* note 147, at 245-49.

156. There is also some authority suggesting that the coverage of section 1981 includes claims of race discrimination brought by white as well as black persons. *See* WRMA Broadcasting Co. v. Hawthorne, 365 F. Supp. 577 (M.D. Ala. 1973).

157. *See* Watkins v. United Steelworkers Local 2369, 369 F. Supp. 1221, 1230-31 (E.D. La. 1974).

158. *See, e.g.*, Carter v. Gallagher, 452 F.2d 315, 329 (8th Cir. 1971); Contractors Assn. of Eastern Pa. v. Secretary of Labor, 442 F.2d 159, 172 (3d Cir. 1971).

159. *See* text at and following note 101 *supra.*

may be permissible, but only when one race or sex is not deprived of a benefit by virtue of a preference given to another. Quotas are acceptable, the argument runs, to achieve school integration since everyone gets a seat in a classroom, but they are unacceptable in the employment context because the preferred hiring of a minority person usually disadvantages a nonminority person.[160] This argument is particularly powerful in a period of economic recession when there are not enough jobs to go around.[161] The use of remedial quotas and preferences under these conditions could increase racial tension so much that it would outweigh any benefit from the hiring of minority people.[162] Because of this potentially detrimental effect, and because the courts apply rigid scrutiny in preference cases,[163] the courts have imposed substantial limitations on preference orders.

The purpose of ordering preferential treatment in the employment context is to overcome the effects of past discrimination, not to mandate specific proportions of each race and sex that must be employed.[164] Once the effects of past discrimination are eliminated, the employer may be enjoined from renewing his discriminatory practices, but affirmative orders should cease and the employer should no longer be bound by quotas or percentage goals. Virtually every court that has ordered preferential treatment has recognized this, and the orders have been formulated to run either for a specific, limited period of time[165] or until a specific, limited percentage or numerical goal is achieved.[166] The goals must be set so that the employer can meet them without hiring unqualified persons, as a preferential remedy should never force an employer to hire someone who is not otherwise qualified or qualifiable *but for* his or her

160. *See* DeFunis v. Odegaard, 82 Wash. 2d 11, 30, 507 P.2d 1169, 1181 (1973), *vacated as moot*, 416 U.S. 312 (1974).

161. *See generally* Watkins v. United Steelworkers Local 2369, 369 F. Supp. 1221 (E.D. La. 1974); Bender, *Job Discrimination, 10 Years Later*, N.Y. Times, Nov. 10, 1974, § 3, at 1, col. 1; Note, *supra* note 44, at 1547-49; NEWSWEEK, Dec. 2, 1974, at 72. *Cf.* Jersey Cent. Power & Light Co. v. IBEW Local 327, 508 F.2d 687 (3d Cir. 1975); Waters v. Wisconsin Steel Works of Intl. Harvester Co., 502 F.2d 1309 (7th Cir. 1974).

162. *See, e.g.*, Detroit Free Press, May 10, 1975, § A, at 1, cols. 7-8; *id.*, May 11, 1975, § A, at 1, col. 3; *id.*, May 15, 1975, § A, at 1, cols. 7-8 (court order prohibiting layoff of certain minority patrolmen led to bitter racial dispute on Detroit police force).

163. *See* text at notes 91-114 *supra*.

164. NAACP v. Allen, 493 F.2d 614, 621 (5th Cir. 1974).

165. *See, e.g.*, United States v. Lathers Local 46, 471 F.2d 408, 413 (2d Cir. 1973).

166. *See, e.g.*, Rios v. Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974) (percentage goal); Erie Human Relations Commn. v. Tullio, 493 F.2d 371 (3d Cir. 1974) (numerical goal).

race or sex. Rather, it should force the employer to hire people who have not been hired *because of* their race or sex.

In determining the proper limit or goal for a preferential remedy, the courts have considered a number of factors. First, some courts have considered the availability of qualified minority people in the geographic area constituting the job market.[167] The appropriate geographic area is usually defined as the area from which the employer or union has traditionally drawn its employees or members.[168] However, if the traditional job market suggested by the employer or union is unreasonably narrow and therefore excludes a potential pool of minority or women workers, the court may look at a wider region in determining the employment goal.[169] The goal is typically based on the percentage of minority people in the appropriate job market who could have been employed by the company *but for* the prior discrimination.[170]

Second, the courts consider the effect that a preferential remedy will have on the company or industry involved and on white male workers. To the extent that any dislocation can be minimized, the courts try to do so.[171]

Finally, the availability of training programs for job applicants is considered in determining the preferential goal. The courts do not always require that potential applicants be qualified to do the work immediately, and it is often held sufficient that the pool of applicants be capable of learning the job in a reasonable period of time if that is what was generally required by the company. In such cases, the courts have ordered preferences for training programs as well as for hiring.[172]

The availability of training programs is particularly important in cases where employment tests have been invalidated and it has not been possible to develop a valid test. In *Griggs v. Duke Power Co.*,[173] the Supreme Court held that an employment test may not

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167. *See, e.g.*, Stamps v. Detroit Edison Co., 365 F. Supp. 87, 111, 122 (E.D. Mich. 1973), *revd. on other grounds sub nom.* EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975); Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974).

168. Rios v. Steamfitters Local 638, 501 F.2d 622, 632 (2d Cir. 1974).

169. *Cf.* Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974).

170. Rios v. Steamfitters Local 638, 501 F.2d 622, 632-33 (2d Cir. 1974).

171. *See, e.g.*, Erie Human Relations Commn. v. Tullio, 493 F.2d 371, 375 (3d Cir. 1974).

172. *See* Rios v. Steamfitters Local 638, 501 F.2d 622, 626 (2d Cir. 1974); United States v. Carpenters Local 169, 457 F.2d 210, 216 (7th Cir. 1972); United States v. Ironworkers Local 86, 443 F.2d 544, 552-54 (9th Cir. 1971).

173. 401 U.S. 424 (1971). The court recently elaborated upon the standards for

be used by an employer if it is shown to have an adverse impact on a protected class and it is not shown to be job related. This two-fold standard may be difficult to meet; thus, some employers have found themselves forced to discard invalid tests and unable to develop valid ones. In such cases, the employer may not only be required to grant preferential treatment to minority persons to overcome the effects of past discrimination, but may also be implicitly required to train them (and others) to perform the job.[174] This does not mean that an employer will be forced to hire unqualified persons, as an invalid test cannot accurately predict job performance. For the same reason, a person cannot legitimately claim to be a victim of reverse discrimination merely because he or she was not hired after receiving a high score on an invalid employment test. This point is often lost in the furor over reverse discrimination.

Preferential remedies only require that the preference be granted to qualified persons and generally assume that all persons within the pool of qualified applicants have equal ability. It would be difficult to rationalize the granting of preferences if a company were able to show that its applicants were not equal. Therefore, the question arises whether an employer may avoid the effect of a preferential remedy by "rank ordering" job applicants pursuant to an employment test or some other objective criterion. Several courts have indicated that an employer is entitled to hire the "best qualified" person for a position.[175] Also, the HEW Office for Civil Rights has recently declared that a college or university may, under title IX, hire the "best qualified" person for a position and that the legal commitment of "affirmative action" merely requires the university to act in good faith in an effort to recruit minority persons and women.[176] Although no case has been found in which rank ordering has been permitted, the "best qualified" cases make it at least theoretically possible that employers would be permitted to rank order applicants from best to least qualified.

The problem with rank ordering is that it is difficult, if not impossible, to develop a test that can rank order applicants with any degree

test validation in Albemarle Paper Co. v. Moody, 43 U.S.L.W. 4880 (U.S. June 25, 1975).

174. Even when the employer can develop a valid employment test, the court may, as a further remedy against past discrimination, require the employer to offer pre-test tutoring to help minority persons prepare for the tests. *See, e.g.*, Carter v. Gallagher, 452 F.2d 315, 319, 326 (8th Cir. 1971).

175. *See* United States v. Jacksonville Terminal Co., 451 F.2d 418, 448 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972); Wilson v. Woodward Iron Co., 362 F. Supp. 886, 894 (N.D. Ala. 1973).

176. HEW, Memorandum to College and University Presidents, Dec., 1974.

of certainty, and an unvalidated test would presumably fail to satisfy the requirement of a "professionally developed ability test" under section 703(h) of title VII.[177] If rank ordering could pass muster under section 703(h), it would obviously tend to dilute the preferential remedy. This latter issue has generally been avoided by finding that the qualifying examination used was invalid and therefore could not legitimately rank applicants.

Normally, before a preferential remedy is ordered there is a finding of a history of discrimination against a protected group and a finding that other available relief would be inadequate to overcome the present effects of the discrimination.[178] It is not necessary to show that an employer or union intentionally discriminated against minorities or women; a history of de facto discrimination, the results of which are being perpetuated, is sufficient to establish a prima facie case of discrimination warranting a preferential remedy.[179] A history of discrimination may be inferred from statistics that show a long-term disparity between the percentage of minority workers available in the job market and the percentage of minority workers employed.[180] Generally, however, there is also nonstatistical evidence of past and present discrimination: for example, the use of discriminatory criteria (such as nepotism in an all-White union), the use of subjective criteria that are shown to statistically favor white males (such as supervisor recommendations where supervisors tend to recommend only Whites), the use of unvalidated employment tests, and specific instances of overt discrimination.[181] In fact, although statistical evidence alone has been found to be sufficient to

177. 42 U.S.C. § 2000e-2(h) (1970). *Cf.* DeFunis v. Odegaard, 416 U.S. 312, 327-31 (1974) (Douglas, J., dissenting) (discussing the problems involved in using the LSAT to "rank order" law school applicants).

178. *See, e.g.*, Rios v. Steamfitters Local 638, 501 F.2d 622, 631-32 (2d Cir. 1974); NAACP v. Allen, 493 F.2d 614, 620-21 (5th Cir. 1974); Morrow v. Crisler, 491 F.2d 1053, 1056 (5th Cir. 1974); Harper v. Mayor & City Council, 359 F. Supp. 1187, 1214 (D. Md.), *affd. sub nom.* Harper v. Kloster, 486 F.2d 1134 (4th Cir. 1973); Arrington v. Massachusetts Bay Transp. Auth., 306 F. Supp. 1355, 1359-60 (D. Mass. 1969).

179. Erie Human Relations Commn. v. Tullio, 493 F.2d 371, 373-74 (3d Cir. 1974).

180. Bridgeport Guardians, Inc. v. Bridgeport Civ. Serv. Commn., 482 F.2d 1333, 1335 (2d Cir. 1973); United States v. Ironworkers Local 86, 443 F.2d 544, 550 (9th Cir. 1971). *See generally* Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 270-73 (1971).

181. *See, e.g.*, Bridgeport Guardians, Inc. v. Bridgeport Civ. Serv. Commn., 482 F.2d 1333, 1335-39 (2d Cir. 1973) (unvalidated test); United States v. N.L. Indus., Inc., 479 F.2d 354, 369 (8th Cir. 1973) (subjective criteria; specific instances of discrimination); United States v. Carpenters Local 169, 457 F.2d 210, 215, 220 (7th Cir. 1972) (nepotism; subjective criteria; specific instances of discrimination). The list of indicators of discrimination is, of course, illustrative, not exhaustive.

support a finding of discrimination,[182] research has not disclosed any decisions ordering a preferential remedy upon only a statistical showing of discrimination. This is reasonable since the courts are dealing with strong medicine in preferential remedies and before prescribing this treatment should be quite sure that the disease, discrimination, is present.[183]

A statistical showing of discrimination, even when there is additional nonstatistical evidence, only establishes a prima facie case of discrimination. The burdens of going forward and of persuasion then shift to the employer, who may justify the disparity on legitimate "business necessity" grounds such as the unavailability of minority workers with necessary skills.[184] Even if the employer cannot rebut the inference that he has engaged in discrimination, he may be able to avoid the imposition of a preferential remedy by showing that he has made good faith[185] but unsuccessful efforts to recruit minority persons or women; this rebuttal is reasonable since an employer should not be required to adhere to an unrealistic ratio or goal.

In addition to the above considerations, several other factors have apparently influenced the courts to grant or withhold preferential remedies in cases of employment discrimination. Curiously, the nature of the work involved may influence a court's decision whether to mandate a preferential remedy. This tentative conclusion may be drawn from the fact that every decision granting a preferential remedy has involved blue-collar jobs. While very few cases have been brought concerning white-collar or professional jobs, the courts that have had an opportunity to issue preferential orders dealing with these jobs have avoided doing so. For example, in *United States v. N. L. Industries*,[186] preferential relief was ordered for the promotion of plant foremen but denied for the hiring of white-collar workers. The court gave no convincing reason for granting a more effective remedy for the promotion of a handful of foremen than for the initial hiring of a large number of white-collar workers.

182. Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 426 (8th Cir. 1970).

183. *See generally* Fiss, *supra* note 180, at 268-81.

184. *E.g.*, Vulcan Soc. of the N.Y.C. Fire Dept. v. Civil Serv. Commn., 490 F.2d 387, 393 (2d Cir. 1973); United States v. Carpenters Local 169, 457 F.2d 210, 214 (7th Cir. 1972); United States v. Ironworkers Local 86, 443 F.2d 544, 551 (9th Cir. 1971). *Cf.* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

185. Resistance to affirmative action measures other than preferences has been considered a good reason to order preferences. *See, e.g.*, Morrow v. Crisler, 491 F.2d 1053 (5th Cir. 1974).

186. 479 F.2d 354 (8th Cir. 1973).

Similarly, in *Stamps v. Detroit Edison Co.*,[187] after finding a long history of discrimination on the part of Detroit Edison, the court ordered the use of specific hiring ratios for blue-collar jobs and mandated a general thirty per cent employment goal for Blacks in the company. Thus, while a relatively effective ratio remedy was granted for blue-collar workers, no substantial remedy was granted for white-collar discrimination: the company could meet its thirty per cent over-all goal without hiring Blacks for white-collar jobs. As in *N. L. Industries*, no reason was given for this difference in treatment.

Research has disclosed no decisions granting a preferential remedy for white-collar employees. One explanation for this may be that the courts are simply wary of breaking new ground with a controversial remedy. Another explanation may be that judges perceive some unstated distinctions between white- and blue-collar jobs that make them reluctant to compel hiring on the basis of race or sex for the former jobs. It is sometimes claimed, for example, that it is more difficult to measure performance in white-collar jobs by objective standards because these jobs involve the exercise of judgment and a closer rapport with co-workers. The courts may assume that this is so and feel that they lack the competence to judge workers' abilities in these jobs; therefore they may be unwilling to intrude too far on an employer's discretion in hiring white-collar workers.

Whatever the reasons for the apparent difference in judicial treatment of white- and blue-collar jobs, there does not appear to be any legitimate justification for this distinction. First, many white-collar jobs involve work performance that can be measured by objective standards and many do not involve significant skill requirements. Second, criteria by which the courts determine whether to grant preferential remedies for blue-collar jobs can be used in all cases. The strict scrutiny applied by the courts in these cases would protect against unreasonable or unworkable preferential remedies. Finally, many white-collar jobs are generally regarded as preferred work, and these are precisely the jobs from which Blacks and women have traditionally been excluded. If the courts fail to use preferential remedies in these important cases, it will be a long time before the general goal of ending discrimination will be achieved.

It is also interesting that virtually every case in which preferential remedies have been granted has involved race or national origin discrimination. Sex discrimination has rarely been considered as

187. 365 F. Supp. 87 (E.D. Mich. 1973), *revd. on other grounds sub nom.* EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975).

grounds for a preferential remedy. Since there appears to be no basis for distinguishing between the treatment of minorities and women under title VII or the Constitution,[188] it would be unfortunate if this distinction developed.[189]

Another factor that may be influencing judicial decisions to grant preferential remedies is the number of positions involved. The courts have tended to order preferential remedies primarily in cases involving relatively few jobs.[190] This tendency suggests that the impact of such remedies is far more limited than the controversy over them would seem to indicate. In a few cases, however, courts have granted preferential remedies when the number of positions was great.[191] Thus, it is not clear how significant this factor is.

Most of the title VII cases in which preferences have been granted have involved union membership or issuance of union work permits rather than hiring or promotion.[192] It is easier for a court to grant a preferential remedy in a case where union membership is at issue because the problem of reverse discrimination rarely arises when a court compels the admission of minority workers into an all-white union. Unless there is a direct relationship between union membership and job placement and the number of memberships is limited, the admission of Blacks or women into the union does not directly affect the job opportunities to white males. However, a number of courts have recognized that union membership may often be the equivalent of a job.[193] This is especially true in the construction industry, where many of the title VII cases have arisen, since

188. *See, e.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973).

189. *See, e.g.*, Rios v. Steamfitters Local 138, 501 F.2d 622, 632-33 (2d Cir. 1974), in which the court granted a preferential remedy for minority workers but excluded statistics concerning women in determining the appropriate minority hiring goals. In doing so, the court reasoned that women had never shown an interest in becoming steamfitters. Because women's disinterest may well have reflected the knowledge that they would be excluded, the court's reasoning is specious. *But see* Schaefer v. Tannian, 394 F. Supp. 1136 (E.D. Mich. 1975).

190. *See, e.g.*, Erie Human Relations Commn. v. Tullio, 493 F.2d 371 (3d Cir. 1971) (20 positions); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971) (20 positions). This may, for example, have been a factor in United States v. N.L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973), where the court granted a preferential remedy for 15 foreman positions but rejected a preferential remedy where one third of all white-collar positions was involved.

191. *See, e.g.*, NAACP v. Allen, 493 F.2d 614, 617 (5th Cir. 1974) (one-Black-to-one-White hiring ratio until 25 per cent of the approximately 930 Alabama Dept. of Public Safety employees were Black); United States v. Lathers Local 46, 471 F.2d 408, 412 (2d Cir. 1973) (one-Black-to-one-White ratio in the issuance of 250 work permits annually for three years).

192. *See* cases cited in note 121 *supra*.

193. *See* text at note 126 *supra*.

contractors almost always favor union members. Thus, it is a short jump from preferences in union membership or union work permits to actual job preferences, and the courts should not have difficulty making this jump. The remedy should be available in either situation.

Another factor influencing the decisions of some courts is the degree of cooperation or resistance by the employer or union in undertaking measures designed to remedy discrimination. The Supreme Court noted in the context of school desegregation that "[j]udicial authority enters only when local authority defaults."[194] Similarly, in the employment context, the severity of the remedy may depend on how intractable the employer has been. If the employer is actively and in good faith attempting to recruit minority or women applicants to overcome the effects of past discrimination, there may be no need to order a controversial preferential remedy. Thus, the fact that the courts only order these severe remedies when employers make no adequate voluntary effort to eliminate the effects of past discrimination both limits the number of court-ordered preferences and encourages voluntary action. Of course, where the employer is recalcitrant in recruiting or hiring minority or women applicants, a preferential order may be the only means of forcing an end to discrimination.[195]

One final factor that seems to enter into decisions on the appropriateness of preferential remedies is the stage at which the employment relationship is to be subjected to the remedy. Most of the cases in which preferences have been ordered involve the hiring of new employees. Although a preference in initial hiring does tend to favor one applicant at the expense of another, neither has a vested right to be hired and any expectation of favorable action on the part of the white male applicant is less legitimate than in situations such as promotion based on seniority. In the promotion cases based on seniority, the courts must balance the utility of preferential remedies in ending discrimination with the legitimate expectations of white employees. The courts' problem seems to be more acute in promotion and layoff cases, where white males often have long-held expectations, than in the hiring cases where the expectations are less clear.

The courts are split on the advisability of ordering preferences in promotion cases and the decision in each case may depend on

194. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971).

195. *See* note 185 *supra* and accompanying text. Similarly, the Court in Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), ordered affirmative remedies when the school board did not voluntarily integrate.

its particular facts. For example, in *Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission*,[196] the court approved a preference for initial hiring, but rejected a preference for promotions. It noted that an imbalance in higher ranks is often due to discrimination at the entry level, not to discrimination in promotion per se; thus, there was no history of discriminatory promotions to correct and correction of hiring discrimination would naturally correct imbalances at higher levels over time.[197] This argument overlooks the importance of ending the effects of discriminatory patterns within a reasonable period. Perhaps more persuasive is the court's argument that when promotion has traditionally had a time-in-grade requirement or been granted in order of seniority, legitimate career expectations of nonminority workers are thwarted solely because of their color or sex if minority or female workers are preferred.[198] Many nonminority workers have invested years under the assumption that they would receive promotions under the traditional procedure; denial of this expectation may have the effect of exacerbating tensions between them and the preferred group. In such cases, it may be wise to reject outright preferences in favor of procedures designed to facilitate more indirectly access to higher level jobs, such as reducing the number of years that must be spent in lower level jobs.[199] Where, on the other hand, there is no legitimate expectation of promotion (for instance, where the promotion decision has traditionally been made at the discretion of the company), it is easier to order a preferential remedy.[200] This seems closer to the hiring case, since, although there may occasionally be some inequity, nonminority employees are not deprived of a benefit that they had reason to expect.[201]

Analogous to the promotion-by-right problem is the fictional seniority problem that has been raised in layoff cases. Many minority and women workers, only recently hired under affirmative action programs, have been laid off during the present recession under "last

196. 482 F.2d 1333 (2d Cir. 1973).

197. 482 F.2d at 1339.

198. 482 F.2d at 1341. *But see* note 199 *infra*.

199. For example, the court in *Bridgeport Guardians* approved a reduction in the time-in-grade requirement and a reduction in the weight given to seniority. 482 F.2d at 1341.

200. *See, e.g.*, United States v. N.L. Indus., Inc., 479 F.2d 354, 367-69, 377 (8th Cir. 1973).

201. In addition, this promotion procedure may make it easier to prove that there was discrimination in promotion decisions if, for example, supervisors consistently chose Whites over Blacks for promotions.

hired, first fired" seniority systems.[202] Thus, the gains that were made over the past ten years are in danger of being lost through layoffs in the recession of the seventies. Since our economy will always be subject to cycles, if "last hired, first fired" is upheld, the achievement of equal opportunity may be slowed or halted.[203]

The courts are split on the question whether to grant fictional seniority to minority and women workers in order to insulate them from layoffs and protect the gains in job opportunities that have been made.[204] Those courts that have granted fictional seniority have reasoned that since minority and female workers would have been hired years earlier *but for* the discrimination, it is not improper to grant fictional seniority to put them in the position in which they would have been absent historical discrimination.

However, since the effect of this remedy is to cause the displacement of white male employees in favor of minority and female employees, it directly conflicts with the oft-cited dictum in *Papermakers Local 189 v. United States*.[205] In that decision, the Fifth Circuit stated in effect that employees with real seniority should never be displaced by less senior employees pursuant to a court order altering an existing seniority system: "[C]reating fictional employment time for newly-hired Negroes would comprise preferential rather than remedial treatment. The clear thrust of the Senate debate [concerning sections 703(h) and (j)] is directed against such preferential

202. *See* authorities cited in note 161 *supra*.

203. The ultimate impact of cyclical recessions on affirmative action programs depends on a number of factors including the frequency and severity of the recessions, the relative seniority of minority workers, and the number of minority workers who either are not recalled, or forfeit their recall rights. *See generally* Note, *supra* note 44, at 1569 n.105. It is possible and indeed probable that some minority workers will survive each recession without a layoff and that a number will be recalled and return to work when the economy swings upward. They would then accumulate seniority, which would make them more resistant to layoff in the next downturn. Thus, the most likely effect of cyclical recessions is to slow, rather than to halt, the achievement of equal employment goals.

204. *Compare* Delay v. Carling Brewing Co., 10 BNA Fair Emp. Prac. Cas. 164 (N.D. Ga. 1974), *and* Loy v. City of Cleveland, 8 BNA Fair Emp. Prac. Cas. 614, *dismissed as moot*, 8 BNA Fair Emp. Prac. Cas. 617 (N.D. Ohio 1974), *with* Jersey Cent. Power & Light Co. v. IBEW Local 327, 508 F.2d 687 (3d Cir. 1975); Waters v. Wisconsin Steel Works of Intl. Harvester Co., 502 F.2d 1309 (7th Cir. 1974); United Affirmative Action Commn. v. Gleason, 10 BNA Fair Emp. Prac. Cas. 64 (D. Ore. 1974), *and* Watkins v. Steelworkers Local 2369, 516 F.2d 41 (5th Cir. 1975). *Cf.* Papermakers Local 189 v. United States, 416 F.2d 980, 994-95 (5th Cir. 1969); Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968). *See generally* Blumrosen & Blumrosen, *Layoff or Work Sharing: The Civil Rights Act of 1964 in the Recession of 1975*, 1 EMPLOYEE REL. L.J. 2 (1975); Friedman & Katz, *Retroactive Seniority for the Identifiable Victim Under Title VII—Must Last Hired First Fired Give Way?*, in PROCEEDINGS OF THE 28TH ANNUAL CONFERENCE ON LABOR, N.Y.U. (1975); Note, *supra* note 44.

205. 416 F.2d 980 (5th Cir. 1969).

treatment on the basis of race."[206] However, the court did uphold the district court's order creating a company-wide seniority system. This order had been issued to minimize the residual effects of a formerly segregated department structure. That structure was being perpetuated by a departmental seniority system under which only time worked in a department was credited toward seniority in the department. The court seemed persuaded that the company-wide seniority system was the most reasonable way to preserve the earned expectations of long-service employees while reducing the discriminatory effects of fulfilling those expectations.

The *Papermakers* dictum was followed in *Waters v. Wisconsin Steel Works of International Harvester Co.*[207] In that case, the court refused to alter a "last hired, first fired" layoff system even though preserving the system meant that a disproportionate number of recently hired Blacks who did not yet have contractual seniority would not be rehired.[208] The court expressed concern that "[t]o hold otherwise would be tantamount to shackling white employees with a burden of a past discrimination created not by them but by their employer"[209] and noted that title VII was not designed to affect "last hired, first fired" seniority provisions.[210]

Similarly, in *Jersey Central Power & Light Co. v. IBEW*,[211] the Third Circuit reversed a district court order that would have granted fictional seniority to women and minority employees to protect earlier affirmative action gains during a period of layoffs.[212] The court

206. 416 F.2d at 995.

207. 502 F.2d 1309 (7th Cir. 1974).

208. Under the employment contract, new employees accrued no seniority until the completion of a 90-day probationary period. 502 F.2d at 1313. The court did, however, hold that laid-off white employees who had accepted severance pay and thus terminated their contractual rights could not be rehired before Blacks with contractual seniority were recalled since this would amount to "presently perpetuating the racial discrimination of the past." 502 F.2d at 1321.

209. 502 F.2d at 1320.

210. 502 F.2d at 1317-20. The legislative history of title VII provides some support for the court's stance: "Seniority rights are in no way affected by the bill. If under a 'last hired, first fired' agreement a Negro happens to be the 'last hired,' he can still be 'first fired' as long as it is done because of his status as 'last hired' and not because of his race." 502 F.2d at 1318, *quoting* 110 CONG. REC. 7217 (1964) (questions and answers prepared by Senator Clark). *See also* 110 CONG. REC. 6563-64 (remarks of Senator Kuchel), 7207 (Dept. of Justice memorandum), 7213 (Clark-Case memorandum) (1964).

211. 508 F.2d 687 (3d Cir. 1975).

212. The company had entered into a collective bargaining agreement under which it agreed that any layoffs would be by reverse seniority. However, the company had also entered into a conciliation agreement with the EEOC that established a five-year affirmative action plan designed to increase the percentage of women and minority employees. The district court found that if the company followed "last hired, first fired," the percentage of minority employees would decrease and this

noted that section 703(h) of title VII[213] on its face enjoins the courts from interfering with a "bona fide" seniority sytem;[214] it "conclude[d] in light of the legislative history that on balance a facially neutral company-wide seniority system, *without more*, is a bona fide seniority system and will be sustained even though it may operate to the disadvantage of females and minority groups as a result of past employment practices."[215]

Nevertheless, a few federal district courts have struck down layoff provisions that would affect a disproportionate number of minority workers. For instance, in *Watkins v. United Steelworkers Local 2369*,[216] the court found that the legislative history surrounding section 703(h) did not clearly preclude the granting of a preferential remedy in a layoff situation. The court observed that the interpretative comments regarding seniority were made during the Senate debates prior to the time when section 703(h) was inserted into title VII. It therefore concluded that these remarks could not be considered determinative in construing the statute. Rather, the court ruled that section 703(h) literally protected only bona fide seniority systems and that a system perpetuating the effects of past discrimination cannot be bona fide.[217] The court rejected the *Papermakers* dictum as mere "remarks . . . made without the benefit of adversary arguments"[218] and noted that since the Fifth Circuit in *Papermakers* had altered an existing seniority system in order to desegregate various jobs within a company, there was no reason why a company that had refused to hire Blacks at all should be allowed to perpetuate

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would violate the conciliation agreement. The Third Circuit reversed, holding that the company's duty under the conciliation agreement was to use affirmative action in hiring, but that there was no such duty in laying off employees. 508 F.2d at 703.

213. Section 703(h) provides, in part:

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

42 U.S.C. § 2000e-2(h) (1970).

214. 508 F.2d at 705.

215. 508 F.2d at 710 (emphasis original). The court also noted that the collective bargaining agreement did not violate public policy as enunciated by title VII, since section 703(h) does not permit interference with a bona fide seniority system. 508 F.2d at 705.

216. 369 F. Supp. 1221 (E.D. La. 1974). *See also* Schaefer v. Tannian, 394 F. Supp. 1136 (E.D. Mich. 1975); Delay v. Carling Brewing Co., 10 BNA Fair Emp. Prac. Cas. 164 (N.D. Ga. 1974).

217. 369 F. Supp. at 1227-29.

218. 369 F. Supp. at 1229.

the effects of that discrimination through its seniority rules.[219] Thus, the court in effect found that any detriment to nonminority employees was, on balance, outweighed by the need to overcome the effects of past discrimination.

This decision, however, was reversed by the Fifth Circuit.[220] That court held that neither title VII nor section 1981 barred the use of a long-established seniority system, adopted without intent to discriminate, even though minority-employee balance would be adversely affected. But the court noted as part of its deliberately narrow holding that the employer's hiring practices had been nondiscriminatory for over ten years and that none of the individual employees laid off had personally been the victim of prior employment discrimination.[221] The court

> specifically [did] not decide the rights of a laid-off employee who could show that, but for the discriminatory refusal to hire him at an earlier time than the date of his actual employment, or but for his failure to obtain earlier employment because of exclusion of minority employees from the work force, he would have sufficient seniority to insulate him against layoff.[222]

The Fifth Circuit decision in *Watkins* suggests the two parts into which the fictional seniority-layoff problem can be divided. First, there is the problem of the appropriate remedy for individuals who have suffered specific instances of discrimination. For example, a minority person who applied for a job two years ago and was rejected because of race would most likely be ordered hired and given back pay for the two-year period. But if a company using a "last hired, first fired" seniority system decides to lay off some workers, the same minority employee will have no seniority and will be the first to go. In such a case, where the specific discriminatees can be identified, retroactive seniority should be granted.[223] The white male workers who might be disadvantaged are not really being treated unfairly because they will be in exactly the same position as that in which they

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219. 369 F. Supp. at 1229.

220. Watkins v. United Steelworkers Local 2369, 516 F.2d 41 (5th Cir. 1975).

221. Indeed, the black employees involved had been with the company for from two to seven years at the time the Whites who would be denied recall by the reinstatement of the Blacks had been hired. 516 F.2d at 46.

222. 516 F.2d at 45.

223. In fact, this remedy has been approved by at least two circuit courts. *See* Meadows v. Ford Motor Co., 510 F.2d 939 (6th Cir. 1975); Jurinko v. Edwin L. Wiegand Co., 477 F.2d 1038 (3d Cir. 1973). *But see* Franks v. Bowman Transp. Co., 495 F.2d 398, 417-18 (5th Cir. 1974), *cert. granted*, 420 U.S. 983 (1975). The court of appeals in *Franks* held that a court cannot grant fictional seniority to black job applicants who were refused employment because of racial discrimination even though the discrimination occurred subsequent to the passage of title VII.

would have been *but for* the discrimination. While it may be true that white males should not be prejudiced by the company's past discrimination, there is no reason why they should retain an unearned advantage.[224] Besides, the retroactive seniority remedy, when limited to identifiable discriminatees, would have no effect on most employees, since the basic seniority system would be left intact.

The more difficult problem arises when a company with a long history of discrimination finally starts hiring Blacks and women, though none hired are specific discriminatees. If the employer then finds it necessary to cut back its work force, and fictional seniority is granted to the recently hired Blacks and women, Whites who had an expectation of continued employment or promotion based on their seniority will find their expectations thwarted because of their race or sex. However, if the remedy is denied, a round of layoffs can restore the earlier racial or sexual employee imbalance.

The legislative history of section 703(h) suggests that whether or not Congress actually meant to prohibit fictional seniority as a remedy under title VII, it did not intend affirmatively to endorse that remedy.[225] In the absence of any clear legislative mandate, the courts should at least scrutinize the layoff-fictional seniority cases very carefully and attempt to find some other means of handling the problem. One possibility might be to reduce the hours of all the company's employees where possible to distribute the burden of past

224. Some support for this position may be found in the Supreme Court's recent decision in Albemarle Paper Co. v. Moody, 43 U.S.L.W. 4880 (U.S. June 25, 1975), where the Court discussed the standards by which back pay should be awarded after proof of a violation of title VII. First, the Court made it clear that title VII "requires that persons aggrieved by the consequences and effects of the unlawful practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." 43 U.S.L.W. at 4885, *quoting* 118 CONG. REC. 7168 (1972). Second, the Court observed that the remedial provisions of title VII were fashioned after the remedial provisions of the National Labor Relations Act and should therefore be construed in a manner consistent with case precedent under the NLRA. *See* 43 U.S.L.W. at 4884, 4885 n.16. Reinstatement with back pay and with retroactive seniority rights is a common remedy for victims of unfair labor practices under the NLRA. *See, e.g.*, NLRB v. Lone Star Textiles, Inc., 386 F.2d 535, 537 (5th Cir. 1967); Ventre Packing Co., Inc., 163 N.L.R.B. 540, 543 (1967); Darlington Mfg. Co., 139 N.L.R.B. 241, 255 n.44 (1962); West Boylston Mfg. Co., 87 N.L.R.B. 808, 813 (1949). Although many of the NLRA cases have involved discriminatory discharges, the NLRB has also awarded retroactive seniority to victims of unlawful discrimination in refusal to hire cases. *See, e.g.*, Aclang, Inc., 193 N.L.R.B. 86 (1971); Bob's Casing Crews, 178 N.L.R.B. 3 (1969). Thus, in following the suggestions made by the Supreme Court in *Albermarle* that victims of unlawful discrimination should be "restored to a position where they would have been were it not for the unlawful discrimination" and that the case law under the NLRA should be followed in developing remedies under title VII, it will not be surprising to see the Court hold that persons who have been unlawfully denied job-rights at the hiring stage may be awarded both back pay and retroactive seniority under title VII.

225. *See* note 210 *supra* and accompanying text.

discrimination. Alternatively, the employer might rotate those employees on layoff, so that each employee could work some weeks and be on layoff other weeks.[226]

Part of the problem when there are no specific discriminatees is that there is no way to determine whether the workers who benefit from fictional seniority are the same workers who were hurt by the company's prior discrimination, and, conversely, there is no way to tell how much the nonminority workers benefited from the discrimination. In many cases there will be no correlation for either minority or nonminority workers between their individual positions and the discrimination. Although this problem also exists in the preferential hiring cases, it is less serious in those cases because they do not involve impingements upon long-standing expectations of nonminority workers and therefore are not likely to create as much tension. Thus, fictional seniority cases should be even more strictly scrutinized than hiring preferences, with an eye toward working out some compromise that will thwart neither the white male's job expectations nor the movement toward equal employment opportunity.

V. Conclusion

Preferential remedies are now an acceptable means of eradicating the effects of past discrimination. However, because such remedies raise a number of legal and moral questions concerning reverse discrimination against white male workers, their use is strictly limited. They are only employed to eliminate the effects of past dis-

226. These possible alternatives were proposed in New York City Commn. on Human Rights, Interpretive Memorandum Concerning Procedures Required by Federal, State, and Local Anti-Discrimination Laws When an Employer Is Planning Reduction in Labor Costs That Could Result in Layoffs, n.d., *discussed in Laying Off Employees Pursuant to a Seniority System*, 9 BNA Fair Emp. Prac. Cas. supp., at 1, 11 (Feb. 22, 1975).

The EEOC has recently issued guidelines on seniority-based layoffs that indicate that there is reasonable cause to believe that an employer violates title VII "by conducting layoffs pursuant to a seniority system which operates to exclude a disproportionate number of Black employees because of past discrimination." EEOC Decision No. 75-251, 10 BNA Fair Emp. Prac. Cas. 1405 (May 8, 1975). Thus, it may be that a union has a duty to propose alternatives to "last hired, first fired" layoff and recall procedures when such a system will have the effect of perpetuating past discrimination. A number of courts have recognized that the union's duty of fair representation includes a duty at least to attempt to negotiate seniority systems that do not lock minority employees into the lowest positions in the company. *See, e.g.*, EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975); Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1381-82 (5th Cir. 1974). If a union can be held liable for acquiescing in a departmental seniority system that locks minority employees into low-level jobs, it seems entirely logical also to hold the union liable for acquiescing in a seniority system that actually denies employment to minority employees who have little seniority because of past discrimination.

crimination and only when no alternative means exist for accomplishing that goal. They are always temporary remedies, set to expire as soon as the past discrimination is corrected. Finally, they are only granted to qualified applicants who could be employed even if preferences were not ordered. As a result, preferential remedies have been ordered only in a relatively small number of cases.

The limitations emphasize the main problem faced by the courts in preferential remedy cases—that of balancing the interests of minority workers in equal employment opportunity with the interests of nonminority workers in employment. This balancing is necessary both because preferential remedies are equitable in nature and should therefore be as fair as possible to all concerned and because the courts in employment cases serve the goal of equal employment while equalizing the position of minority workers if people of different races and sexes are to work side by side.

All things considered, preferential remedies as presently used by the courts in employment cases serve the goal of equal employment opportunity and support the ultimate achievement of the principle of "color blindness;" these remedies are therefore a valuable weapon in the fight against discrimination.

[Professor Edwards' views on "last hired, first fired" and "fictional seniority" are more fully set forth in a paper entitled *The Cost of Equality: Civil Rights During Periods of Economic Stress*, delivered as part of the David C. Baum Memorial Lecture Series at the University of Illinois Law School on October 30, 1975. This paper will be published by the University of Illinois—Ed.]