Duquesne Law Review

Volume 14 | Number 2 Article 7

1975

Civil Rights Act of 1964 - Title VII - Affirmative Action in Hiring - Persons Protected

Joseph P. Caracappa

ogy.[79] Nevertheless, by affording this greater protection to employees on statutory grounds, the Board is perhaps indicating that it intends to take a more expansive view of its responsibility to protect the process of employee self-organization and collective bargaining.[80] The Board may accomplish this result by developing the separation of "mutual aid or protection" from union organization and collective bargaining which it has begun in *Weingarten*.

Thomas A. Berret

CIVIL RIGHTS ACT OF 1964—TITLE VII—AFFIRMATIVE ACTION IN HIRING—PERSONS PROTECTED—The United States District Court for the District of New Jersey has held that a white male is not a member of any class protected by Title VII of the Civil Rights Act of 1964 and may not invoke the protection of the Equal Employment Opportunity Commission's guidelines which require that any standardized test which serves as a basis for hiring by an employer must be job-related.

Mele v. United States Department of Justice, 395 F. Supp. 592 (D.N.J. 1975).

The International Brotherhood of Electrical Workers (IBEW), Local 52, administered an affirmative action program[1] formulated

79. In Lafayette Radio Electronics Corp., 194 N.L.R.B. 491 (1971), the trial examiner found the general counsel's argument that employees were entitled to representation was based on the principles underlying the United States Supreme Court decision in Escobedo v. Illinois, 378 U.S. 478 (1964). He rejected this argument on the grounds that *Escobedo* turned on a constitutional guarantee of the right to counsel, while the right sought by the employees was a contract right. 194 N.L.R.B. at 494.

80. *Cf.* the Board's statement in *Weingarten* that

> [it] could not and did not immediately articulate all the rights and duties inherent in Section 7. In its early years the Board was mainly concerned with more obvious violations of the Act, as many employers resisted the basic concepts of self-organization and collective bargaining. With the passage of time, acceptance of self-organization and collective bargaining has increased, and the Board has had to deal with new, and often more subtle practices which are nonetheless inimical to the purposes and policies of the Act.

Supplemental Brief for Petitioner at 5-6.

1. Affirmative action plans assure positive steps will be taken to achieve equal employment opportunity for minority groups. The concept involves more than simply refraining from

pursuant to a prior consent decree[2] and designed to correct past discriminatory practices in the union's admissions policy. In accordance with the plan and under the supervision of the New Jersey Department of Labor, the union scheduled an open examination as part of its trainee recruitment program. John Mele, a Caucasian male, was denied entrance into the apprenticeship program after he took the examination and was informed he had failed. Upon learning that dual scoring had been used in the selection,[3] Mele filed a complaint with the Equal Employment Opportunity Commission (EEOC).[4] The EEOC investigated but refused to act upon the complaint, whereupon Mele filed an action with the United States District Court for the District of New Jersey.[5] He alleged that the IBEW, as an employer,[6] had discriminated against him solely on the

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further discriminatory acts; it requires that employers go beyond passive nondiscrimination and take specific steps toward the elimination of employment barriers to minorities. Such steps include, but are not limited to, adequate advertising of employment opportunities and active recruitment of minority applicants. For a detailed discussion of the affirmative action concept as it applies to the construction industry see Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3rd Cir.), *cert. denied*, 404 U.S. 854 (1971). *See generally Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1291-1304 (1971) [hereinafter cited as *Developments*].

2. In United States v. Journeymen Local 24, 364 F. Supp. 808 (D.N.J. 1973), the United States filed a complaint against IBEW Local 52 and others for unlawful discriminatory practices which were evidenced in part by the fact that only eight of the Local's six hundred members were black. *Id.* at 812. The parties entered into a consent decree whereby the IBEW agreed that at least twenty-five members of its next group of trainees would be black or Spanish-surnamed. In addition, the IBEW agreed that any standardized test which would serve as the basis for an employment decision would be validated in accordance with the guidelines promulgated by the Equal Employment Opportunity Commission. *See* text accompanying notes 15-21 *infra*.

3. As the court interpreted the consent decree, thirty of the next thirty-five apprentices would be members of minority groups. The union graded the minority group's examinations separately and offered positions to the thirty minority applicants with the highest scores. The five highest ranking nonminority candidates completed the trainee group. Mele v. United States Dep't of Justice, 395 F. Supp. 592, 594 (D.N.J. 1975). The consent decree did not mandate a dual scoring system; nor do the EEOC guidelines suggest such a method is appropriate. *See* 29 C.F.R. §§ 1607.1-.14 (1975). The court never addressed the propriety of this system.

4. In 1972, the EEOC was given the power to initiate civil suits as one means of fulfilling its obligation to detect and eliminate employment discrimination under Title VII of the Civil Rights Act of 1964. Equal Employment Opportunity Act of 1972, 42 U.S.C.A. §§ 2000e to 2000e-17 (1974), *amending* Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-15 (1970) [hereinafter referred to as Title VII or the Act]. The EEOC may sue any employer, labor union or employment agency which has not voluntarily complied with its directives. *Id.* § 2000e-5(f)(1).

5. Mele v. United States Dep't of Justice, 395 F. Supp. 592 (D.N.J. 1975).

6. The opinion refers to the IBEW as an employer rather than a labor union. The distinc-

basis of his race in violation of Title VII of the Civil Rights Act of 1964[7] and Executive Order No. 11246.[8] He alleged that the discrimination resulted from the use of a preferential hiring quota[9] and the use of a non-validated test.[10]

The first issue the court addressed was whether court-ordered preferential hiring structured on racial considerations violated Title VII.[11] The court disposed of the issue broadly, rather than in terms of the specific consent decree involved.[12] Since affirmative action

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tion is not critical, however, since Title VII also prohibits unions from engaging in discriminatory practices. 42 U.S.C. § 2000e-2(c) (1970).

7. Title VII states in part: "It shall be an unlawful employment practice for an employer to fail or refuse to hire . . . any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex or national origin . . . ." *Id.* § 2000e-2(a)(1).

8. The Executive Order reads in part: "The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin." 3 C.F.R. 169, 170 (1974), 42 U.S.C. § 2000e (1970). Executive Orders are generally viewed as having the force and effect of law. *See* Joyce v. McCrane, 320 F. Supp. 1284, 1290 (D.N.J. 1970).

Executive Order No. 11246 contains a mandate that contractors take affirmative action guaranteeing employees are hired and treated during employment without regard to race, color, religion, sex or national origin. 3 C.F.R. 169, 170-71 (1974), 42 U.S.C. § 2000e (1970). The Order authorizes the federal government to require that bidders on government contracts formulate and submit affirmative action programs. *Id.* Each plan must outline specific goals and timetables for the prompt achievement of full and equal employment opportunity. The penalty for noncompliance can be severe. *See, e.g.*, Rosetti Contracting Co. v. Brennan, 508 F.2d 1039 (7th Cir. 1975) (bidder disqualified with no opportunity for amendment once the bids were opened).

9. In addition to Title VII's basic proscriptive language, the Act contains an antipreferential provision. 42 U.S.C. § 2000e-2(j) (1970). The pertinent language appears at note 68 *infra*. This section has been interpreted as a ban on preferential hiring. Pennsylvania v. Glickman, 370 F. Supp. 724 (W.D. Pa. 1974) (§703(j) prohibits any hiring on the basis of race). *See* note 61 *infra*.

10. An employer's use of a standardized test for hiring and promotions is not in itself discriminatory. When a test excludes a disproportionate number of minorities from job consideration, however, the employer must demonstrate that the test bears a reasonable relationship to job performance. 29 C.F.R. §§ 1607.3-.9 (1975). The employer must show a definite need for the test and must demonstrate that the test accurately identifies criteria indicative of successful job performance. *Id.* While various courts have interpreted job-relatedness differently, the Supreme Court has defined the concept in terms of "business necessity." Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). Validation, simply stated, is the process of satisfying the business necessity test. *See* 2 AM. JUR. PROOF OF FACTS 2d *Racial Discrimination in Employment—Testing and Educational Requirements* 237 (1974).

11. 395 F. Supp. at 595. The concept of quotas in hiring derives from two sources. Executive Order No. 11246 mandates such plans. *See* note 8 *supra*. Title VII of the Civil Rights Act authorizes federal courts to order whatever relief they deem appropriate after finding past and present discriminatory hiring practices. 42 U.S.C. § 2000e-5(g) (1970), *as amended*, 42 U.S.C.A. § 2000e-5(g) (1972).

12. The plaintiff not only assailed quotas in general; he attempted to distinguish the

plans establishing numerical quotas to remedy the effects of past discrimination have consistently been upheld,[13] the court concluded that the consent decree in question was in conformity with existing law and a valid exercise of the court's equitable powers.[14]

The court next addressed the "more troublesome" issue of test validation[15] and its viability in a situation where a white plaintiff challenged an unvalidated test under Title VII. The court read the guidelines promulgated by the EEOC[16] as equating the use of any

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consent decree in question by arguing that courts have implemented quotas only where other remedies have proved ineffective or a compelling need exists to integrate a particular employee group due to a high degree of public visibility. Brief for Appellant at 11-12, Mele v. United States Dep't of Justice, 395 F. Supp. 592 (D.N.J. 1975). *Mele* never addressed this argument. *See* Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975) (importance of black patrolmen); United States v. Wood Lathers Local 46, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973) (failure to abide by initial decree).

13. Among the cases the *Mele* court cited were Carter v. Gallagher, 452 F.2d 315 (8th Cir.), *cert. denied*, 406 U.S. 950 (1972) (fire department to include twenty minority members among its next sixty hires); Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir. 1971) (upholding the "Philadelphia Plan," which required minority goals in the construction trades ranging from nineteen to twenty-six percent). *See* 395 F. Supp. at 595.

Courts have demonstrated much flexibility in this area and there is substantial authority for the propriety of numerical preferences in employment. *See, e.g.*, United States v. Masonry Contractors Ass'n, 497 F.2d 871, 877-78 (6th Cir. 1974) (reserve at least five percent of all bricklayer hours for blacks); Arnold v. Ballard, 390 F. Supp. 723, 736 (N.D. Ohio 1975) (as openings occur in city police department, it "seems a reasonable approach" that one of every three hired be black); Crockett v. Green, 388 F. Supp. 912, 922 (E.D. Wis. 1975) (one-to-one ratio until number of blacks in skilled crafts equals the percentage of blacks in Milwaukee). *Cf.* Rogers v. International Paper Co., 510 F.2d 1340, 1355 (8th Cir. 1975) (to insure their "rightful place" in plant hierarchy, minorities may forego residency requirements for certain jobs absent a showing of business necessity); Harper v. Kloster, 486 F.2d 1134, 1135 (4th Cir. 1973) (denying permanent preferential relief but ordering fire department to accept applicants from the Baltimore area only (population 47% black) rather than from the entire urban area, where the population was 24% black). *Contra*, Hiatt v. City of Berkeley, 10 FEP Cases 251 (Cal. Super. 1975) (proposed affirmative action plan violated the Civil Rights Act of 1964).

14. *See* Louisiana v. United States, 380 U.S. 145, 154 (1965) (courts have "not merely the power but the duty" to render decrees which will eliminate the vestiges of past discrimination and prevent discrimination in the future).

15. 395 F. Supp. at 595. *See* note 10 *supra*.

16. Guidelines on Employment Selection Procedures, 29 C.F.R. §§ 1607.1-.14 (1975). Title VII explicitly permits employers to hire and promote by the use of standardized tests under certain conditions. 42 U.S.C. § 2000e-2(h) (1970). Guidelines were formulated to curb potential abuse, since a test neutral on its face could exclude a disproportionate number of blacks whose educational level was typically lower than that of whites. Moreover, the tests could be subtly slanted in a white applicant's favor. This phenomenon was acknowledged by Justice Douglas in DeFunis v. Odegaard, 416 U.S. 312, 320 (1974) (dissenting opinion), where a white student alleged he had been denied admission to law school because of the preferential treatment afforded minority applicants. Justice Douglas realized that law school admission

unvalidated standardized test[17] with discrimination per se.[18] Noting that lower federal courts have split on the question of whether an unvalidated test constitutes discrimination per se,[19] the *Mele* court was satisfied that the Supreme Court had settled the issue in *Griggs v. Duke Power Co.*,[20] which placed the burden on the employer to demonstrate that any test with a significant discriminatory effect was job-related. Since a validity study has been the only acceptable method of demonstrating job-relatedness, the court reasoned that *Griggs* had adopted the per se approach to non-validation: an unvalidated test would not meet the employer's burden, and use of the test would violate Title VII.[21]

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tests, while neutral on their face, could have a discriminatory effect due to differences in the cultural backgrounds of minorities and the dominant Caucasian group. *Id.* at 334. A test "sensitively tuned" to the majority of applicants would indirectly discriminate against minorities; if that were the case he would approve giving them preference by considering their applications separately. Validation under the guidelines attempts to decrease the probability that a test will be discriminatory.

17. The guidelines set out in great detail what employers must do to establish that a test is sufficiently job-related. 29 C.F.R. §§ 1607.4-.9 (1975). Similar guidelines were issued by the Secretary of Labor for use by federal contractors in determining whether tests they have implemented conform with the requirements of Executive Order No. 11246. 41 C.F.R. §§ 60-3 to -3.18 (1975). For a detailed discussion of the judicial approach to the complexities of test validation see Kirkland v. New York State Dep't of Correctional Servs., 374 F. Supp. 1361, 1370-74 (S.D.N.Y. 1974), *rev'd in part and remanded*, 520 F.2d 420 (2d Cir. 1975).

18. 395 F. Supp. at 596.

19. *Compare* Hicks v. Crown Zellerbach Corp., 319 F. Supp. 314 (E.D. La. 1970), *modified*, 321 F. Supp. 1241 (E.D. La. 1971) (since employer engaged in no significant study to support its testing program, the program was unlawful) *with* United States v. H.K. Porter Co., 296 F. Supp. 40, 76-77 (N.D. Ala. 1968) (requiring evidence that the use of an unvalidated test has resulted in discrimination).

20. 401 U.S. 424 (1971). *Griggs* is the Supreme Court's only major declaration to date concerning permissible employment criteria under Title VII. The Court has recently reaffirmed its holding in *Griggs* as it pertains to test validation. Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975).

21. Tests which have a discriminatory effect against minorities are subject to close judicial scrutiny; often they do not survive. *See, e.g.*, Douglas v. Hampton, 512 F.2d 976 (D.C. Cir. 1975) (blacks improperly denied injunction when statistics showed that the Federal Service Entrance Examination had a disproportionate adverse impact on blacks and lacked empirical validation); Rogers v. International Paper Co., 510 F.2d 1340, 1350 (8th Cir. 1975) (failure to include blacks in validation studies and absence of "differential" validation rendered studies inadequate); Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975) (validation study of two-part test conducted by defendant's expert was inadequate); Crockett v. Green, 388 F. Supp. 912 (E.D. Wis. 1975) (validation study must evince a business necessity, not merely a business purpose). *But see* Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975) (although Georgia bar examination excludes disproportionate number of blacks, test need not be validated when state has a substantial interest in ensuring standards of minimum legal competence).

Despite the fact that the test Mele took had not been validated in accordance with the guidelines,[22] the court held he was not entitled to relief. Since the guidelines applied only to tests which adversely affected the employment opportunities of "*classes protected by Title VII*,"[23] a test which adversely affected white applicants was not discriminatory under the statute. The court reasoned Congress did not intend that Title VII should extend the Act's protections to whites, who were the dominant majority; thus Mele could not invoke the protection of the EEOC guidelines, which reflected the purposes of Title VII in the area of employment testing.[24] Allegations that discriminatory tests adversely affected nonminority applicants failed to state a claim upon which relief could be granted.[25]

An analysis of the *Mele* rationale must consider that the IBEW's affirmative action plan had been implemented pursuant to a court order.[26] Absent such a decree, the union's racially structured preferential policy might be constitutionally questionable;[27] since the union's hiring policy had been ordered by the court, it was less susceptible to attack.[28] Had the court explicitly based its decision in *Mele* on the prior decree, the case would have been clear and consistent with the court's past policy. Rather than summarily referring the plaintiff to the earlier court order, however, the court apparently limited the ambit of Title VII by confining the concept of test validation to a class consisting only of minorities who faced

22. Although the consent decree required it, the test Mele took had not been validated. Brief for Appellant at 22.

23. This limitation appears twice in the guidelines. 29 C.F.R. § 1607.3 (1975) (defining discrimination); *Id.* § 1607.14 (relating test validation to affirmative action). Presumably the language refers to Title VII's enumerated classifications of race, color, religion, sex and national origin. *See* 42 U.S.C. § 2000e-2(a)(1) (1970).

24. Title VII has been invoked to protect minorities from employment decisions based upon criteria such as the applicant's past garnishment and arrest records. If such practices are shown to have a significant discriminatory effect, the employer must evince a sufficient correlation between an employee's past history and substandard job performance. *See* Wallace v. Debron, 494 F.2d 674 (8th Cir. 1974) (garnishment); Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (C.D. Cal. 1970), *modified*, 472 F.2d 631 (9th Cir. 1972) (arrest records).

25. The case was dismissed pursuant to FED. R. CIV. P. 12(b)(6) (failure to state a claim upon which relief can be granted).

26. *See* note 2 *supra*.

27. *See* note 69 *infra*.

28. Supreme Court decisions authorizing the implementation of quotas to achieve school desegregation illustrate this point. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971). While courts generally look askance at ratios structured on racial considerations, they are permitted as a means of rectifying past discriminatory practices. *See* note 13 *supra*.

discriminatory employment practices prior to Title VII's enactment. The court might have felt that whites could not challenge unvalidated tests because affirmative action should not be disturbed; if so, the court failed to clearly articulate that proposition. In defining the classes protected by the Act and deciding that whites are not included, the broad lanugage of the court conveys that under no circumstances does Title VII protect white persons. Hence, the potential scope of the decision is troublesome.

The *Mele* court's concept of "minority" was an underlying factor in the outcome of the case. According to the court, Congress enacted the Civil Rights Act of 1964 from concern over the obstacles which faced members of minority groups seeking equal employment,[29] and did not intend that Title VII should interdict *all* discrimination based on race, color, religion, sex and national origin. Rather, the proscription applied only when blacks or any other "traditional" minorities were targets of discrimination.[30] In effect the court froze the definition of "minority," confining it to the context of social problems existing in 1964 when the Act was passed. Under that construction, however, the statute has less relevance in the present. In 1964, "race discrimination" commonly meant discrimination against blacks, Hispanics and Chicanos; today any group, including the white majority, may be adversely affected by discrimination. "Minority" cannot realistically be defined in quantitative terms, since under that interpretation white anglo-saxon protestants, who constitute a numerical minority, would be entitled to Title VII protection while women, who comprise a numerical majority group, would be excluded.[31]

A literal reading of Title VII, free from the societal overtones of a given time period, indicates the statute was designed to prohibit any

29. The high minority unemployment rate was a primary reason for the Act's passage; this was reflected in both the House and Senate committee reports. H.R. REP. No. 914, 88th Cong., 1st Sess. 26-27 (1963); S. REP. No. 867, 88th Cong., 2d Sess. 6-8 (1964). For a copy of the cited unemployment statistics and part of the congressional debates concerning them see Blumrosen, *The Duty of Fair Recruitment under the Civil Rights Act of 1964*, 22 RUT. L. REV. 465, 511-27 (1968). *See also* Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971), where the Court stated the objective of Congress in enacting Title VII was to achieve equality of employment opportunities and remove barriers that had operated in the past to favor white employees over minority employees.

30. 395 F. Supp. at 597.

31. Flaherty & Sheard, *DeFunis, The Equal Protection Dilemma: Affirmative Action and Quotas*, 12 DUQ. L. REV. 745, 763 (1974).

form of discrimination.[32] The legislative history[33] also supports the idea that "minority" is a fluid concept which defines a dominated group or a group whose interests have been made subservient to those of another. When the Supreme Court referred to the congressional intent of Title VII in *Griggs*, it too interpreted Title VII as limited by the principle of colorblindness.[34] In restricting the coverage of Title VII, the *Mele* court focused on a principle motivation for Title VII's enactment rather than the actual language of the end product.[35]

This narrow construction of the Act seems strained when contrasted with the expansion of comparable federal legislation prohibiting employment discrimination. Title VII and § 1981 of the Civil Rights Act of 1866[36] are similar in motivation and effect. The latter

32. The relevant language appears at note 7 *supra*. Proponents of the "plain meaning" approach to statutory interpretation may argue that *Mele's* construction of Title VII went so far as to usurp the power of the legislature. *See* Caminetti v. United States, 242 U.S. 470, 485 (1917) ("[w]here the language is plain and admits of no more than one meaning the duty of interpretation does not arise . . . ."). *See also* Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947), where the author contends that questions of statutory construction arise only if there is a fair contest between two possible meanings of statutory language.

33. There is much dialogue which contradicts the *Mele* court's contention that Congress did not intend to protect whites when it enacted Title VII:

> The truth is that this title [Title VII] forbids discrimination against anyone on account of race.
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> . . . .
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> . . .Title VII prohibits discrimination. In effect, it says that race, religion, and national origin are not to be used as the basis for hiring and firing.

110 CONG. REC. 6549 (1964) (remarks of Senator Humphrey). The floor managers of the bill stated:

> There is no requirement in Title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance . . . would involve a violation of Title VII because maintaining such a balance would require an employer to hire or refuse to hire on the basis of race.

Id. at 7213 (interpretative memorandum of Title VII submitted by Senators Clark & Case). Senator Williams remarked: "[T]o hire a Negro solely because he is a Negro is racial discrimination . . . prohibited by Title VII of this bill." *Id.* at 8921. *See Developments, supra* note 1, at 1114, 1116.

34. "Discriminatory preference for *any group, minority or majority*, is precisely and only what Congress has proscribed." Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (emphasis added).

35. *Cf.* Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 728 (1974) [hereinafter cited as Ely], where the author points out that the equal protection clause of the fourteenth amendment has been construed to protect other minorities despite the fact that it was initially intended to protect blacks.

36. Civil Rights Act of 1866, 42 U.S.C. §§ 1981-82 (1970) reads in pertinent part: "All persons within the jurisdiction of the United States shall have the same right in every State

statute was overlooked as a weapon against private racial discrimination until it was revived by the Supreme Court in *Jones v. Alfred H. Mayer Co.*.[37] Since then, every circuit which has considered the question has applied § 1981 to employment discrimination.[38] Although the Supreme Court has never ruled on the specific issue,[39] a number of federal courts have held that § 1981 prohibits all discrimination based upon race, against whites as well as blacks.[40] The rationale of those decisions is apposite to Title VII: when enacting § 1981 to protect blacks in the exercise of their new freedoms, the Congress of 1866 used the rights traditionally enjoyed by whites as a measure of the treatment to which all citizens were entitled.[41] The courts have refused to limit § 1981's proscription solely to blacks

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. . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . ." *Id.* § 1981.

37. 392 U.S. 409 (1968) (§1982 of the Civil Rights Act of 1866 prohibits private racial discrimination in the sale or rental of real property). *Jones* dealt with § 1982 because a property interest was involved, but courts have not hesitated to hold that § 1981 also prohibits private racial discrimination. *See* note 38 *infra*.

38. *See, e.g.*, Long v. Ford Motor Co., 496 F.2d 500 (6th Cir. 1974); Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (D.C. Cir. 1973); Young v. ITT, 438 F.2d 757 (3d Cir. 1971). Many cases have been brought under both Title VII and § 1981. *See, e.g.*, Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 911 (1975); Ripp v. Dobb Houses, Inc., 366 F. Supp. 205 (N.D. Ala. 1973). There is disagreement on the procedural differences between the two statutes. *Compare* Hill v. American Airlines, Inc., 479 F.2d 1057 (5th Cir. 1973) (plaintiff may sue directly under § 1981 without first pursuing remedies he may have under Title VII) *with* Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970) (plaintiff intending to sue under § 1981 must first exhaust his Title VII remedies).

39. In McDonald v. Sante Fe Trail Transp. Co., 513 F.2d 90 (5th Cir. 1975), *cert. granted*, 44 U.S.L.W. 3257 (U.S. Nov. 3, 1975) (No. 75-260), the lower court dismissed plaintiff's § 1981 claim, reasoning that section conferred no actionable rights upon white persons. The Supreme Court's decision in *McDonald* may also affect the scope of Title VII and the extent to which whites can use it to free themselves from employment discrimination. In addition to denuding whites of the protection of § 1981, the Fifth Circuit stated that an employer's dismissal of white, but not black, employees charged with misappropriating funds did not raise a claim upon which relief could be granted under Title VII. The court did not dismiss the former employees' complaint on the grounds that the charges of theft were true, but rather because its position on Title VII was the same as the *Mele* approach. 513 F.2d at 90-91.

40. *E.g.*, Carter v. Gallagher, 452 F.2d 315, 327 (8th Cir. 1972) (§ 1981 proscribes all discrimination whether it be against blacks or whites); Hollander v. Sears, Roebuck & Co., 392 F. Supp. 90 (D. Conn. 1975) (minority recruitment program which excluded whites was unlawful); WRMA Broadcasting v. Hawthorne, 365 F. Supp. 577, 581 (M.D. Ala. 1973) ("in those rare instances when a white alleges discrimination under Section 1981, it is entirely consonant with the purpose of Section 1981 that whites discriminated against for *racial reasons* should have standing under Section 1981 . . . ."); Gannon v. Action, 303 F. Supp. 1240, 1244 (E.D. Mo. 1969) (§ 1981 applies to discrimination against anyone regardless of race).

41. Hollander v. Sears, Roebuck & Co., 392 F. Supp. 90, 94 (D. Conn. 1975).

who have been victims of discrimination, because members of the white race who have been denied the rights which were normally available to them have needed the same protection.[42] This reasoning has also been persuasive to courts in a Title VII setting;[43] had the *Mele* court considered the similarity between Title VII and § 1981, it might have reached a different result.

The court did not frame the issue whether a white plaintiff may invoke Title VII as a question of standing. Standing generally focuses on the individual bringing suit rather than on the class to which that person belongs, and the threshold question is whether this particular plaintiff has suffered an injury.[44] In cases challenging unvalidated tests, however, courts first ask whether the test has adversely affected members of a particular class.[45] This may explain why the court approached discrimination in terms of the injury sustained by Mele's class rather than the injury he may have suffered as an individual. The court concluded that unless a plaintiff was a member of the classes protected by Title VII, there was no discrimination and hence no cause of action under the statute.[46] The conclusion assumed a white complainant was not within the class protected by the statute without reaching the crucial inquiry of what groups composed the class. While the *Mele* court did not question the composition of the protected class, other courts which have dealt with legislation prohibiting discrimination have evolved modern concepts of standing which undermine the holding in *Mele*.[47]

Under Title VII, a "person claiming to be aggrieved" may file a charge with the EEOC.[48] A number of federal courts have inter-

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42. *Id.*

43. *See, e.g.*, United States v. International Longshoremen's Ass'n, 334 F. Supp. 976, 979 (S.D. Tex. 1971) ("Civil Rights Act of 1964 was passed . . . to help Whites as much as Negroes, if their civil rights are being violated . . . .").

44. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727 (1972) (party seeking review must have himself suffered an injury).

45. *See* note 21 *supra*.

46. 395 F. Supp. at 596.

47. Much civil rights legislation has turned on whether the plaintiff seeking relief has standing to present his claim. *See, e.g.*, Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972) (white tenants have standing under the Fair Housing Act); Foust v. Transamerica Corp., 391 F. Supp. 312 (N.D. Cal. 1975) (standing under Title VII restricted to those who are the objects of the prohibited discrimination); Gray v. Greyhound Lines-East, 10 FEP Cases 259 (D.D.C. 1975) (white plaintiff lacked standing when discrimination against blacks caused him indirect emotional harm); Elk Grove Firefighters Local 2340 v. Willis, 391 F. Supp. 487 (N.D. Ill. 1975) (one has no standing to sue for the deprivation of another's civil rights).

48. 42 U.S.C. § 2000e-5(a) (1970).

preted that language as evincing a congressional intent to define standing as broadly as the Constitution will permit.[49] In *Flast v. Cohen*,[50] the Supreme Court considered standing under article III of the Constitution and emphasized that the party seeking to invoke federal court jurisdiction must have a personal stake in the controversy in order to present a justiciable claim.[51] In *Data Processing Service v. Camp*,[52] the Supreme Court looked beyond article III and enunciated a two-prong test for determining standing conferred by statute. Under *Data Processing*, a "person aggrieved" within the meaning of the Administrative Procedure Act must meet two requirements: he must have suffered injury in fact and the interest he seeks to have protected must be "within the zone of interests to be protected or regulated by the statute . . . in question."[53] *Data Processing* expressly acknowledged a trend to enlarge rather than limit the category of "aggrieved persons."[54] The Court followed that course in *Trafficante v. Metropolitan Life Insurance Co.*,[55] which gave a white plaintiff standing to challenge racial discrimination in housing under Title VIII of the Civil Rights Act of 1968.[56]

The standing analysis focuses the issue in *Mele* on the questions of whether the plaintiff had sustained injury and whether his interest in freedom from discrimination in hiring was within the "zone of interests" protected or regulated by Title VII. If Title VII is con-

49. *See, e.g.*, Hackett v. McGuire Bros., 445 F.2d 442, 446 (3d Cir. 1971) (the language "a person claiming to be aggrieved" evinces an intent to define standing as broadly as article III of the Constitution permits); Air Line Pilots v. Continental Air Lines, 10 FEP Cases 462 (N.D. Ill. 1974) ("[i]n using the language 'a person claiming to be aggrieved' Congress intended to extend standing as far as constitutionally permissible").

50. 392 U.S. 83 (1968) (taxpayers have standing to challenge the validity of federal spending programs which may violate the establishment clause).

51. *Id.* at 99, 101. Justice Brennan read *Flast* to hold that standing exists if the plaintiff alleges that the challenged action has caused him "injury in fact, economic or otherwise." Barlow v. Collins, 397 U.S. 159, 172 n.5, 173 n.6 (1970) (concurring in the result and dissenting).

52. 397 U.S. 150 (1970). Justice Brennan's opinion in *Barlow* also applied to the result in *Data Processing*. Barlow v. Collins, 397 U.S. 159, 167 (1970).

53. 397 U.S. at 153. *See* Foust v. Transamerica Corp., 391 F. Supp. 312 (N.D. Cal. 1975) (Title VII plaintiff must have suffered injury and be within the zone of interests the Act seeks to protect).

54. 397 U.S. at 154.

55. 409 U.S. 205 (1972). One commentator has suggested that the Court was influenced in *Trafficante* by the long line of civil rights cases which have expanded the white plaintiff's ability to bring suit. Comment, *Standing to Challenge Housing Discrimination: The Limits of Trafficante v. Metropolitan Life*, 7 URBAN L. ANN. 311 (1974). A sampling of those cases appears *id.* at 316 nn.34-41.

56. 42 U.S.C. §§ 3601-31 (1970).

strued to prohibit *all* discrimination, Mele is arguably within the zone. Nevertheless, the district court apparently felt Mele had not been injured in fact, since it considered validation a device for protection of the rights of minority job applicants. According to the "business necessity" test announced in *Griggs v. Duke Power Co.*,[57] however, validation is more accurately characterized as "job-relatedness." When an applicant has been denied employment on the basis of his score on a qualifying examination which does not indicate how well he would have performed the job, he has been injured no matter what his race. Like the classes in Title VII, the concept of job-relatedness should be colorblind.

To date, only one other federal court has aligned itself with the *Mele* position on Title VII. In *Haber v. Klassen*,[58] the court also avoided evolving standing doctrine which seemingly has enlarged the class of persons with justiciable claims of unlawful discriminatory practices. Because it construed Title VII to afford whites no protection from employment discrimination, the *Haber* court summarily dismissed the complaint because it saw "no substantial issue of significant fact."[59]

As of this writing, *Mele* and *Haber* are the only cases which stand for the proposition that Title VII was never intended to protect whites from discriminatory hiring practices.[60] Other courts which have dealt with the issue of whether Title VII permits color-conscious remedies have not been in agreement, but none has gone so far as to completely denude whites of the Act's protections. There

57. 401 U.S. 424 (1971). *See* note 10 *supra*.

58. 10 FEP Cases 1446 (N.D. Ohio 1975).

59. *Id.* In support of its decision, the *Haber* court cited McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (plaintiff in a Title VII suit must be afforded fair opportunity to demonstrate that employer's reason for refusing to rehire him was pretext or discriminatory in its application). In *McDonnell*, however, the Supreme Court was unconcerned with the issue of whom Title VII protects, but rather dealt with the burden of proof required in Title VII cases. Justice Powell enunciated a four-step formula by which a complainant can meet his initial burden under the Act to establish a prima facie case of racial discrimination. The first step establishes that one is a member of a racial minority. *Id.* at 802. Earlier in his opinion, however, Justice Powell explicitly stated that Title VII tolerates no discrimination in any form. *Id.* at 801. The case did not involve a white plaintiff and at least one federal court has held, by necessary implication, that the *McDonnell* formulation does not preclude whites from bringing suit under Title VII. Parks v. Brennan, 389 F. Supp. 790, 794 (N.D. Ga. 1974). *See* note 64 *infra*.

60. There is a fundamental distinction between denying a plaintiff the protection of the Act and permitting reverse discrimination under the Act due to a compelling state interest. The latter is the constitutional issue which the Supreme Court has yet to decide. *See* note 69 *infra*.

is some authority for the view that Title VII prohibits all discrimination, benign or not.[61] Other courts have refused to sanction preferential quotas absent findings of discriminatory hiring policies[62] or nonvalidated tests.[63] These positions necessarily presume that white plaintiffs are within the protected "zone."[64] The Equal Employment Opportunity Commission itself has ruled that Title VII extends standing to any person aggrieved by unlawful discriminatory practices[65] and has explicitly held that the Act protects whites denied employment opportunities due to preferential hiring.[66] *Mele* is difficult to reconcile with this most recent pronouncement of EEOC policy. Even courts which have countenanced preferential quotas[67] have stated in dicta that Title VII affords relief only when there has been some showing of discrimination.[68] Although the constitutional

61. *E.g.*, Pennsylvania v. Glickman, 370 F. Supp. 724, 736 (W.D. Pa. 1974) ("Title VII [section 703(j)] of the Civil Rights Act clearly prohibits all hiring on the basis of race"); Decision 75-268, 10 FEP Cases 1502 (EEOC 1975) (an employer may not violate § 703(j) of Title VII, which proscribes all preferential hiring whether blacks or whites are the favored class). *See* Judge Hays' vigorous dissent in Rios v. Steamfitters Local 638, 501 F.2d 622, 639 (2d Cir. 1974), where he argued that many cases which have employed preferential quotas have ignored § 703(j) and should not be followed. *See also Developments, supra* note 1, at 1114, where it is suggested the Civil Rights Act of 1964 is limited by the principle of color-blindness.

62. *E.g.*, Hiatt v. City of Berkeley, 10 FEP Cases 251 (Cal. Super. 1975) (absent discrimination, city-wide affirmative action plan violated the Civil Rights Act of 1964).

63. *See, e.g.*, Kirkland v. New York State Dep't of Correctional Servs., 520 F.2d 420 (2d Cir. 1975) (once a court-approved job-related test had been prepared, giving preference to minorities on racial grounds by the imposition of quotas violated the United States and New York Constitutions); Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1341 (2d Cir. 1973), *aff'd on rehearing*, 497 F.2d 1113 (2d Cir. 1974), *cert. denied*, 421 U.S. 991 (1975) (imposition of quota unwarranted absent a finding of a discriminatory examination for promotion applicants).

64. In Parks v. Dunlop, 517 F.2d 785 (5th Cir. 1975), *rev'g sub nom.* Parks v. Brennan, 389 F. Supp. 790 (N.D. Ga. 1974), a Title VII action instituted by a white federal employee, the Fifth Circuit reversed the district court's order granting the appellee a preliminary injunction. This was not done because the complaint failed to state a claim under Title VII, but because appellee's remedy at law would be adequate should he prevail on the merits. This holding implicitly contravenes the *Mele* position, since the court gave no indication that the plaintiff's rights under the Act were affected by his color.

65. Decision 74-76, 10 FEP Cases 809, 810 (EEOC 1974) ("Title VII gives standing to *any person* aggrieved by any practice forbidden by Title VII") (emphasis added).

66. Decision 75-268, 10 FEP Cases 1502 (EEOC 1975) (an employer may not violate § 703(j) of Title VII, which proscribes all preferential hiring whether whites or blacks are the favored class).

67. *See* note 13 *supra*.

68. For example, in Rios v. Steamfitters Local 638, 501 F.2d 622, 630-31 (2d Cir. 1974), the court construed Title VII to prohibit preferential treatment as a means of altering racial imbalances in an employer's work force which were attributable to causes other than invidi-

issue is beyond the scope of this note, reverse discrimination has been justified in terms of a compelling state interest to achieve parity among the races in the employment area.[69]

The rationale in *Mele* may further complicate the difficulties encountered by courts in grappling with the language of Title VII and the conflicting interests it attempts to serve.[70] In its disposition of the "novel" issue[71] of whether a white plaintiff may invoke the EEOC guidelines, the *Mele* court might have meant that employers may eschew validation requirements when implementing preferential quotas, under the theory that white applicants must tolerate the adverse consequences of numerical preferences until minorities achieve some degree of parity. Such an approach would better ac-

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ous discrimination. In the court's view, the Act did not preclude the use of quotas to eradicate the vestiges of past discriminatory practices. The section of Title VII which necessitated this construction reads in part:

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

42 U.S.C. § 2000e-2(j) (1970). *See* Blumrosen, *Quotas, Common Sense, and Law in Labor Relations: Three Dimensions of Equal Opportunity*, 27 RUT. L. REV. 675, 690-92 (1974).

69. *Compare* Associated Gen. Contractors v. Altshuler, 490 F.2d 9, 17-18 (1st Cir. 1973) (construction contractors challenging minority percentage goals) *with* Pennsylvania v. Glickman, 370 F. Supp. 724, 736 (W.D. Pa. 1974) ("if *any* racial classification is constitutionally objectionable in and of itself, then no governmental purpose . . . can justify the imposition of racially oriented hiring quotas") (footnotes omitted). *See also* Note, *Employment Discrimination: Statistics and Preferences Under Title VII*, 59 VA. L. REV. 463, 491 (1973).

Possibly, a compelling state interest could authorize reverse discrimination. *See* Loving v. Virginia, 388 U.S. 1, 11 (1967) (equal protection at least requires that government action predicated on color must be necessary to the attainment of an overriding governmental purpose); Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (racial classifications are constitutionally suspect and must be scrutinized with particular care). Perhaps reverse, "ameliorative" discrimination does not raise serious constitutional questions; the argument has been posed that racial classifications are not "suspect" in the constitutional sense when a majority discriminates against itself. Ely, *supra* note 35, at 726-27. *See Comment, Reverse Discrimination*, 45 MISS. L.J. 467, 478-79 (1974) ("compensatory" preferences are not invidious and hence not constitutionally suspect). *But see* DeFunis v. Odegaard, 416 U.S. 312, 333 (1974) (Douglas, J., dissenting) (consideration of race, even for so-called benign purposes, is capricious and invidious discrimination subject to the closest scrutiny).

70. Title VII requires that employers achieve racial equality in employment while simultaneously adhering to the principle of color-blindness in hiring. 42 U.S.C. § 2000e-2(j) (1970). It has been recommended that the Act be amended to permit numerical preferences, thereby alleviating this inherent contradiction. *Developments, supra* note 1, at 1299-1304.

71. 395 F. Supp. at 595.

commodate the competing interests at stake; it would uphold affirmative action while preserving Title VII as a flexible statute applicable to groups other than the traditional minorities.

The court seems to have gone much further, however, in its holding that a white plaintiff has no cause of action under Title VII for harm done by an unvalidated test. It is one thing to say that Title VII permits numerical preferences or unvalidated tests, however reluctantly,[72] in order to achieve the racial balance in employment which was a major purpose of the Act. It is quite another to maintain that Title VII was never intended to protect white persons and therefore is of no avail to nonminorities facing employment discrimination for racial reasons. While courts have disagreed on the *degree* of protection Title VII affords, the fact that white complainants are protected has rarely been denied.[73] Were a black-dominated urban labor union to refuse membership to nonminority individuals solely on the basis of their race, such a practice would appear discriminatory. Yet the holding in *Mele* could be used as authority to turn away complainants on the grounds that the Act is not sufficiently broad to prohibit such a practice.[74]

Aside from its pronouncements on test validation and affirmative action, the *Mele* court, perhaps needlessly, addressed one central consideration: does Title VII prohibit employment discrimination based on the five general classifications of race, color, religion, sex and national origin as its language indicates, or only when "traditional" minorities are denied equal employment opportunities? If indeed it chose the latter alternative, the court may have deprived most of the population of the protection of major federal legislation in the sensitive area of employment opportunity. That decision would be contrary to EEOC policy[75] and would go beyond decisions

72. *See* Note, *Employment Discrimination: Statistics and Preferences Under Title VII*, 59 VA. L. REV. 463, 491 (1973).

73. *See* notes 61-66 *supra*. Many courts have denied preferential relief under Title VII absent a showing of purposeful discrimination. *See* notes 62-63 *supra*. Although Title VII was not involved, this was precisely the dilemma left unsolved by the Court in DeFunis v. Odegaard, 416 U.S. 312 (1974); there was no finding that the law school had ever intentionally discriminated against blacks. *See* Lavinsky, *DeFunis v. Odegaard: The "Non-Decision" with a Message*, 75 COLUM. L. REV. 520 (1975).

74. In Haber v. Klassen, 10 FEP Cases 1446, 1447 (N.D. Ohio 1975), the court stated Title VII was of no avail to a white victimized by employment discrimination, although there were other statutes which might provide relief to whites similarly situated. The court did not name the statutes to which it referred.

75. *See* note 66 *supra*.

which have required at least a showing of past discrimination before approving numerical preferences. Because it ignored standing from an individual's viewpoint, the decision appears to be outside the mainstream of recent civil rights cases which have afforded white plaintiffs access to the courts in order to vindicate their civil rights.[76] A decision at odds with this authority should be based on strong precedent or cogent reasoning. The *Mele* decision is susceptible of this meaning and deficient in both respects.*

Joseph P. Caracappa

PARENT AND CHILD—CUSTODY OF CHILD—VOLUNTARY RELINQUISHMENT—PLACEMENT AGREEMENTS—The Supreme Court of Pennsylvania has held that child placement agreements voluntarily executed by parents and the county child welfare agency which condition the child's return on the agency's approval are authorized by state statutes and the regulations of the Department of Public Welfare and do not violate the due process clause of the fourteenth amendment to the United States Constitution.

Lee v. Child Care Service Delaware County Institution District, 337 A.2d 586 (Pa. 1975).

On August 28, 1972, Rita and Edwin Lee executed a placement agreement which transferred custody of their son to the Child Care Service of the Delaware County Institution District.[1] By the terms of the agreement, Child Care would arrange for placement, medical care and appropriate visitation. The child would be returned under conditions approved by Child Care. In case of dispute between the parties, the Juvenile Court of Delaware County would be available to review the matter and issue necessary orders.[2] Approximately

76. *See* notes 40 & 55 *supra*.

* The *Mele* decision was appealed on June 3, 1975, and the case is pending before the Third Circuit Court of Appeals.

1. Hereinafter referred to as Child Care.

2. The agreement form provided spaces for the date, the names of the family members involved and the reason for the transfer, which was subject to the following conditions:

> I, WE agree that said child/children may be removed from [our home] and hereby grant and give custody of said child/children to said Child Care Service.