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STUDENT COMMENT

THE HIRING PREFERENCE ORDER AS A REMEDY FOR EMPLOYMENT DISCRIMINATION: DOES *CARTER V. GALLAGHER* LIMIT THE USE OF ABSOLUTE PREFERENCE ORDERS?

INTRODUCTION

Since the enactment of Title VII of the Civil Rights Act of 1964,[1] civil rights groups and individual plaintiffs have been conducting a frontal attack on employment discrimination under the authority of that statute and the Civil Rights Act of 1866.[2] In dealing with these cases, courts continue to encounter violations of fair employment laws and have sought to remedy both overt and covert[3] policies of employment discrimination. In seeking to rectify discriminatory employment practices, courts have utilized their broad equity powers in the formulation of relief. The trend of recent decisions has been toward greater activism in the institution of remedial decrees which affirmatively halt discriminatory employment practices. Remedial judicial decrees have moved from the restrained posture of simply eliminating overt discriminatory employment practices[4] to the more activist stance of also attacking deeply ingrained covert practices and their effects.[5] In their desire to root out covert discriminatory employment practices, courts have ordered the revision of testing standards so as to reflect more equitably the qualifications of prospective minority employees[6] and the utilization of publicity programs.[7] The most far reaching remedial solution, however, was that proposed recently by the United States District Court for the District

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1 42 U.S.C. §§ 2000e et seq. (1970), as amended, 86 Stat. 103 (1972).

2 Act of April 9, 1866, ch. 31, 14 Stat. 27. Specifically, Section 1 of the Act, which provides that all persons "shall have the same right . . . to make and enforce contracts" has recently been resurrected as a statutory basis for employment discrimination suits against non-governmental employers. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, reenacted by § 18 of the Enforcement Act of 1870, Act of May 31, 1870, ch. 114, § 18, 16 Stat. 140, 144, and codified in §§ 1977 and 1978 of the Revised Statutes of 1874, now 42 U.S.C. § 1981 (1970).

3 The courts' main problem in the area of employment discrimination is with covert or "neutral" policies of discrimination. For a discussion of this problem, see Cooper and Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598 (1969). See also Comment, 1971-1972 Annual Survey of Labor Relations Law, 13 B.C. Ind. & Com. L. Rev. 1347, 1362-65 (1972).

4 See, e.g., United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971); Dobbins v. Local 212, IBEW, 292 F. Supp. 413 (S.D. Ohio 1968).

5 See, e.g., Griggs v. Duke Power Co., 401 U.S. 424 (1971); United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971).

6 Griggs v. Duke Power Co., 401 U.S. 424 (1971).

7 Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972); United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969).

of Minnesota in *Carter v. Gallagher*.[8] The district court in *Carter* issued a decree instituting an absolute minority preference as a temporary measure to remedy the injustice of past employment discrimination and to prevent future discrimination in the hiring practices of the Minneapolis Fire Department.[9] The decree ordered the defendant employer to hire only minority group applicants until such time as twenty minority employees had been hired.[10] On appeal, the Eighth Circuit Court of Appeals rejected the district court's absolute preference decree, holding it to be violative of the equal protection clause of the Fourteenth Amendment.[11] The court did not, however, rule all hiring preference plans invalid. Rather than simply dismissing the order of the district court, the Eighth Circuit modified the order so as to require the defendant to hire minority applicants on a one-to-two ratio with whites.[12] Because it drew the line between the absolute preference order and the limited preference order—holding the former to be violative of the equal protection clause but the latter constitutionally acceptable—the *Carter* decision provides valuable insight into the problem of the limits of judicial power in fashioning relief in employment discrimination cases.

This comment will examine the minority preference order as a remedy for racially discriminatory employment practices. The essential question encountered is the limit to which a remedial judicial decree may go in the area of employment discrimination. The comment will place *Carter v. Gallagher* under constitutional analysis in order to determine the permissible bounds of remedial decrees in this context. It will then examine the effect of Title VII of the Civil Rights Act of 1964 and that statute's antipreferential provision on the courts' remedial power. Finally, the comment will compare the remedies for discriminatory employment practices with available remedies for denial of equal educational opportunity.

I. The Constitutional Problem

Carter v. Gallagher is the first case to confront the question of "reverse discrimination" in the form of an absolute preference decree. *Carter* is significant in that it rejects the absolute minority preference as a constitutionally acceptable remedial decree. *Carter* is also the first case under the Civil Rights Acts of 1866 and 1871[13] to adopt a hiring ratio as part of the remedy.

[8] 3 FEP Cases 692 (D. Minn. 1971).

[9] Id. at 709.

[10] Id.

[11] 452 F.2d 315 (8th Cir. 1971), cert. denied, 406 U.S. 950 (1972).

[12] 452 F.2d at 331.

[13] Although *Carter* was not brought pursuant to Title VII of the Civil Rights Act of 1964, there is no basis for the assertion that its rationale will not apply to cases brought under that statute. It should be noted, in addition, that Title VII has recently been amended to include cases of the *Carter* variety; i.e., cases in which a state or local governmental employer is involved. 86 Stat. 103, § 2 (1972).

At the time suit was initiated in *Carter v. Gallagher*, the Minneapolis Fire Department had 535 employees, none of whom was a member of a minority group.[14] Moreover, there had been only two minority group employees in the Fire Department in the preceding twenty-five years[15] in a city where in recent years non-whites comprised 6.44 percent of the population.[16] Desirous of terminating what they deemed to be the exclusion of minority members from the Fire Department, five blacks instituted a class action on behalf of themselves and all those similarly situated[17] under Sections 1981[18] and 1983[19] of Title 42 of the United States Code, alleging that the recruitment, examination and hiring practices of the defendants discriminated against minority group job applicants. The plaintiffs prayed for declaratory judgment and injunctive relief to redress the alleged pattern and practice of racial discrimination which had resulted in all-white employment in the Minneapolis Fire Department.[20]

The district court concluded that the recruitment, examination, and hiring practices of the Minneapolis Civil Service Commission[21]

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[14] 3 FEP Cases at 695. The minority groups in question included blacks, Indian-Americans and Mexican-Americans.

[15] Id.

[16] Id. The non-white percentage figure was derived from the 1970 Census Bureau Reports.

[17] The classes represented included:

> (a) All those Black, Indian and other minority persons presently applying for employment with the Minneapolis Fire Department.
>
> (b) All those Black, Indian and other minority persons in the City of Minneapolis who are not applicants for employment with the Minneapolis Fire Department either because their applications were not approved or because they believed that equal employment opportunity is denied to Black, Indian and other minority applicants for such employment.

452 F.2d at 317.

[18] 42 U.S.C. § 1981 (1970). Section 1981 provides:

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

Section 1981 was originally a part of Section 1 of the Civil Rights Act of 1866. Comment, 1971-1972 Annual Survey of Labor Relations Law, supra note 3, at 1351.

[19] 42 U.S.C. § 1983 (1970). Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[20] 3 FEP Cases at 693. The defendants in the action were three members of the Civil Service Commission of the City of Minneapolis, the Personnel Director of the Commission, and Fire Chief Kenneth W. Hall. They were sued individually and in their official capacities. Id. at 694-95.

[21] The Minneapolis Civil Service Commission was responsible for the recruitment,

were in violation of sections 1981 and 1983 and of the equal protection clause of the Fourteenth Amendment. The court's order in part directed the Civil Service Commission to give "absolute preference"[22] in hiring for the position of fire fighter[23] to twenty minority applicants who qualified for that position on the basis of revised examination criteria.[24] On appeal a three-judge panel of the Eighth Circuit affirmed the district court's holding that the defendants had violated sections 1981 and 1983, but vacated the "absolute preference" order, holding that remedy to be violative of the equal protection clause of the Fourteenth Amendment and of section 1981.[25] The court felt that section 1981 and the Fourteenth Amendment proscribed *all* discrimination in employment on account of race whether it be against whites or blacks.[26] To adopt the remedy suggested by the trial court, the appellate court reasoned, would be to deprive a superiorly or equally qualified white applicant of a position merely because of the color of his skin. The Eighth Circuit found support for its finding in Title VII of the Civil Rights Act of 1964 which expressly prohibits racially preferential hiring practices.[27]

On rehearing en banc limited to the question of appropriate relief, the Eighth Circuit agreed that the absolute preference order was constitutionally defective.[28] However, the court did not go so far as to deprive the district court totally of this type of remedial power.[29] Rather, the Eighth Circuit modified the order to provide for a hiring ratio of one minority applicant for every two white applicants until twenty minority persons had been so hired.[30] Judge Gibson, author of the revised opinion, did not feel limited by Title VII in formulating a remedy because the action was brought under section 1981 and the Fourteenth Amendment.[31] Nor did the absence of specific discriminatees render inappropriate relief on a class basis.[32]

In formulating relief to remedy the effects of past discriminatory hiring practices of the Civil Service Commission, the Eighth Circuit on rehearing weighed its affirmative duty to eliminate the effects of

examination, and certification of all applicants for the Minneapolis Fire Department and all other service classifications in the City. Id.

22 Id. at 709.

23 Fire fighter is the entry position for new employees in the fire department. Id. at 695.

24 The court ordered discontinuation of the Civil Service Commission's examination plans for fire fighter and the validation of new examinations consistent with the guidelines set forth in the "Equal Employment Opportunity Commission Guidelines on Employment Testing Procedures," 29 C.F.R. § 1607.1-.14 (1971). Id. at 710.

25 452 F.2d at 325.

26 Id.

27 Id. at 327-28. The relevant language of Title VII is quoted in the text accompanying notes 68 and 69 infra.

28 452 F.2d at 331.

29 Id.

30 Id.

31 Id. at 329.

32 Id. at 330.

racial discrimination against the constitutional proscriptions of the equal protection clause of the Fourteenth Amendment.[33] In grappling with these conflicting interests the court viewed the absolute preference decree of the district court as having exceeded permissible constitutional bounds.[34] The Eighth Circuit felt that affirming the order which granted absolute preference to minority groups as a class would result in reverse discrimination against equally or superiorly qualified white applicants in violation of their constitutional rights under the equal protection clause.[35] In seeking to find constitutionally acceptable relief, the court concluded that a hiring ratio of one minority applicant to two white applicants until twenty qualified minority applicants had been hired would be equitable in light of the circumstances of the case.[36] The court emphasized that as soon as the number of minority fire fighters reached a level consistent with their numbers in the general population, hiring would return to a racially neutral basis.[37]

A careful constitutional analysis of *Carter*'s ruling is instructive in the formulation of the limits of remedial judicial decrees in the area of employment discrimination. It is submitted that the court was correct in finding the absolute preference order constitutionally impermissible in the context of the existing fact situation. It is further submitted that, since the facts of *Carter* are fairly typical of employment discrimination cases, it will be a rare case in which the absolute preference decree will be an appropriate remedy.

As a matter of constitutional interpretation, racial classifications by the Government are suspect and are placed under the most rigid examination.[38] In order to pass constitutional review there must be a showing of a compelling governmental interest furthered by the use of such a classification, which interest must outweigh the interest of the individuals discriminated against by the racial classification.[39] Further, the governmental action in question must be shown to be necessary to the furtherance of the compelling governmental interest; i.e., there must be no less drastic means of achieving the stated goal.[40] The Supreme Court in *Louisiana v. United States*[41] sanctioned the

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[33] Id.

[34] Id.

[35] Id.

[36] Id. at 331.

[37] Id.

[38] Korematsu v. United States, 323 U.S. 214, 216 (1944).

[39] Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964). It has been suggested by a recent commentator that the more lenient "rational relationship" test be utilized when the purpose for using a racial classification is to remedy the effects of racial discrimination. He asserts that such a "benign" use of racial distinctions should pass constitutional scrutiny without the need to show as heavy a justification as is normally required of such suspect categorizations. Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1106, 1115 (1969).

[40] Id. at 1132.

[41] 380 U.S. 145 (1964).

use of the compelling interest test by district courts when fashioning relief to eradicate the present effects of past discrimination and to prevent discrimination in the future.[42] Color-consciousness, then, is clearly recognized and accepted in judicial decrees which seek to redress the effects of past discriminatory hiring practices, so long as a sufficiently compelling governmental interest which is furthered by the decree can be shown.[43]

Both the district court's decree of absolute minority hiring preference and the Eighth Circuit's decree of a hiring ratio were formulated on lines which were clearly color-conscious. It is beyond argument that they constituted racial classifications and hence had to satisfy the compelling interest test. Therefore, to withstand constitutional scrutiny, the decrees had to be shown to be necessary to the furtherance of a compelling governmental interest which outweighed the competing interest of the white job applicants whose employment opportunities were hampered by them.

The governmental interest involved in *Carter* was the elimination of the present effects of past discrimination. This interest, it is argued, is furthered by the absolute preference order of the district court and by the quota hiring plan ordered by the Eighth Circuit in *Carter*. However, the decrees would fall as unconstitutionally violative of the equal protection clause of the Fourteenth Amendment if the interest of white job applicants in equal employment opportunity outweighed the interest of the Government in eradicating the present effects of past discrimination against minority applicants as a class,[44] or if the governmental interest could be vindicated through less drastic measures.

The primary purpose of the absolute preference order was to eradicate the chilling effect[45] which twenty-five years of racially discriminatory hiring practices had had on prospective minority applicants for the position of fire fighter.[46] The racially discriminatory hiring policies and resulting absence of minority group fire fighters in the community had a chilling effect on the desire of minority ap-

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[42] In approving the discontinuation of racially discriminatory voting laws in *Louisiana*, the Court stated: "We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." Id. at 154.

[43] Contractors Ass'n v. Schultz, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971); Weiner v. Cuyahoga Community College District, 19 Ohio St. 2d 35, 249 N.E.2d 907 (1969), cert. denied, 396 U.S. 1004 (1970); Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968).

[44] Developments in the Law—Equal Protection, supra note 39, at 1132.

[45] The Eighth Circuit on rehearing stated with respect to the chilling effect: "Given the past discriminatory hiring policies of the Minneapolis Fire Department, which were well known in the minority community, it is not unreasonable to assume that minority persons will still be reluctant to apply for employment, absent some positive assurance that if qualified they will in fact be hired on a more than token basis." 452 F.2d at 331. Cf. United States v. Sheet Metal Workers Local 36, 416 F.2d 123, 132 (8th Cir. 1969); Lea v. Cone Mills Corp., 301 F. Supp. 97, 102 (M.D.N.C. 1969).

[46] 452 F.2d at 331.

plicants to apply for positions.[47] The *Carter* court wanted future nondiscriminatory hiring to be fully effective in creating more representative minority employment in the fire department.[48] In order to accomplish this objective, the court felt, prospective minority applicants needed positive assurance that applications submitted by them would not simply be ignored.[49] The *Carter* court felt that affirmative action was required in order to dispel this attitude of futility,[50] and to show the minority communities that they would be fully represented in the fire department. Such judicial encouragement at the outset was required in this case so that the nondiscriminatory hiring practices and procedures decreed by the court would in fact lead to equal employment opportunity.[51]

To accomplish the goal of eradicating the effects of the defendant's discriminatory practices, the Eighth Circuit affirmed the district court's decree implementing an affirmative action mandate for the recruitment of minority applicants.[52] Affirmative action here included the use of all available communications sources to reach the minority communities for the purpose of promoting applications for fire fighter.[53] The district court did not feel that mere publicity would be sufficient to dispel the chilling effect.[54] The court concluded that only purposeful hiring of qualified minority applicants, which would take the form of an absolute preference decree, could eradicate the chilling effect of past discriminatory hiring practices.[55]

The Eighth Circuit disagreed.[56] Although it recognized the need to provide concrete assurance to prospective minority applicants, it felt that this goal could be achieved through less drastic measures than an absolute preference order.[57] Hence the implication of the court's holding was that the benefits to be obtained through the absolute preference order did not outweigh that order's detrimental effect. Framed in terms of the compelling interest test, the Eighth Circuit held that, although the governmental interest in eradicating the present effects of past discrimination did outweigh the interest of the

[47] The trial court in *Carter* observed that

> [T]he minority community has viewed the Minneapolis Fire Department as an agency of the city in which they were not welcome. . . . [T]he breadth of this bad reputation results, as much as anything, from the fact that minority persons had not seen their fellows on fire trucks over the past twenty-five years.

3 FEP Cases at 699.

[48] 452 F.2d at 331.

[49] Id.

[50] The court relied upon Louisiana v. United States, 380 U.S. 145 (1964), to support the legitimacy of such action. 452 F.2d at 328.

[51] Id.

[52] Id. at 326.

[53] 3 FEP Cases at 710.

[54] Id. at 708.

[55] Id.

[56] 452 F.2d at 325.

[57] Id. at 331.

white job applicants in equal job opportunity, the governmental interest could be furthered by means less drastic than the absolute preference order.[58]

It is submitted that the Eighth Circuit's refusal to endorse the absolute preference decree is based on sound application of constitutional principles. An absolute minority preference in hiring was not necessary in order to create a favorable attitude in the minority communities towards the fire department.[59] A hiring ratio would, in all probability, achieve comparable success in redressing the chilling effect on minority applications. The effective difference between the absolute preference and the hiring ratio in *Carter* was time. It would require more time to place twenty qualified minority applicants on a one-for-two basis,[60] than it would by granting an absolute preference to twenty. Time was not of the essence in *Carter*. The importance of an affirmative hiring decree in the minority communities was of a psychological nature. Tangible, positive assurance that minority group applicants would actually be hired on more than just a token basis would be sufficient to dispel long-held notions of discriminatory hiring practices. A hiring ratio, as proposed by the Eighth Circuit, could accomplish this objective as effectively as an absolute preference, but without the onerous collateral consequences of the latter type of remedy.

With the conclusion that a hiring ratio is a viable remedial alternative in *Carter*, the absolute preference decree definitely fails to pass constitutional scrutiny in that case. This is so because in order for a governmental action involving a racial classification to meet the requirements of the compelling interest test, there must be available no

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[58] Id.

[59] Courts have recognized the acceptability of an absolute preference in hiring identifiable persons who were victims of discriminatory hiring practices. United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971) (affirmed the district court's order for defendant unions to immediately refer for construction work those persons who were previously subject to discriminatory practices); Local 53, Int'l Ass'n of Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969) (affirmed the district court's order requiring the defendant union to admit four previous discriminatees and grant job referrals for nine others). However, *Carter* was not concerned with identifiable persons who were subject to discriminatory practices. Rather, the court was dealing with minorities as a class.

The Fourth Circuit may be faced with the issue of absolute preference in the near future. In a case involving racial discrimination in employment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. (1970), the United States District Court for the Western District of North Carolina in United States v. Central Motor Lines, Inc., 325 F. Supp. 478 (W.D.N.C. 1970), formulated a preliminary order. The court ordered the defendant trucking company to hire six qualified blacks without delay as over-the-road drivers and hire on a one-to-one basis any persons hired after those six. The six blacks were not identifiable previous discriminatees. The order to hire six qualified blacks can only be construed as an absolute minority preference decree. The decree in *Central Motors*, after an adjudication on the merits, 338 F. Supp. 532 (W.D.N.C. 1971), approved of the one-to-one hiring ratio but did not refer to the absolute preference order. An appellate decision has not as yet been reported.

[60] Sixty fire fighter positions would be required to fulfill this order. This means more than a 10% turnover if the department size is not increased.

less drastic means of furthering the stated governmental interest. By rejecting the absolute preference decree of the district court, but instituting a limited hiring preference order, the Eighth Circuit helps to define the permissible constitutional limits of affirmative relief to redress the present effects of past discrimination.

The decision in *Carter* can be extended beyond its particular facts. In most employment discrimination cases an absolute preference decree would fail to pass constitutional analysis. Except where identifiable previous discriminatees are involved,[61] courts will seldom encounter situations in which the overriding necessity of an absolute preference decree, coupled with the unavailability of less onerous viable alternatives, outweighs the potentially harmful reverse discriminatory results. However, if a court should feel that time is of the essence in the implementation of a remedial decree, and that accordingly a limited hiring ratio decree will not serve adequately to eliminate the lingering effects of past discrimination, the absolute minority preference may prove acceptable if it is of a temporary nature.

The limited hiring ratio decree itself was also arguably susceptible to a charge of unconstitutionality. However, the *Carter* court felt that it was absolutely necessary to order the hiring of minority group firefighters in order to eradicate the chilling effect which decades of discriminatory practices had brought about. Hence, since no less drastic viable alternative existed, it would appear that the limited ratio decree of the Eighth Circuit satisfies the requirements of the compelling interest test.

The Supreme Court has recognized that in the formulation of equitable relief courts are free to resort to mathematical ratios.[62] Such ratios may be used to guide the court in the fashioning of a decree suited to the circumstances of the particular case, but their utilization is to be made with an eye towards flexibility.[63] In justification of its decree for a mathematically-based minority preference, the Eighth Circuit explained that its order of a one-to-two hiring ratio did not establish a permanent quota system.[64] The court stated that once the twenty minority positions had been filled under the decree, hiring would then be conducted on a strictly nonpreferential basis.[65]

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[61] See note 59 supra.

[62] Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 25 (1971).

[63] Id.

[64] 452 F.2d at 330.

[65] Id. Judge Van Oosterhout, who had written the Eighth Circuit's opinion, dissented on rehearing. He felt that a hiring ratio would have a reverse discriminatory effect. He reasoned that affirmative action which included recruitment publicity but eliminated minority preference and hiring ratios, was as far as the court was constitutionally permitted to proceed. Id. at 332.

For a discussion of the necessity of quota hiring see: Leiken, Preferential Treatment in the Skilled Building Trades: An Analysis of the Philadelphia Plan, 56 Cornell L. Rev. 84, 98-100 (1970); Comment, The Philadelphia Plan and Strict Racial Quotas on Federal Contracts, 17 U.C.L.A. L. Rev. 817, 827-35 (1970). But see Kaplan, Equal Justice in an

Hiring ratios have been utilized by other courts in cases involving discriminatory hiring practices.[66] Courts are acutely aware of their responsibility to tread softly and to utilize hiring ratios sparingly. The *Carter* court sensed this need to maintain flexibility in its decree. The hiring ratio was of a temporary nature and was tailored to the particular circumstances of the case.[67] In future employment discrimination cases, courts seeking guidance in the formulation of remedial decrees should not look simply to the fact that *Carter* utilized a minority hiring ratio. Rather, they should look closely at the reasons behind the use of a hiring ratio in that case. The courts should closely scrutinize the appropriateness and necessity of a hiring ratio and the possible effectiveness of less suspect alternatives with reference to the circumstances of the individual cases.

In sum, the limits of remedial judicial decrees to redress the effects of employment discrimination set by the *Carter* decision should prove to be guiding precedent. Under the *Carter* rule, only in cases where there are previous identifiable discriminatees or where time is of the essence in the institution of a remedial decree may courts utilize the absolute minority preference order.

Constitutional proscription, however, is not the only factor which must be weighed in determining the acceptability of remedial decrees. Statutory prohibitions must also be closely scrutinized for possible areas of conflict with such decrees. Title VII of the Civil Rights Act of 1964 is one such statute which must be examined closely to determine if further limits are to be placed upon the courts' power to implement remedial decrees in the area of employment discrimination.

II. The Statutory Problems: Title VII of the Civil Rights Act of 1964

Although the hiring preference decrees of both the district court and the Eighth Circuit in *Carter* were not predicated on Title VII, the language of this statute casts doubt upon the capacity of the courts to employ such means to cure discriminatory employment patterns. Specifically, section 703(a) provides: "It shall be an unlawful employ-

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Unequal World: Equality for the Negro—The Problem of Special Treatment, 61 Nw. U. L. Rev. 363, 363-88 (1966).

[66] Contractors Ass'n v. Schultz, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971) (the Third Circuit suggested a one-to-one ratio of whites to blacks as an informal guideline to aid contractors meet their "good faith effort" hiring obligations pursuant to Executive Order No. 11246); Local 53, Int'l Ass'n of Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969) (the Fifth Circuit affirmed the district court's order requiring the union to alternate white and black work referrals); United States v. Lathers Local 46, 4 FEP Cases 573 (S.D.N.Y. 1972) (the district court ordered the union to issue work permits in a one-to-one ratio of whites to blacks); United States v. Central Motor Lines, Inc., 338 F. Supp. 532 (W.D.N.C. 1971) (the district court approved the preliminary order instituting a one-to-one hiring ratio of whites to blacks).

[67] 452 F.2d at 330. The court felt that a one-to-two hiring ratio, as opposed to a one-to-one ratio, was equitable in that the minority population in Minneapolis in 1970 was only 6.44 percent. Id. at 323, 331.

ment practice for an employer—(1) to fail or refuse to hire or discharge any individual . . . because of such individual's race, color, religion, sex, or national origin."[68]

Title VII also contains provisions which seemingly proscribe any form of racially preferential treatment in the hiring process. Section 703(j) provides:

> Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by an employer . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.[69]

These provisions, when read alone, appear to be clear limitations on the remedial power of the courts insofar as hiring preference orders are concerned. It is clear that the modified order of the Eighth Circuit in *Carter*, as well as the absolute preference order of the district court, required the employer to "fail or refuse to hire"—at least temporarily —white job applicants because of their race or color. It is equally clear that the order required the employer "to grant preferential treatment" —again temporarily—to minority group applicants "on account of an imbalance which . . . [existed] with respect to the total number or percentage of persons of any race . . . employed by . . . [the Fire Department] . . . in comparison with the total number or percentage of persons of such race . . . in [the] community." Hence the court's decree would appear, at first blush, to order the defendant employer to violate Title VII.

These antipreferential provisions, however, must be read in the context of the entire Act in order to elucidate the extent of their limitation. Section 706(g) of the Act empowers the district courts to "order such affirmative action as may be appropriate, which may . . . include . . . hiring of employees . . . ."[70] Read in light of the Supreme Court's holding in *Griggs v. Duke Power Co.*[71] that Title VII empowers the courts to eliminate the present effects of past discrimination,[72] Sec-

[68] 42 U.S.C. § 2000e-2(a) (1970).

[69] 42 U.S.C. § 2000e-2(j) (1970).

[70] 42 U.S.C. § 2000e-5(g) (1970), as amended, 86 Stat. 103, § 4 (1972).

[71] 401 U.S. 424 (1971).

[72] The *Griggs* Court stated that: "Under the Act, practices, procedures or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." Id. at 430. The Court further observed that courts formulating remedies for Title VII violations are required to remove "artificial, arbitrary, and unnecessary barriers to employment

tion 706(g) becomes a broad mandate to courts formulating remedies for discriminatory employment practices.

The *Carter* court recognized its duty to eliminate the continuing effects of the embedded discriminatory employment practices of the Minneapolis Fire Department.[73] It further recognized that this goal could not be attained with any reasonable haste so long as potential minority group applicants were discouraged from applying for employment by the knowledge that in the past it had appeared impossible for non-whites to be hired by the Department. Hence, the court concluded that it was necessary to impose a limited hiring ratio on the Department in order to erase the psychological effects of years of discrimination. In short, it felt that the only way to do away with the feeling of futility was to provide concrete evidence—by ordering the hiring of a limited number of minority group fire fighters—that a non-white would not be wasting his time in applying for a position with the Department.

Assuming that a court in a Title VII case is correct in its belief that the limited hiring preference order is necessary to eliminate the effects of decades of discriminatory hiring practices, it can fairly be said that it is compelled to issue that order since its duty under the *Griggs* interpretation of the remedial provisions of Title VII is to eradicate the present effects of past discrimination. Hence it would create an inconsistency within the Act to interpret Sections 703(a) and 703(j) as prohibiting remedial orders of the *Carter* type where the court finds that such an order is absolutely necessary to eradicate such effects. It is submitted, then, that sections 703(a) and 703(j) should be interpreted as prohibiting only *permanent* hiring preference orders. Section 703(a) makes it unlawful for an employer to "fail or refuse to hire . . . any individual . . . because of . . . race." In order to reconcile this language with the *Griggs* interpretation of Section 706(g) and the hiring preference order, it must be asserted that the hiring preference order does not require the employer permanently to "fail or refuse to hire" white job applicants because of their race or color, but rather merely to delay hiring them until the court's order has been complied with. Likewise, section 703(j) must be read as a prohibition only against establishment of a *permanent* quota system whose purpose is to provide an employee complement which reflects the racial mix of the community.

The criteria for legality, then, would appear to be that the order be temporary, that it be implemented with the goal of eliminating the lingering effects of past discriminatory practices, and that it be neces-

when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." Id. at 431.

[73] This duty was expressly recognized by the First Circuit Court of Appeals in Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972), in which the court reversed the district court because of its failure to institute a hiring ratio. The First Circuit held that only through this type of remedy could the court effectively fulfill its duty to eliminate the present effects of past discrimination.

sary to the attainment of that goal. The scope of any given order will be shaped by these factors. In some instances, the court may find that the institution of objective hiring criteria will suffice.[74] In such a case, a hiring preference order—limited or absolute—would fail to satisfy the criterion of necessity. A particularly embedded discriminatory employment pattern may, however, call for more drastic remedies. If this be the case, then the absolute preference order may be adopted as the only viable tool capable of eliminating the discriminatory employment situation.

In recent years, courts have generally adopted a broad interpretation of the remedial provisions of Title VII in formulating affirmative action remedies. For example, in *Local 53, Int'l. Ass'n. of Asbestos Workers v. Vogler*,[75] the Fifth Circuit Court of Appeals granted relief based on Section 706(g) of Title VII, asserting that: "the courts are not limited to simply parroting the Act's prohibitions but are permitted, if not required, to order such affirmative action as may be appropriate."[76] To fulfill this mandate, the *Vogler* court ordered immediate admission to union membership of those who had been previously excluded on account of race.[77] In addition, the court eliminated work experience gained prior to the passage of the Civil Rights Act as a criterion for union membership.[78] The court also ordered alternate white and black work referrals until the union developed objective membership criteria.[79] The Fifth Circuit discounted the defendant's contention that it was establishing a quota system to correct a racial imbalance in violation of section 703(j).[80] The remedy merely assured that the administration of the referral system would henceforth be void of discrimination.

With marked unanimity, other courts have followed the mandate expressed in *Vogler* and have refused to permit the antipreferential treatment section of Title VII to thwart the elimination of all vestiges of discrimination in employment. This trend towards affirmative judicial action was further illustrated in *United States v. Ironworkers Local 86*.[81] The district court there had entered a far-reaching decree not only enjoining the unions from engaging in future discrimination, but also ordering them to offer immediate construction referrals to certain individuals, to fully apprise the Negro community of the new opportunities available to blacks in the construction trade, and to create special apprenticeship programs designed to meet the special needs of the average black with no experience or skill in the profes-

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[74] Dobbins v. Local 212, IBEW, 292 F. Supp. 413 (S.D. Ohio 1968).

[75] 407 F.2d 1047 (5th Cir. 1969).

[76] Id. at 1052.

[77] Id. at 1053.

[78] Id. at 1054.

[79] Id. at 1051.

[80] Id. at 1054-55.

[81] 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971).

sion.[82] The union, on appeal, asserted that the immediate job referrals as well as the special training programs designed to increase the numbers of blacks within the trade, violated Section 703(j) of the 1964 Civil Rights Act.[83] Despite the claims of preferential treatment and racial quotas, the Ninth Circuit Court of Appeals felt that section 706(g) necessitated such a remedy.[84] The district court did no more than remove the vestiges of past discrimination and ensure the nonexistence of future barriers to equal employment opportunities for qualified blacks.[85] To deny the courts such powers, the Ninth Circuit reasoned, would be to render ineffectual the congressional desire to eliminate all forms of discrimination.[86]

By focusing on the congressional mandate of creating equal employment opportunity, the courts have been able to resolve the ambiguities of Title VII. To interpret the Act's antipreferential sections as prohibiting *Carter*-type orders would be to allow the effects of illegal employment practices to linger on intolerably. In *United States v. IBEW, Local 38*,[87] the Sixth Circuit Court of Appeals reviewed a district court decision which specifically precluded any affirmative relief designed to eliminate the continuing effects of past discriminatory practices.[88] The appellate court realized that racially neutral policies are often ineffectual in remedying an employment pattern based on decades of discrimination.[89] The court recognized that Section 703(j) could be interpreted to prohibit the mandatory requirement of preferential treatment solely to correct an imbalance in racial employment, but the court observed that a reading of the remainder of the Act revealed that only by allowing the courts wide remedial powers could the Act's stated purpose be attained.[90] Thus, a broad reading of Title VII required a reversal of the district court's passive policy. Such a broad interpretation of Title VII seems perfectly consistent with the goal of removing the present effects of past discrimination and with the Supreme Court's mandate in *Louisiana v. United States*,[91] a voting rights case in which the Court stated that: "the court has not merely the power but the duty to render a decree which will so far as possible eliminate discriminatory effects of the past as well as bar like discrimination in the future."[92] When read in a broad light, then, Title VII does not pose a great threat to the type of "preferential" remedy employed in *Carter* and in earlier cases. As the district court in *United*

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[82] Id. at 548.
[83] Id. at 552-53
[84] Id. at 553.
[85] Id.
[86] Id.
[87] 428 F.2d 144 (6th Cir.), cert. denied, 400 U.S. 943 (1970).
[88] Id. at 146
[89] Id. at 149.
[90] Id. at 149-50.
[91] 380 U.S. 145 (1965).
[92] Id. at 154.

States v. Central Motor Lines, Inc.[93] said in ordering alternate Negro and white hiring: "The Court in ordering relief is seeking to correct the current and future effects of past discrimination and to restore the victims to their rightful status. It therefore is not limited by the prohibition in section 703(j), 42 U.S.C. 2000e-2(j)."[94]

The rationale for compensatory hiring as a lawful remedy in unfair employment situations was most recently elaborated by the First Circuit in *Castro v. Beecher.*[95] The district court had previously found that the Civil Service Examination for the selection of police officers had discriminated against minority groups. The lower court refused to order preferential hiring, however, because of constitutional reasons.[96] The First Circuit found, however, that the district court's failure to institute a hiring ratio was a dereliction of its duty to eradicate effectively the present effects of past discrimination in the employment process.[97] Unless affirmative relief in the police selection process was forthcoming, the dynamics would be such as "to relegate to the remote future the achievement of significant representation of black and Spanish-surnamed persons on the metropolitan or Commonwealth police forces."[98] The court then ordered that the Civil Service Examination be revised so as not unnecessarily to discriminate against minority groups, and that a separate hiring pool be created for those minority persons who passed the revised examination. One member of this minority employment pool was then to be selected for certification as a police officer on a ratio to be determined by the district court on remand. This procedure was to continue until the minority pool was exhausted.[99] The First Circuit refused, however, to give this remedy a permanent existence.[100] As Judge Coffin said: "Such a result would be to translate what is a discretionary power of courts in giving relief to a mandatory standing obligation."[101] This interpretation closely follows the congressional intent regarding Title VII as expressed in an Interpretive Memorandum submitted by Senators Clark and Case, the floor managers of the bill:

> 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, whatever such a balance may be, would involve a violation of title VII

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93 338 F. Supp. 532 (W.D.N.C. 1971).

94 Id. at 560.

95 459 F.2d 725 (1st Cir. 1972)

96 334 F. Supp. 930, 938 (D. Mass. 1971). Judge Wyzanski did not refer specifically to any section of the Constitution in reaching this conclusion. However, it may reasonably be inferred that he was referring to the equal protection clause of the Fourteenth Amendment.

97 459 F.2d at 730.

98 Id.

99 Id. at 737.

100 Id. at 733.

101 Id.

> because *maintaining* such a balance would require an employer to hire or refuse to hire on the basis of race.[102]

It is submitted that this interpretation of section 703(j) of Title VII suggests that while a racial hiring quota or compensatory hiring cannot be permanently required of an employer, it can be used as a *temporary device* to remedy the effects of past discrimination. The difference between permanent as opposed to temporary racial balancing distinguishes preferential treatment—which is prohibited by sections 703(a) and 703(j)—from remedial treatment which is mandated by section 706(g). In *Carter*, precisely this point was made. After the twenty minority group persons were hired, the selection process was to become racially neutral.[103] The failure to take such action would allow the effects of past discrimination to linger on intolerably. With qualified minority persons on the force, the Minneapolis Fire Department would no longer represent a racially undesirable place of employment for minorities in the city of Minneapolis. The remedy in *Carter* was remedial, not preferential.

It may be argued, however, that this reasoning is equally applicable to the absolute preference order of the district court in *Carter*. Indeed, the absolute preference order would accomplish the stated goal in a shorter period of time and therefore be even less permanent than the limited preference order of the Eighth Circuit. It appears, however, that, given the existence of a less drastic remedy—the limited preference order—the absolute hiring preference order fails to satisfy the criterion that the remedy be *necessary* to attainment of the stated goal, and hence is outside the scope of the courts' remedial power under Title VII.

Although remedial as opposed to preferential action is not proscribed by Title VII or the Fourteenth Amendment, such action is bound to affect adversely the members of the white majority who benefited under the old, discriminatory system. In *Vogler v. McCarty, Inc.*,[104] the Fifth Circuit dealt with this problem. The district court had ordered the implementation of a system of alternate white and black referrals which adversely affected the rights of the white workers under a collective bargaining agreement.[105] Dispelling immediately the contention that such a remedy exceeded the discretionary power of the trial court, the Fifth Circuit asserted that the adequate protection of Negro rights under Title VII would in many instances require some adjustment of the rights of white employees.[106] The courts had to be given the freedom to deal equitably with the conflicting interests at

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102 110 Cong. Rec. 7213 (1964) (emphasis added).

103 452 F.2d at 330.

104 451 F.2d 1236 (5th Cir. 1971).

105 Id. at 1238

106 Id.

stake to fashion remedies which would redress the grievances of previous discriminatees.[107]

One court, in an attempt to interpret the apparently conflicting provisions of Title VII consistently, has adopted traditional equity principles to define the extent of permissible court-ordered remedies. In *United States v. Lathers, Local 46*[108] the District Court for the Southern District of New York realized that the achievement of equal employment opportunity for previously excluded minorities was impossible without adversely affecting the existing labor force.[109] The court then proceeded to order the issuance of work permits in a one-to-one ratio until the number of minority persons within the trade approximated their numbers in the general population.[110] The minimal injury to the white labor force which such an action entailed compared with the great benefit to be conferred on the minorities justified this action which, the court said, was necessary to carry out the purposes of Title VII.[111] It was precisely this type of balancing of interests which occurred in *Carter*. It would appear, then, that what Judge Van Oosterhout saw in his dissent in *Carter* as a violation of the constitutional rights of white applicants, was really the adjustment of conflicting interests.

As these cases illustrate, Title VII, despite its strong antipreferential provisions, is not generally perceived as a threat to the broad equitable power of the courts to remedy the present effects of past discrimination. As long as these affirmative action remedies are of temporary duration and are necessary to the successful implementation of equal employment opportunity they will not run afoul of either constitutional or statutory proscriptions.

III. Remedies for Discrimination in Educational Institutions: An Analogy

The achievement of equal employment opportunity is a clearly stated goal of national policy.[112] There is, however, uncertainty as to how far the courts can go in remedying the lingering effects of past discrimination without unduly infringing upon the rights of the majority. Although the Supreme Court has not yet spoken on the question of preferential hiring orders it has frequently expressed its views in the analogous area of school desegregation remedies. In education, as in employment, rights basic to decent human existence are at stake. Similarly, both areas have been plagued by invidious forms of racial

[107] Id. at 1238-39.

[108] 4 FEP Cases 573 (S.D.N.Y. 1972).

[109] Id. at 576-77.

[110] Id. at 575.

[111] Id. at 576

[112] See 42 U.S.C. §§ 2000e et seq. (1970).

discrimination. Thus, what holds true in the field of education may reasonably be imputed to the area of equal employment opportunity.

The most recent pronouncement by the Supreme Court in the area of equal educational opportunity was in *Swann v. Charlotte-Mecklenburg Board of Education,*[113] in which the Court reviewed the scope of powers of the federal courts to eliminate racially separate public schools.[114] The courts, since the decision in *Green v. County School Board*[115] have been charged "with the affirmative duty to take whatever steps might be necessary to convert to a unitary school system in which racial discrimination would be eliminated root and branch."[116] Also according to *Green,* the validity of an affirmative action plan was to be determined according to the likelihood of its success.[117] With this duty in mind, Chief Justice Burger, speaking for the unanimous court in *Swann,* reasserted the broad equitable powers available to the district courts to remedy past wrongs.[118] To uphold this authority, the Court rebutted the contention that Title IV of the 1964 Civil Rights Act limited the equitable powers of the district courts in dealing with racial discrimination in education.[119] The pertinent sections of Title IV which seemed to threaten the remedial powers of the courts were textually very similar to those sections of Title VII which cast doubt on the legality of the remedy in *Carter.* Section 2000c(b) defines desegregation as used in Title IV:

> "Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.[120]

Similarly, section 2000c-6 also seems to restrict the remedial powers of the courts:

> Nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.[121]

Since both Title IV and Title VII arise from the Civil Rights

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113 402 U.S. 1 (1970).
114 Id. at 5
115 391 U.S. 430 (1968).
116 Id. at 437-38.
117 Id. at 439.
118 402 U.S. at 15.
119 Id. at 16.
120 42 U.S.C. § 2000c(b) (1970).
121 42 U.S.C. § 2000c-6(a) (1970).

Act of 1964, it would seem that a similar interpretation would be applicable to both provisions. The unanimity of the Court also renders unlikely divergent views regarding such analogous areas as education and employment.

As many lower courts had ruled in cases dealing with equal employment remedies and Title VII, the Supreme Court ruled in *Swann* that Title IV did not limit the power of the federal courts in implementing remedies to end dual school systems.[122] The Court ruled that Title IV in no way restricted the historic equitable powers of the courts and that the validity of any remedy would have to be determined by recourse to the equal protection clause of the Fourteenth Amendment.[123] The Court therefore had to pass on the constitutionality of the 71-29 percent racial balance which the district court required of the individual schools.[124] Just as the remedy in *Carter* created a racial balance in apparent violation of Title VII, it could be argued that the *Swann* Court's plan violated Title IV as well as the Fourteenth Amendment by resorting to obvious racial classification. The Supreme Court pointed out that if it read the holding of the district court to *require*, as of right, a racial balance, they would have to reverse.[125] Chief Justice Burger felt, however, that the use of such mathematical ratios was "no more than a starting point in the process of shaping a remedy rather than an inflexible requirement."[126] Also, the Court emphasized that an awareness of the racial composition of the school system is likely to prove quite useful in shaping a remedy to correct past constitutional violations.[127] The Court also recognized that an effective remedy would likely cause some difficulties for those accustomed to the old dual pattern of school assignment.[128] Racially neutral assignment plans were seen as inadequate to counteract the continuing effects of past school desegregation.[129]

Swann is strikingly analogous to *Carter*. In *Carter*, a racially neutral plan was seen as an ineffective tool to correct the effects of years of discriminatory hiring practices. Although the remedy was color-conscious, it did not impose a permanent racial quota upon the Minneapolis Fire Department in violation of either Title VII or the Fourteenth Amendment. There also existed a temporary disadvantage for those white applicants with numerically higher test scores; however, it was decided that because of the imprecision of the test scores, the preferential classification of qualified minority applicants did not take on the nature of an invidious racial classification in violation of the Fourteenth Amendment. Finally, the 1964 Civil Rights Act was

122 402 U.S. at 16.
123 Id. at 18.
124 Id. at 23.
125 Id. at 24.
126 Id. at 25
127 Id.
128 Id. at 28.
129 Id.

not viewed as an obstacle to remedying the results of past discrimination in either case.

Although education and employment are not identical rights, they are equally fundamental to decent human existence; accordingly, in light of the *Swann* decision, it is submitted that in appropriate cases courts may and should use remedies entailing hiring ratios as long as they are temporary and remedial in nature and do not invidiously discriminate against the white labor force.

CONCLUSION

A hiring ratio is an appropriate as well as a legally sound tool for remedying the present day effects of previous discrimination. In *Carter*, the Eighth Circuit ordered a ratio that met the legal standards required to ensure the validity of its decree.[130] The ratio was of temporary duration—once twenty minority group applicants were hired, employment would return to a racially neutral basis—and the order was essential for the achievement of the statutory goal of equal employment opportunity. The absolute preference ordered by the district court failed precisely because it did not satisfy this latter criterion: an absolute preference simply was not necessary to attain equal employment opportunity. This failure, however, should not be interpreted as precluding all use of absolute preference decrees. For example, had time been considered to be of the essence in *Carter*, it would appear that the Eighth Circuit could have chosen to affirm the district court's use of the absolute hiring preference as an order necessary to attain the statutory goal in question.

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[130] Underlying all the standards discussed at length in this comment is another that is a "given": the requirement that the minority applicants qualify for the job. As defined by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971), the definition of "qualified" is closely tied to a strict concept of business necessity. For example, tests as conditions of employment are required to be related specifically to on-the-job performance. In *Carter*, the Eighth Circuit carefully limited its order so as to encompass only qualified minority group applicants. 451 F.2d at 331. An example of the force of this underlying requirement was recently illustrated in Commonwealth v. O'Neill, 4 FEP Cases 1286, 1288 (3d Cir. 1972). There, the Third Circuit vacated the district court's order establishing a minority hiring pool because the pool was not limited to applicants who necessarily *qualified* for the position.