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Title VII Employment Discrimination: Criteria for Judicious Ise of Affirmative Action

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TITLE VII EMPLOYMENT DISCRIMINATION: CRITERIA FOR THE JUDICIOUS USE OF AFFIRMATIVE ACTION

INTRODUCTION

In enacting Title VII of the Civil Rights Act of 1964,[1] Congress formally recognized the depressed economic status of blacks, hispanics and women in the United States[2] by providing a legal mechanism to compensate individuals for injury caused by employment discrimination.[3] The framers of Title VII articulated equal employment opportunity as their policy goal.[4] Section 706(g)[5] of the Act provides a broad grant of equitable power to the federal district

1. Civil Rights Act of 1964, §§701-718, 42 U.S.C. §2000e to 2000e-17 (1976 & Supp. II 1978) [hereinafter referred to as the Act or Title VII].

2. The legislative history of the Act reveals statistically what problems Congress was trying to address. A House of Representatives Committee report which underlies the passage of the Civil Rights Act of 1964, specified three ways in which the profile of blacks was inferior to that of whites in the employment area. In 1964 black unemployment rates were double those of whites; blacks were concentrated in the worst paying, least stable job classifications; and black median annual wage and salary levels were less than 60% of those whites, given comparable age, education and experience. H.R. REP. No. 914, 88th Cong., 1st Sess. Pt. 2 (1963), *reprinted in* BNA, THE CIVIL RIGHTS ACT OF 1964 256, 282-83 (1964). For the view that equal treatment alone would not adequately narrow the economic disparity between blacks and whites, see Blumrosen, *Quotas, Common Sense, and Law in Labor Relations: Three Dimensions of Equal Opportunity*, 27 RUTGERS L. REV. 675, 682 (1974).

Considerable disparity also exists when the economic condition of women is compared to that of white males. In 1970, women earned 59.4 percent of what men did. *See* EMPLOYMENT STANDARDS ADMINISTRATION, WOMAN'S BUREAU, DEP'T OF LABOR, HIGHLIGHTS OF WOMEN'S EMPLOYMENT AND EDUCATION 1 (1974). In that year, while 13.5 percent of the full-time male workers earned at least $15,000 per year, only 1.1 percent of full time female workers earned that much. *See* EMPLOYMENT STANDARDS ADMINISTRATION, WOMAN'S BUREAU, DEP'T OF LABOR, FACT SHEET ON THE EARNINGS GAP 1 (1971). *See generally* Edwards & Zaretzky, *Preferential Remedies for Employment Discrimination*, 74 MICH. L. REV. 1, 4-5 (1975).

3. *See* K. MCGUINESS, PREFERENTIAL TREATMENT IN EMPLOYMENT — AFFIRMATIVE ACTION OR REVERSE DISCRIMINATION 1 (1977).

4. The purpose of Title VII is set out explicitly in the Equal Employment Opportunity Commission regulations. 29 C.F.R. §1608.1(b) (1979). These regulations state that Congress enacted Title VII to improve the economic and social conditions of minorities and women by providing equality of employment opportunity. These adverse conditions were caused by a pattern of "restriction, exclusion, discrimination, segregation and inferior treatment of minorities and women in many areas of life." Contemporary studies show that the employment profile of blacks has not substantially improved since the enactment of Title VII. In 1978, the black unemployment rate was 129% higher than the white unemployment rate. *See* U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, MONTHLY LABOR REV. 78 (Mar. 1979). *See also* H.R. REP. No. 914, *supra* note 2. Studies suggest that approximately one-half of the income and occupational disparity that exists between blacks and whites is attributable to differences in education and qualifications. The other half is attributable to discrimination. See C. JENCKS, INEQUALITY 190-93 (1972).

5. 42 U.S.C. §2000e-5(g) (1976) provides in part: "If the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice . . ., the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirma-

courts to implement the stated policy goal;[6] however, it is arguable that sections 703(h)[7] and 703(j)[8] restrict the remedies available to the courts.

In the fifteen years since the Act became effective,[9] it has become clear that attempts to eradicate employment discrimination face an elusive target.[10] Many seemingly innocent employment practices, such as the prerequisite of a high school diploma for a job, have impacted negatively upon minorities. As a result, the Supreme Court has construed the meaning of discrimination under Title VII to embrace any employment practice which has a disparate impact on minorities and women, regardless of whether the employer intended to discriminate.[11]

Although the Supreme Court has provided clear guidelines to lower courts by defining discrimination expansively, in other equally vital areas the Court has provided little direction. The sections of the Act which currently pose the

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tive action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate."

Affirmative action is a very broad term which applies not only to Title VII, but to action taken to comply with Executive Order No. 11246, which conditions the awarding of federal contracts on appropriate affirmative action taken by the contractor. *See* 41 C.F.R. §60-1.4 (1979). See note 80 *infra*. Under Title VII, affirmative action is a term used by courts and the parties to describe any kind of preferential treatment given, such as hiring a fixed percentage of non-whites or women to meet a certain goal. The goal set usually reflects the percentage of non-whites or women who live in the surrounding area. *See* A. LARSON, EMPLOYMENT DISCRIMINATION §57.00-.50 (1979). The terms "preferential treatment," "quotas," and "goals" all are subsumed under the generic category of affirmative action. *See* Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974) (affirmative action in the form of hiring goals permissible under Title VII).

6. *See* Sape, *The Use of Numerical Quotas to Achieve Integration in Employment*, 16 WM. & MARY L. REV. 481, 498 n.82 (1975).

7. 42 U.S.C. §2000e-2(h) (1976).

8. 42 U.S.C. §2000e-(j) (1976).

9. Title VII did not become effective until 1965 because Congress wanted to give a one year breathing period for the Equal Employment Opportunity Commission to organize itself. 42 U.S.C. §2000e-4(a) (1976). *See* Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 VAND. L. REV. 905, 920 (1978).

10. Discrimination, as a legal term, has been difficult for the courts to define. Generally it means a denial of equal treatment to an individual who is a member of a class which has been targeted as having been discriminated against. *See* Blumrosen, *supra* note 2, at 681. The unequal treatment test for discrimination, however, cannot deal with many of the employment practices which are arguably discriminatory. For example, under an equal treatment test, an employer could insist that a high school diploma was a valid prerequisite for any job. Under this test any black who had a high school diploma would then have to be given an opportunity equal to any white to get the job. *Id.* at 682. It remains a fact, however, that fewer blacks have high school diplomas, and consequently an employer could continue to hire only a very small percentage of blacks and still be in compliance with an equal treatment test. *See generally* A. LARSON, *supra* note 5, §57.00 For a discussion of the courts' definitions of discrimination see text accompanying notes 28-43 *infra*.

11. Because the unequal treatment test does not reach many discriminatory employment practices, the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), developed the disparate impact test. See notes 28-32 and accompanying text, *infra*. *See* Blumrosen, *supra* note 2, at 682.

most perplexing legal and policy questions are those which were inserted to protect the interests of white, male employees.[12]

Two sections of Title VII create the greatest uncertainty. The Court has construed the Act to encompass discrimination against any individual, including white males.[13] If the remedy afforded a minority member or female who has been discriminated against injures a white, male employee by excluding him from a job or a promotion, he may have a cause of action under the Act. In addition, the Court has not definitively construed section 703(j), which can be read to prohibit the courts from imposing a hiring or promotion quota on an employer.[14] A compelling need exists for an interpretation of this section. According to some authorities, if a court cannot impose a quota as a form of affirmative action, the Act cannot serve as an effective remedy for employment discrimination.[15] In most cases, particularly when egregious discrimination has been found, the lower courts resolve these conflicts in favor of minorities and women by imposing quotas, at times to the detriment of other employees.[16] This approach, however, raises serious legal and policy questions.

This note will examine the extent to which it is fair and permissible for a court to impose a quota on an employer or a union, pursuant to a finding of discrimination.[17] From both legal and policy perspectives, courts may fairly

12. *See* United States v. City of Alexandria, 614 F.2d 1358 (5th Cir. 1980) (the extent and velocity of affirmative action are among the most difficult problems facing the judiciary today).

13. *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) (all employees, minority or white, have a cause of action for discrimination under Title VII). *McDonald* did not address the question of whether a white employee has a cause of action under the Act if he is adversely affected by the operation of an affirmative action program. See note 67 and accompanying text, *infra*. In most cases when a union, an employer or a single white male employee appeals the imposition of an affirmative action plan, arguing that the plan discriminates against white employees in reverse, they will lose. *See, e.g.*, Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); Barnett v. International Harvester, 11 Empl. Prac. Dec. ¶10,846 (W.D. Tenn. 1976) (white male operator bypassed for an apprenticeship program which gave priority to the highest ranked minority applicant has no cause of action because plan was an appropriate Title VII remedy); Mele v. United States Dep't of Justice, 395 F. Supp. 592 (D.N.J. 1975) (affirmative action plan pursuant to a statutory finding of discrimination which ordered a union to hire 30 blacks and 5 whites did not give rise to a cause of action for reverse discrimination).

14. *But see* United Steelworkers v. Weber, 443 U.S. 193 (1979) (§703(j) construed in context of voluntary affirmative action program).

15. *See, e.g.*, Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970) (held as matter of law that miniscule number of blacks in workforce alone established Title VII violation); Local 53, Int'l Ass'n of Heat & Frost Insulators v. Vogler, 407 F.2d 1047 (5th Cir. 1969) (merely enjoining discriminatory practices will not make equal employment opportunity a reality). *See also* Slate, *Preferential Relief in Employment Discrimination Cases*, 5 LOY.-CHI. L. J. 315 (1974). The author, an attorney with the Equal Employment Opportunity Commission, exhaustively cites cases in which the appellate courts support equal employment and have approved quota remedies. *See id.* at 318-20 nn.8-10. He argues that such relief is justified under Title VII if more moderate relief is ineffective and the discrimination is particularly egregious. *See generally* Blumrosen, *supra* note 2.

16. *See* cases cited in note 15 *supra*.

17. This note will not attempt to address the constitutional questions raised by the imposition of affirmative action programs under Title VII. For a discussion of the equal protec-

require quota hiring or promotions if particular guidelines are followed. The proper method of applying quotas and the factual circumstances to which they are best suited will also be discussed.

TITLE VII OF THE CIVIL RIGHTS ACT — THE STATUTE'S PURPOSE AND LEGISLATIVE HISTORY

The legislative history of Title VII bears significantly on the arguments both for and against quota relief.[18] Although the Act prohibits all employment discrimination, it primarily focuses on those classes historically excluded from the economic mainstream.[19] The Supreme Court has acknowledged that Congress' intent was to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[20]

To remedy discrimination against excluded classes, Congress granted broad power to the federal district courts to order appropriate relief, including affirmative action, under section 706(g) of the Act.[21] The legislative history of this section supports the establishment of extensive remedial powers, and many courts have found quota remedies to be permissible. However, section 703(j) of

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tion issue, see Blumrosen, *supra* note 2, at 692-94; Edwards & Zaretzky, *supra* note 2, at 9-25, Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); *Developments in the Law — Equal Protection*, 82 HARV. L. REV. 1065 (1969). For a recent analysis of the constitutionality of the "minority business enterprise" provision of the Public Works Employment Act of 1977, which provides that local government must use 10% of all federal funds allocated for public works projects to procure the services of minority contractors, see Fullilove v. Klutznick, 48 U.S.L.W. 4979 (U.S. July 2, 1980).

18. See text accompanying notes 19 & 23 *infra*.

19. See note 2 and accompanying text, *supra*. *See also* 110 CONG. REC. 6548 (1964) (remarks of Sen. Humphrey) (Congress is basically concerned with the plight of blacks in the economy; blacks are relegated to largely unskilled jobs, which are decreasing in number due to automation). At this time the unemployment rate of blacks was 124% higher than that of whites. *Id.* at 6547. Accordingly, Congress took note of this serious social problem during the deliberations on Title VII. *Id.* at 7204 (remarks of Sen. Clark). *See generally* Vass, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431 (1966). *But see* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976), see note 13 *supra*.

20. *See* Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971). See notes 28-32 *infra*. *See generally* Edwards & Zaretzky, *supra* note 2, at 3-6 (white, male employees are still preferred in many positions and therefore cannot be considered to be excluded from the economic mainstream). The sentiment expressed by the Court in *Griggs* was echoed in Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975) and McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (the primary purpose of Title VII is to "assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.") See text accompanying notes 33-42 *infra*.

21. 42 U.S.C. §2000e-5(g) (1976). See note 5 *supra*. The legislative history of the Equal Employment Opportunity Act of 1972 supports a broad reading of this section. According to a congressional report, §706(g) was intended to give the courts wide discretion in exercising their equitable powers to fashion the most complete relief possible. The intent of the Act was to restore persons aggrieved by the consequences and effects of unlawful employment practices to a position they would have been in had it not been for the discrimination. *See* 118 CONG. REC. 7166, 7168 (1972).

the Act[22] may limit the use of quotas. It states that preferential treatment cannot be granted to any individual on account of a racial, sexual or ethnic imbalance in the workforce. The reach of this statutory limitation is unclear due to its ambiguous language.[23] However, the legislative history suggests the section limits a court's remedial power by prohibiting quota remedies. Section 703(h) can also be read to restrict the use of affirmative action.[24] These seemingly contradictory sections resulted from a political compromise reached by a philosophically divided Congress in 1964. In enacting Title VII, Congress intended to upgrade the economic plight of blacks and women in the workforce, but the political realities dictated that remedial relief should not deprive other employees of opportunities and benefits.[25]

DISCRIMINATION DEFINED — SECTION 703(a)

Many courts have resorted to affirmative action remedies for Title VII

22. 42 U.S.C. §2000e-2(j) (1976). This section provides, in part: "Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment . . . because of the race, color, religion, sex, or national origin of such individual . . . on account of an imbalance which may exist with respect to the total number . . . of persons . . . employed by any employer . . . ."

23. *See* Blumrosen, *supra* note 2, at 691. When Title VII was debated in the Senate, there was a great deal of concern that it would lead to quota hiring. One of the floor managers of H.R. 7152, the bill which became Title VII, introduced Amendment Number 568 which became §703(j) to assuage these fears. He made it clear that the purpose of the amendment was to prohibit quota hiring. *See* 110 CONG. REC. 9881 (1964) (remarks of Sen. Allott). Senator Humphrey, the principal proponent of the bill, also explained the intent behind §703(j): "A new subsection 703(j) is added to deal with the problem of racial balance among employees. The proponents of this bill have carefully stated on numerous occasions that Title VII does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group. Since doubts have persisted, subsection (j) is added to state this point expressly." 110 CONG. REC. 12723 (1964) (remarks of Sen. Humphrey).

But see United States v. City of Miami, 614 F.2d 1322, 1326 (5th Cir. 1980) (affirmative relief required to ensure that the effects of past discrimination arenegated); Davidson, *Preferential Treatment and Equal Opportunity*, 55 OR. L. REV. 53, 59 (1976) (§703(j) places no limitation on §706(g) after a court has found a violation of Title VII).

24. 42 U.S.C. §2000e-2(h) (1976) provides in part: "[I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin. . . ."

25. The debate which divided the Senate is apparent from remarks made by by the bill's proponents. *See* 110 CONG. REC. 8921 (1964) (remarks of Sen. Williams) ("Some people charge that H.R. 7152 favors the Negro, at the expense of the white majority. But how can the language of equality favor one race or one religion over another?"); 110 CONG. REC. 7206 (1964) (remarks of Sen. Clark) ("It has been asserted that Title VII could undermine vested rights of seniority. This is not correct. Title VII would have no effect on seniority rights existing at the time it takes effect."); Blumrosen, *supra* note 2, at 692. One commentator has argued that the amendments which became §§703(j) and 703(h) were needed to end filibustering on the bill which became Title VII. *See* Sape, *supra* note 6, at 498 n.82. *See generally* EQUAL EMPLOYMENT OPPORTUNITY COMM'N, LEGISLATIVE HISTORY OF TITLES VII AND XI OF THE CIVIL RIGHTS ACT OF 1964 (1967). See notes 51-52 and accompanying text, *infra*.

violations because discrimination, as defined by section 703(a),[26] has proven to be more subtle than originally envisioned by the 1964 Congress.[27] For example, facially neutral employment practices often have a disparate impact on minority and female employees. In *Griggs v. Duke Power Co.*,[28] the Supreme Court determined that Title VII prohibits employment practices which exclude minority members in disproportionate numbers, without regard to intent.[29] At issue in *Griggs* was the use of employment tests for entry into certain jobs. Black employees failed the tests far more often than their white counterparts. Because the tests were not found to bear a demonstrable relationship to successful job performance, the Court found that the testing procedures violated Title VII.[30] That the practice had a discriminatory impact on blacks, absent a justifiable business purpose, was held to be a violation of section 703(a),[31] notwithstanding the lack of discriminatory intent.[32]

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26. 42 U.S.C. §2000e-2(a) (1976) provides in part: "It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . ."

Employment agencies are similarly covered under §703(b) of the Act, and labor unions under §703(c).

27. *See* SENATE COMM. ON LABOR AND PUBLIC WELFARE, REPORT ON THE EQUAL EMPLOYMENT OPPORTUNITIES ENFORCEMENT ACT OF 1971, S. REP. NO. 415, 92d Cong., 1st Sess. 5 (1971). The report states that the 1964 Congress viewed employment discrimination as a series of discrete events mostly due to ill will on the part of a particular employer, and that experience has shown this view to be false. *See* Sape, *supra* note 6, at 482.

28. 401 U.S. 424 (1971).

29. *Id.* at 431. *See generally* M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT (1966); Bernhardt, Griggs v. Duke Power Co., *The Implications for Private and Public Employers*, 50 TEX. L. REV. 901 (1972); Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972); Wilson, *A Second Look at* Griggs v. Duke Power Company: *Ruminations on Job Testing, Discrimination, and the Role of the Federal Courts*, 58 VA. L. REV. 844 (1972); Note, *Employment Testing: The Aftermath of* Griggs v. Duke Power Co., 72 COLUM. L. REV. 900 (1972).

30. 401 U.S. at 430. The Court noted that the court of appeals, on the record, found that whites registered far better on the tests than blacks. The Court stated that employment practices and procedures, facially neutral and neutral in terms of their intent, could not be maintained if they operated to freeze the status quo of prior discriminatory employment practices. *Id.* Because Duke Power Company could not show that effective job performance depended upon completion of high school or passage of the intelligence test used, these employment requirements were held to be in violation of the Act. *Id.* at 431, 435.

31. The four principal federal agencies concerned with enforcing equal employment opportunity (the Equal Employment Opportunity Commission, The Civil Service Commission, the Justice Department, and the Labor Department) adopted Uniform Guidelines on Employee Selection Procedures in 1978. *See* 29 C.F.R. §1607 (1979). These guidelines provide criteria for determining whether a test has a discriminatory impact. The guidelines provide, in part: "Discrimination defined: Relationship between use of selection procedures and discrimination.

"A. Procedure having adverse impact constitutes discrimination unless justified. The use of any selection procedure which has an adverse impact on the hiring, promotion, or other employment or membership opportunities of members of any race, sex, or ethnic group will be considered to be discriminatory and inconsistent with these guidelines, unless the procedure

Two years later, in *McDonnell Douglas Corp. v. Green*,[33] the Court expanded the *Griggs* analysis of discrimination and developed the "disparate treatment" test. In *McDonnell Douglas*, a black employee alleged he had been fired because of his race and civil rights activities.[34] McDonnell Douglas claimed its failure to rehire the employee was justified by his illegal conduct in blocking traffic entry during morning rush hour to protest the company's general hiring policies and his discharge.[35] According to the Court, the *Griggs* test for discrimination was unsuited to the *McDonnell Douglas* facts, because *Griggs* dealt wtih facially neutral, standardized tests which operated to exclude blacks capable of performing effectively in desired jobs.[36] In contrast, McDonnell Douglas asserted that the employee's dismissal was justified by his engaging in a seriously disruptive act.[37]

The *McDonnell Douglas* Court articulated a different test which individuals claiming employment discrimination must satisfy to establish their prima facie case.[38] The complainant must prove he belongs to a racial minority; that he applied and qualified for a job for which the employer was seeking applicants; and that despite his qualifications he was rejected. He must further show the position remained open and the employer continued to seek applications from similiarly qualified persons.[39] The burden then shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for rejecting the employee.[40] If the employer effectively rebuts the prima facie case by showing that a more qualified employee was hired, the complainant still must be given an opportunity to show that the employer's stated reason for the rejection was merely a pretext for discrimination. The complainant's proof of pretext can be based on statistics demonstrating the employer's pattern of excluding minorities and

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has been validated in accordance with these guidelines, or the provisions of section 6 below are satisfied.

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"D. Adverse impact and the "four-fifths rule." A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact. Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user's actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group." 29 C.F.R. §1607.3 (1979).

32. 401 U.S. at 431.

33. 411 U.S. 792 (1973). For a recent application of the disparate treatment test, see Crawford v. Western Elec. Co., 614 F.2d 1300 (5th Cir. 1980).

34. 411 U.S. at 794-95.

35. *Id.* at 806.

36. *Id.*

37. *Id.*

38. *Id.* at 802.

39. *Id.*

40. *Id. See also* Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978) (to rebut *McDonnell* prima facie test, employer need only show employment decision was based on legitimate business goal; not necessary to show that employer pursued course most likely to attract greatest number of minority applicants); Davis v. Jackson County Port Auth., 611 F.2d 577 (5th Cir. 1980) (legitimate business purpose asserted held to be not legitimate).

women from its workforce.[41] This disparate treatment test essentially allows a complainant to prove that, although other factors entered into the employment decision, the employer's behavior led to a discriminatory result actionable under Title VII.[42]

The *Griggs* disparate impact test and the *McDonnell Douglas* disparate treatment test are methods of defining discrimination under section 703(a) by which a plaintiff can demonstrate that an employer's act violated Title VII and resulted in individual injury. Many Title VII lawsuits directed at a single discriminatory act, however, uncover a larger pattern or practice of discrimination carried on by the employer.[43] For example, if a black applicant attempts to prove his rejection was the result of discrimination, part of his proof may be that an employer's workforce is comprised of two percent black employees, whereas the surrounding community consists of twenty percent blacks.[44] This disparity would constitute a separate Title VII[45] violation, and in such a case

41. 411 U.S. at 807. *See* Blumrosen, *supra* note 2, at 687. The *McDonnell Douglas* Court recognized that proof of a statistical disparity between the percentage of minorities and women in the employer's workforce and that in the relevant labor pool could be helpful in determining whether the employer's refusal to hire the plaintiff conformed to a general pattern of discrimination. 411 U.S. at 807. *See also* Hazelwood School Dist. v. United States, 433 U.S. 299 (1977) (prima facie case of discrimination may be established by statistical workforce disparities, but employer must be given opportunity to show claimed discriminatory pattern is a product of pre-Act hiring rather than post-Act discrimination); United States v. City of Alexandria, 614 F.2d 1358 (5th Cir. 1980) (to make out a prima facie case of discrimination under Title VII plaintiff need only show a significant statistical disparity between the racial, sexual or ethnic balance and composition of the employer's workforce and that of the community from which the workers were hired); Detroit Police Officer's Ass'n v. Young, 608 F.2d 671, 686-87 (6th Cir. 1979) (statistical evidence alone of employment practices which have a racially disparate impact may establish a Title VII violation), *petition for cert. filed*, 48 U.S.L.W. 3558 (U.S. Jan. 10, 1980) (No. 79-1080); Blumrosen, *supra* note 2, at 687.

42. A violation of §703(a) can also be found for acts which injure white, male employees as well as minorities and women. In McDonald v. Santa Fe Trail Transp. Corp., 427 U.S. 273 (1976), petitioners, two white employees, were discharged for misappropriatiing cargo, while a third employee involved in the incident, a black, was not. The whites sued under Title VII and 42 U.S.C. §1981 (1976). Justice Marshall, writing for the Court, held that §703(a) discrimination applied to white as well as black plaintiffs, as did §1981. 427 U.S. at 278. The *McDonald* test is similar to the *Griggs* and *McDonnell Douglas* tests. If the white plaintiff can show the company applied a facially neutral policy differently to each employee involved and those employees were of different races, a prima facie violation of §703(a) of Title VII exists. *Id.* at 285. There are, however, significant differences between the way a cause of action under Title VII arises for blacks and the way one arises for whites. In most cases, a cause of action for a white will arise in response to an affirmative action program entered into by an employer and a union, which discriminates against the white employee. Generally the plaintiff will argue that the affirmative action program imposed on the employer favors minorities or women, in violation of §703(j) of the Act, and discriminates against white males in reverse. *See* cases cited in note 13 *supra*. A cause of action for a black employee or a woman will generally arise under §§703(a) and (d) of the Act as a result of the normal course of the employer or the union's activity. See note 102 *infra*.

43. *See, e.g.*, Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 686-87 (6th Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3558 (U.S. Jan. 10, 1980) (No. 79-1080). "Pattern or Practice" is also a term of art under Title VII. See note 113 *infra*.

44. *See* Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 686-87 (6th Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3558 (U.S. Jan. 10, 1980) (No. 79-1080).

45. *See* Hazelwood School Dist. v. United States, 433 U.S. 299, 307-08 (1977).

most courts would impose an affirmative action plan on the employer, ordering the hiring of a fixed number of blacks until their percentage reflects that in the surrounding population.[46] The relief ordered in such cases often goes beyond compensating the individual complainant. Such expansive remedies are challenged as affording preferential treatment to the affected class at the expense of the non-minority employees in violation of section 703(j).[47]

STATUTORY CONSTRAINTS ON A COURT'S REMEDIAL POWER TO FRAME RELIEF

Sections 703(h)[48] and 703(j)[49] of the Act, both of which have been construed to limit a court's power to fashion remedies under Title VII, question the legality of any remedy which affords preferential treatment to minorities and women.[50] Section 703(h) provides that "it is not unlawful for an employer to apply different standards of compensation, or different terms of employment, pursuant to a bona fide seniority system; provided that such differences are not the result of an intention to discriminate."[51] This section prevents courts from

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46. *See, e.g.*, Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 698 (6th Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3558 (U.S. Jan. 10, 1980) (No. 79-1080).

47. *See* United States v. City of Miami, 614 F.2d 1322, 1335 (5th Cir. 1980).

48. 42 U.S.C. §2000e-2(h) (1976). See note 24 *supra*.

49. 42 U.S.C. §2000e-2(j) (1976). See note 22 *supra*.

50. *See* United Steelworkers v. Weber, 443 U.S. 193 (1979), see text accompanying notes 79-93 *infra*; International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977), see text accompanying note 58 *infra*.

51. See notes 24-25 and accompanying text, *supra*. Certain recurring patterns serve to discriminate against blacks and women in seniority systems which existed prior to the passage of Title VII. Separate seniority lists for whites and blacks who performed the same work were maintained, and the most junior white was given preference over the most senior black. Alternatively, whites and blacks were kept together for seniority purposes but only whites could bid on promotions. *See* Note, *Title VII, Seniority Discrimination and the Incumbent Negro*, 80 HARV. L. REV. 1260 (1967). After Title VII was enacted, such discrminatory practices were obviously prohibited; however, the past operation of the system often established a distribution of jobs among the black and white employees that continued the effects of the past discrimination. For example, black employees can often show that white employees of equal background and ability received promotions which the black employee would have received but for the discriminatory system. To remedy this situation, the courts developed three theories. Under the "status quo" theory, seniority expectaions would be left intact. Relative to their white contemporaries, black workers could not improve their position. *Id.* at 1268. Another doctrine developed by the courts was the "rightful place" theory, which was adopted by the Supreme Court in Franks v. Bowman Transp. Co., 424 U.S. 747 (1976). Under the rightful place theory, continuation of the relative competitive disadvantage imposed on blacks by the past operation of a discriminatory system which is no longer in effect, is in itself a violation of Title VII. Blacks are given the seniority they would have had in the plant or company but for the prior discrimination. Under this theory, the employment situation of white employees is affected because black employees are put in a more competitive position vis-a-vis their white contemporaries, but nonetheless it is a position they are lawfully entitled to. A third theory, less popular, is the "freedom now" theory, which states that the maintenance of jobs which were allocated under a discriminatory system after Title VII became law constitutes an unlawful employment practice. This theory allows white employees to be bumped from jobs to make room for black discriminatees. *Id.* at 1268-69. For a discussion of

disturbing existing seniority rights when framing relief under Title VII.[52] The Supreme Court held, however, in *Franks v. Bowman Transportation Co.*,[53] that this section does not prevent a court from awarding retroactive seniority within an existing seniority system.

In *Franks*, black applicants had applied for positions as over-the-road truck drivers and were rejected. As a rule, these positions were given to whites, while the less desirable city driver positions were given to blacks. Black employees asked for an award of the seniority status they would have had but for the discriminatory refusal to hire.[54] The United States Court of Appeals for the Fifth Circuit found that because the seniority system fell within the protection of section 703(h), no retroactive seniority could be granted which would disrupt the existing system.[55] The Supreme Court reversed, holding that section 703(h) does not limit the remedies available to a court, but merely defines an illegal, discriminatory practice when the post-Act operation of a seniority system is challenged as perpetuating the effects of pre-Act discrimination.[56]

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seniority, see S. SLICHTER, J. HEALEY & E. LIVERNASH, THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT 104-210 (1960).

52. Senators Clark and Case prepared a memorandum to counter the concerns which had surfaced during debate over existing seniority rights. The memorandum, which was placed in the Congressional Record, states: "Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective." 110 CONG. REC. 6992 (1964). "Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a non-discriminatory basis. He would not be obliged — or indeed permitted — to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier." 110 CONG. REC. 7213 (1964). See also note 25 *supra*.

53. 424 U.S. 747 (1976).

54. *Id.* at 758.

55. *Id.* at 757.

56. *Id.* at 761. The Court stated that nothing in the legislative history indicates that §703(h) was intended to restrict relief otherwise appropriate once an illegal discriminatory practice is proven. *Id.* at 747. The Court drew on the legislative history of §706(g) to support its rationale: "The Act is intended to make the victims of unlawful discrimination whole and . . . the attainment of this objective . . . requires that persons aggrieved by the consequences and effects of unlawful employment practice, be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." *Id.* at 764. Lower courts have considered the question of whether retroactive seniority constitutes perferential treatment as prohibited by §703(j) of the Act. In Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970), Crown Paper Company organized jobs hierarchically within lines of progression. Prior to 1964, these lines were segregated by race. The lowest white jobs were in every case better than the best black jobs. Promotion within each line was determined by job seniority. When a vacancy occurred, the worker in the slot below who had worked longest in that particular job had priority for promotion. *Id.* at 984. In 1966 the union and the company agreed to merge the lines of progression. What this meant, however, was simply to tack the black lines to the bottom of the white lines. The company continued to award promotions according to job seniority, and the man in the slot below still had first shot at the promotion. The number of years worked in the mill, as opposed to years worked in a particular job, counted for nothing; only years spent in formerly white jobs determined who could bid on formerly white jobs except for those at the entry level. In response to a proposal by the Office of Federal Contract Compliance that a system be created whereby an employee's time in the job below the

As construed in *Franks,* section 703(h) does not prevent a plaintiff from securing a remedy of retroactive seniority with proof of illegal discrimination. In *International Brotherhood of Teamsters v. United States,*[57] however, the Supreme Court held that a system which perpetuates the effects of past discrimination is not unlawful unless an intent to discriminate can be shown.[58]

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vacancy plus his total time at the mill be used to compute seniority for the purpose of promotions, the union threatened to strike. *Id.* at 984-85. The government then filed suit to enjoin the strike and alleged the present seniority system violated Title VII. The district court ordered the abolition of job seniority in favor of mill seniority for all blacks hired before the lines of progression were merged. The Fifth Circuit affirmed the district court, holding that under the present system, "Negroes at Crown's mill will lose promotions which, but for their race, they would surely have won. Every time a Negro worker hired under the old segregated system bids against a white worker in his job slot, the old racial classification reasserts itself, and the Negro suffers anew for his employer's previous bias." *Id.* at 988.

The court addressed the issue of whether such a holding would constitute "preferential treatment" as prohibited by §703(j), or whether §703(h) protected the company's seniority system. The court responded to the two arguments as one, stating that Congress meant to prevent reverse discrimination by prohibiting fictional seniority for blacks. In other words, a black who had been qualified and rejected for employment before the Act could not, after passage of the Act, claim seniority which would allow him to outrank whites who had been hired after the discriminatee had been rejected even though the black would have had senior status but for the discriminatory rejection. *Id.* at 994. However, time actually worked in black jobs was to be given equal status with time worked in white jobs. The court did not consider such retroactive seniority to be "preferential treatment" as prohibited by §703(j). *Id.* at 995. *See also* United States v. International Union of Elevator Constructors Local 5, 538 F.2d 1012 (3d Cir. 1976) (§706(g) empowers courts to order retroactive seniority); Hutchings v. United States Indus., Inc., 428 F.2d 303, 311-12 (5th Cir. 1970) (trial judge vested with wide discretion in formulating relief under Title VII to model decree to ensure compliance with the Act).

57. 431 U.S. 324 (1977).

58. *Id.* In *Teamsters,* the company and the union negotiated a collective bargaining agreement which stipulated that an employee's benefit seniority, which determined his vacations and pensions, would run from the date the employee joined the company. *Id.* at 343. In contrast, an employee's competitive seniority, which fixed the order employers bid on jobs, were laid off, and were recalled, was determined by the total time spent as a member of a particular bargaining unit, not the total time spent with the company. *Id.* The effect of this system was that employees who wanted to transfer to the more desirable positions had to forfeit all competitive seniority accumulated in their previous bargaining unit and start at the bottom of the new unit. *Id.* at 344. The plaintiffs argued that this forfeiture of seniority in order to transfer to jobs they were initially refused on a discriminatory basis was a violation of the Act. The district court found, and the Supreme Court affirmed, that the company and the union had discriminated against black and hispanic employees. *Id.* at 331. As a result, the district court and the Fifth Circuit found the competitive seniority system unlawful under Title VII because it "locked" minority employees into inferior positions and perpetuated the effects of prior discrimination by penalizing transferees from one unit to another. The Supreme Court, however, rejected this latter finding despite the disparate impact the seniority system had on minority members. *Id.* at 344. According to the Court, §703(h) insulates bona fide seniority systems, when they are not entered into with an intent to discriminate, from the *Griggs* disparate impact test. For a discussion of the *Griggs* test, see text accompanying notes 28-30 *supra. See also* Jones, *Title VII, Seniority and the Supreme Court: Clarification or Retreat?,* 26 KAN. L. REV. 1 (1977) (criticizing *Teamsters* as a retreat from the traditional disparate impact test set out in *Griggs*). When a seniority system was entered with an intent to discriminate, however, it is unlawful under *Teamsters.* Examples of such systems were cited by the Court and adjudicated in United States v. Chesapeake & O.R. Co., 471 F.2d

Therefore, to an extent not clearly defined by the cases, seniority systems do protect the existing rights of white, male employees against Title VII challenge.[59]

Title VII also protects white, male employees under section 703(j), which prohibits preferential treatment due to an imbalance in the workforce. Although the legislative history of this section evidences concern that Title VII not be interpreted to permit compulsory employment quotas,[60] many federal appellate courts have held that such quotas are legitimate.[61] Courts which have approved quota remedies generally interpret section 703(j) to prohibit the imposition of a quota when merely an imbalance in the racial or sexual composition of the workforce exists, short of a situation severe enough to warrant a finding of discrimination, in which case a quota may be imposed.[62]

The application of these sections in Title VII lawsuits has created serious conflict in the lower federal courts.[63] The dispute arises between the prohibition against quotas in section 703(j), the protection afforded bona fide seniority

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582 (4th Cir. 1972), *cert. denied*, 411 U.S. 939 (1973); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971); Local 18, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969). The *Teamsters* holding still preserves the right of individual employees who are personally discriminated against to get relief in the form of transfer, retroactive seniority and back pay. 431 U.S. at 353-56.

59. See notes 52-58 and accompanying text *supra*. *But see* Patterson v. American Tobacco Co., 535 F.2d 257, 266 (4th Cir.) (district court's decision to promote women and blacks by bumping white males reversed), *cert. denied*, 429 U.S. 920 (1976); Note, *Preferential Relief under Title VII*, 65 VA. L. REV. 729 (1979) (preferential relief) based solely on race is not a congressionally authorized remedy under Title VII).

60. Some commentators doubt the validity of the argument that Congress wanted to prohibit quotas in 1964 by looking at the 1972 congressional debates on an amendment to the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972), which would have explicitly forbidden quota remedies and was rejected. *See* Blumrosen, *supra* note 2, at 692; Edwards & Zaretsky, *supra* note 2, at 27 & n.129.

Congress in 1972 was aware of the cases which held that quotas were permissible remedies. Senator Javits was the primary opponent of two amendments introduced by Senator Ervin, which would have forbade the courts from using quota remedies, and Senator Javits cited two cases, United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971) and Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971), both of which are pro-quota and appear in the Congressional Record. Senator Ervin's amendments were defeated, and the final bill amending Title VII, in the relevant section, provides: "In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII." 118 CONG. REC. 7166 (1972).

For a view that the uncertainty of the case law in 1972 undermines the effect of this broad endorsement, see Sape, *supra* note 6, at 498 & n.88 and Note, *supra* note 59, at 751-52.

61. United States v. International Union of Elevator Constructors Local 5, 538 F.2d 1012 (3d Cir. 1976); Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); United States v. I.B.E.W. Local 38, 428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970). *See* K. MCGUINESS, *supra* note 3, at 87.

62. The leading case in this area is Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974). See notes 112-126 and accompanying text, *infra*.

63. See notes 102-143 and accompanying text, *infra*.

systems in section 703(h), and the broad power conferred by section 706(g) on the federal district courts to order affirmative action. The dilemma becomes apparent when the issue of reverse discrimination is raised. Such an allegation arises most frequently after a court has ordered an affirmative action plan to remedy an adjudication of discrimination under the Act.[64] In response to the order, a white, male employee, the defendant employer or union may appeal, arguing that sections 703(j) and 703(h) prohibit the plan as well as the reverse discrimination allegedly engendered by the plan.[65] While the federal courts have struggled to resolve this conflict, the Supreme Court has never directly spoken to this issue. Nevertheless, dicta in a number of recent Supreme Court decisions sheds some light on what its analysis might be.

SUPREME COURT CASES BEARING ON THE LEGALITY OF PREFERENTIAL TREATMENT

The Supreme Court has maintained consistently that the state has a compelling interest in "making whole" the victims of employment discrimination.[66] Such "make whole" relief may impinge on the expectations of white employees. The following hypothetical illustrates this problem. A black worker applied for a job in 1970 and was not hired because of unlawful discrimination; a white employee applied for the same position and was hired in 1972. The same black worker applied again for employment in 1974 and was hired. In 1975 both were subject to lay off due to depressed economic conditions. Under existing case law, if the black employee could prove that he was unlawfully refused a job in 1970, he would be awarded retroactive seniority based on his original application and would have greater protection from being laid off than the white worker. The white employee would argue, however, that he had been working two years longer than the black worker and, but for the retroactive seniority, would have had the greater protection.[67]

Under the authority of *Franks v. Bowman Transportation Co.*,[68] a court would probably sustain the order of retroactive seniority despite the argument that such relief diminishes the expectations of other arguably innocent employees.[69] The *Franks* court maintained that to deny seniority relief to identifiable victims of discrimination solely because the remedy conflicts with the

64. See note 13 and accompanying text, *supra*. For a discussion of reverse discrimination, see Baldwin & Nagan, Board of Regents v. Bakke: *The All-American Dilemma Revisited*, 30 U. FLA. L. REV. 843 (1978).

65. *See* United States v. City of Miami, 614 F.2d 1322 (5th Cir. 1980).

66. *See* Franks v. Bowman Transp. Co., 424 U.S. 747 (1976). For a discussion of this case see text accompanying notes 53-58 *infra* and *see generally* Jones, *supra* note 58.

67. Although McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976), held that whites have a cause of action under Title VII and 42 U.S.C. §1981 (1976), see note 42 *supra*, the white employee would not have a cause of action under *McDonald* because Justice Marshall specifically exempted affirmative action programs from the holding of the case. *Id.* at 281 n.8.

68. 424 U.S. 747 (1976).

69. *Id.* at 774. *See also* Acha v. Beame, 531 F.2d 648 (2d Cir. 1976) (award of retroactive seniority available under section 703(h) to victims of discrimination).

economic interests of other non-minority employees would frustrate the objective of Title VII.[70]

One year after the *Franks* decision, however, the Court was more equivocal in its support of the "make whole" objective of Title VII. In *International Brotherhood of Teamsters v. United States*,[71] the Court announced a balancing test to be used after a finding of discrimination and identification of victims. Relief should result, according to the *Teamsters* Court, from balancing the interests of victims of discrimination against the legitimate expectations of innocent employees.[72]

Some insight into the Court's thinking in *Griggs*, *Franks* and *Teamsters* can perhaps be found in Justice Powell's dicta in *Regents of the University of California v. Bakke*.[73] When discussing his reasons for rejecting the Davis Medical School quota admissions program, Justice Powell analyzed the Title VII cases.[74] He stated that the Court has frequently upheld preferential remedies instituted pursuant to judicial, legislative or administrative findings of constitutional or statutory civil rights violations.[75] In the absence of such findings, however, no compelling justification exists for the government to inflict the harm which results when one individual is preferred over another on the basis of race.[76] Justice Powell stated explicitly what the employment discrimination cases recognized implicitly: under Title VII a preferential remedy, such as constructive seniority, which arguably impairs the interests of white, male employees is permissible to aid a proven discriminatee.[77] The congressional intent behind Title VII mandates a strong state interest in making individual victims of discrimination whole, tipping the balance in favor of the discriminatee over others.

The *Bakke* analysis, however, sheds very little direct light on the legality of

70. The Court required the company to give proven discriminatees retroactive seniority back to the date of the discriminatory refusal to hire. 424 U.S. at 767. Without such relief, the individual would never obtain his "rightful place" and would "perpetually remain subordinate to persons who, but for the illegal discrimination, would have been in respect to entitlement of those benefits, his inferior." *Id.* at 768. The Court went on to say that its holding, which required a sharing of the burden of past discrimination, was entirely consistent with any fair characterization of equity jurisdiction. *Id.* at 777-78.

71. 431 U.S. 324 (1977).

72. *Id.* at 375-76.

73. 438 U.S. 265 (1978). Allan Bakke, a white male, had applied for admission to the medical school at the University of California at Davis in 1973 and 1974 and was rejected each time. 438 U.S. at 276-77. After his second rejection, Bakke filed suit against the University of California Regents in state court. He argued that because Cal-Davis set aside 16 places out of an entering class of one hundred for minority students, the number of places available to him were reduced and he was therefore denied equal protection of the law in violation of the fourteenth amendment to the United States Constitution. *Id.* at 278-79. The California Supreme Court agreed with Bakke, holding the Davis plan unconstitutional, *id.* at 281, and ordering Bakke's admission. On certiorari, the United States Supreme Court in six opinions, without a majority, upheld the order requiring Bakke's admission to medical school. *Id.* at 320.

74. *Id.* at 301-08.

75. *Id.* at 307.

76. *Id.* at 309. For a discussion of *Bakke*'s relevance to the case law of employment discrimination, see United States v. City of Miami, 614 F.2d 1322, 1337 n.28 (5th Cir. 1980).

77. 438 U.S. at 307.

a preferential remedy such as a hiring or promotion quota. When a quota is instituted, it is not an individual who is compensated for harm from unlawful discrimination; instead, members of a discrete minority group are collectively compensated for harm inflicted upon the class.[78] The only Supreme Court decision which specifically addressed the legality of Title VII quota remedies is *United Steelworkers v. Weber*.[79]

The *Weber* Court decided the permissibility of an affirmative action program voluntarily initiated by a private employer.[80] In 1974, Kaiser Aluminum and the United Steelworkers had agreed to establish an affirmative action program for black craftsmen. Their objective was to employ a percentage of black skilled craftsmen in the plant equal to that in the surrounding labor pool. At the time of the agreement, less than two percent of the employees at Kaiser's plant were black while the surrounding labor pool was thirty-nine percent black.[81] A training program was established for production employees who wished to advance to these craft positions. Seniority determined eligibility, but one-half of the available slots were set aside for blacks, so that they were admitted to the program with less seniority than whites who were rejected.[82] One of the rejected white employees brought a class action suit against Kaiser and the union alleging that the affirmative action plan was a violation of Title VII.[83] Kaiser and the union appealed the injunction entered by the district court against further use of the training quota, arguing that it was mandated by valid executive action,[84] and was justified by past societal discrimination, notwithstanding the absence of a specific finding of discrimination. A divided panel of the fifth circuit affirmed the injunction, holding that the preferential treatment given the black employees constituted reverse discrimination.[85] Re-

78. *Id. See also* Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622, 631 (2d Cir. 1974).

79. 443 U.S. 193 (1979). For an interesting analysis of *Weber*, see *The Supreme Court, 1978 Term*, 93 HARV. L. REV. 60, 243-54 (1979).

80. As was pointed out, however, in the lower court decision, Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216 (5th Cir. 1977), *rev'd sub nom.* United Steelworkers v. Weber, 443 U.S. 193 (1979), the "voluntariness" of Kaiser's program was questionable. Kaiser entered into the agreement with the AFL-CIO to avoid future litigation and to comply with threats of the Office of Federal Contract Compliance (OFCC), which conditions federal contracts on appropriate affirmative action. Executive Order No. 11246 requires all applicants for federal contracts to refrain from employment discrimination and to take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex or national origin. *Id.* at 236-38 (Wisdom, J., dissenting). *See also* 41 C.F.R. §60-1.4 (1979).

81. 443 U.S. at 199.

82. *Id.*

83. *Id.* at 200. The district court agreed with the plaintiff and entered a permanent injunction against further use of the training quotas. *See* Weber v. Kaiser Aluminum & Chem. Corp., 415 F. Supp. 761 (E.D. La. 1976), *aff'd*, 563 F.2d 216 (5th Cir. 1977), *rev'd sub nom.* United Steelworkers v. Weber, 443 U.S. 193 (1979).

84. *See* 41 C.F.R. §60-1.4 (1979).

85. *See* Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216 (5th Cir. 1977). Reverse discrimination is not a term which has been used by the Supreme Court in any Title VII case, although it was used in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) and DeFunis v. Odegaard, 416 U.S. 312 (1974). The court conceded that a hiring quota would have been a

versing the lower court, the Supreme Court held that such voluntary affirmative action was permissible under Title VII.[86] The narrow issue before the Court was "whether Title VII forbids private employers and unions from voluntarily agreeing upon bona fide affirmative action programs that accord racial preference."[87] The Court observed that Congress' primary concern in enacting Title VII was to rectify the inferior position of blacks in the economy[88] and to provide an atmosphere conducive to the voluntary resolution of this concern.[89] However, the Court still had to reconcile its decision with section 703(j), which states that employers are not required to provide preferential treatment to remedy racial imbalance. If voluntary programs which provide preferential treatment had not been permitted under section 703(j), the Court reasoned that the language would have so provided, rather than use the term "not required."[90]

The *Weber* Court declined, however, to demarcate the exact line between permissible and impermissible affirmative action plans, but noted the accepted Kaiser plan neither required the discharge of white employees nor absolutely barred their entry into the training program.[91] The Court also noted the plan was temporary and was designed to eliminate a manifest racial disparity rather than to maintain racial balance.[92]

Under the *Weber* interpretation of section 703(j), employers may now voluntarily institute quota hiring. Although the Court said nothing about the permissibility of court-ordered quotas after a finding of unlawful discrimination, it would be illogical for a quota to be impermissible when there has been a specific adjudication of a Title VII violation, but permissible when there has not been such a finding.[93] Most courts agree with this logic, although not with-

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permissible remedy for victims of past discrimination, but that no such discrimination had been found in this case. 563 F.2d at 224. Judge Gee stated that without a judicial finding of discrimination, a racial quota loses its character as an equitable remedy and consequently becomes unlawful under §703(a) and (d) of the Act. *Id.*

In his dissent, Judge Wisdom pointed out that one problem in the case was that neither party, the plaintiff nor the defendant employer and union, had any interest in proving that there was, in fact, past discrimination by the union. *Id.* at 231-32. For Kaiser and the union to argue that there had been past discrimination would have made them vulnerable to a Title VII suit. Weber's case could have been weakened by a finding of past discrimination which would have emphasized the need for a hiring quota. Judge Wisdom argued that a reasonableness test should apply. If an affirmative action plan were adopted in a collective bargaining agreement as a reasonable remedy for an arguable Title VII violation, it should be upheld. The policy behind this would be to encourage the private settlement of disputes. *Id.* at 232.

86. 443 U.S. 193 (1979).

87. *Id.* at 200.

88. *Id.* at 202-03.

89. *Id.* at 205.

90. *Id.* at 206.

91. *Id.* at 208.

92. Justice Rehnquist joined by the Chief Justice in dissent, stated that §703(a), (d), and (j) of Title VII clearly prohibited the Kaiser program. *Id.* at 226-27. Congress, according to the dissenters, unequivocally intended that quotas, voluntary or otherwise, were not to be imposed under the Act. *Id.* at 228.

93. *See* Note, *supra* note 79, at 250. The authors argue that *Weber* was incorrectly decided and that courts alone should have the power to impose the exceptional remedy of affirmative

out a great deal of concern about sections 703(j) and 703(h) and the advisability of the remedy as a matter of social policy.[94]

THE PERMISSIBLE APPROACH TO AFFIRMATIVE ACTION

Whether or not a court is sympathetic to affirmative action as a matter of social policy, most courts view the imposition of quotas as an extreme form of relief.[95] Consequently, courts impose quotas only when certain factors are present, two of which can be found in almost all federal appellate cases implementing this remedy. First, a gross statistical disparity always exists between the percentage of minorities and women in the workforce and that in the surrounding labor pool.[96] Second, other remedies or attempts at conciliation have been tested and have failed.[97] Affirmative action is frequently imposed in conjunction with other remedies such as injunctions against further discrimination, or reinstating or promoting discriminatees.[98]

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action. The sixth circuit has held that *Weber* does not apply to the type of remedies a court might order after a finding of discrimination. *See* Detroit Police Officers' Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979), *petition for cert. filed,* 48 U.S.L.W. 3558 (U.S. Jan. 10, 1980) (No. 79-1080). There is of course a counterargument to the contention that after *Weber* it would be illogical to argue that a quota is permissible if there has been no adjudication of unlawful discrimination, but not permissible if there has been. *Weber*'s central focus was on the voluntariness of Kaiser's program, and the need to encourage voluntary attempts at solving racial problems. Therefore, or so the argument would go, if the program is not voluntary, the *Weber* rationale is not applicable. However, from the employee's point of view, whether the program is voluntary or court ordered is largely irrelevant. The employee's interests are either advanced or impaired in either case. From a black employee's perspective, the argument remains that if it is justifiable to have a quota without a finding of discrimination, it is even more justifiable to have one if there is a finding, because in such a case the state's interest in compensating the victim is more compelling.

94. *See, e.g.,* Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974). *See also* cases cited in Slate, *supra* note 15, at 318-20 nn.8-10.

95. *See* Ostapowicz v. Johnson Bronze Co., 541 F.2d 394 (3d Cir.) (reversing district court decision to order hiring quota), *cert. denied,* 429 U.S. 1041 (1976); United States v. International Union of Elevator Constructors Local 5, 538 F.2d 1012 (3d Cir. 1976).

96. *See* Slate, *supra* note 15, at 343-47. The proper geographic reference area used to determine what percentage of the minority group should be represented in the work force is the area where the workers live, not where they work. This is significant because in many cases the work area is a city, which usually has a higher percentage of minorities, and the living area usually includes the suburbs, where minority concentration is less dense. *Compare* Williams v. Tallahassee Motors, Inc., 607 F.2d 689 (5th Cir. 1979) *with* Equal Employment Opportunity Comm'n v. Local 14, Int'l Union of Operating Engrs., 553 F.2d 251 (2d Cir. 1977). See note 5 *supra.*

97. *See, e.g.,* United States v. City of Miami, 614 F.2d 1322 (5th Cir. 1980); Detroit Police Officers' Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979), *petition for cert. filed,* 48 U.S.L.W. 3558 (U.S. Jan. 10, 1980) (No. 79-1080); United States v. International Union of Elevator Constructors Local 5, 538 F.2d 1012 (3d Cir. 1976); Equal Employment Opportunity Comm'n v. Local 638, Sheet Metal Workers' Int'l Ass'n, 532 F.2d 821 (2d Cir. 1976); Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); Vogler v. McCarty, Inc., 451 F.2d 1236 (5th Cir. 1971); Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970); Local 53, Int'l Ass'n of Heat & Frost Insulators v. Vogler, 407 F.2d 1047 (5th Cir. 1969). *See also* A. LARSON, *supra* note 5, §57.00.

98. *See, e.g.,* Equal Employment Opportunity Comm'n v. Local 638, Sheet Metal Workers'

If the facts of a particular case warrant the imposition of an affirmative action program, some courts take the approach that the power to grant equitable relief in section 706(g) is not limited by sections 703(j) or 703(h).[99] Because section 703(j) prohibits only preferential treatment, a goal or quota imposed after a finding of discrimination is permissible.[100] Hiring a fixed number of minorities and women to meet a percentage goal is not preferential treatment; it merely treats these classes as equals because the quota represents the percentage of the workforce they would have comprised absent the past discrimination.[101]

Local 53, International Association of Heat & Frost Insulators v. Vogler, a fifth circuit case, illustrates this approach to preferential treatment.[102] In *Local 53* the union was the exclusive representative for employees in the asbestos and insulation trades in southeastern Louisiana.[103] The strict requirements for joining the union restricted new members to close relatives living with present union members, all of whom were white.[104] Rejected black applicants sued

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Int'l Ass'n, 532 F.2d 821 (2d Cir. 1976) (injunction imposed prohibiting future discrimination; reinstatement and hiring of employees); Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969) (court ordered employees be promoted, transferred, awarded retroactive seniority and given back pay, as well as merger of segregated departments and unions), *cert. denied*, 397 U.S. 919 (1970). See note 56 *supra*. *See* A. LARSON, *supra* note 5, §57.30.

99. See notes 21-24 and accompanying text, *supra*.

100. *See* Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974).

101. *See* Local 53, Int'l Ass'n of Heat & Frost Insulators v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

102. *Id. See also* Vogler v. McCarty, Inc., 451 F.2d 1236 (5th Cir. 1971). In *McCarty*, the district court, after a finding of unlawful discrimination, ordered the union to effectuate a system of alternative black and white referrals for employment and to develop a plan for the admission of new members based on non-racial factors. Three years later, because of an unstable employment situation, the union sought to modify the decree. The district court did so, and the effect of the order was to increase the employment opportunities of more experienced white workers at the expense of those less experienced without decreasing black opportunities. Adversely affected white union members appealed, and the fifth circuit affirmed the district court, stating: "Adequate protection of Negro rights under Title VII may necessitate, as in the instant case, some adjustment of the rights of white employees. The Court must be free to deal equitably with conflicting interests of white employees in order to shape remedies that will most effectively protect and redress the rights of the Negro victims of discrimination." *Id.* at 1238-39. The dissent in *McCarty* referred to the court's decision as "government by injunction" insofar as it usurped the function of the union of readjusting an employment situation during a time of economic downturn. *Id.* at 1240 (Clark, J., dissenting). Cases in accord with the *Local 53* result and rationale are United States v. City of Alexandria, 614 F.2d 1358 (5th Cir. 1980); United States v. International Union of Elevator Constructors Local 5, 538 F.2d 1012 (3d Cir. 1976); Boston Chapter NAACP, Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974); United States v. N.L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973); Southern Ill. Builder's Ass'n v. Ogilvie, 471 F.2d 680 (7th Cir. 1972); United States v. IBEW Local 38, 428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970); United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969). A different result was reached in Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216 (5th Cir. 1977), but was reversed in United Steelworkers v. Weber, 443 U.S. 193 (1979). See notes 79-94 and accompanying text, *supra*.

103. 407 F.2d at 1049.

104. *Id.* at 1050. To join the union, an individual had to be under 30, have three written

Local 53, alleging unlawful discrimination under the Act.[105] The federal district court enjoined the union from continuing its discriminatory hiring and referral practices,[106] ordering that the union could not admit any new members until objective criteria for membership were developed.[107]

On appeal, the union argued that the court's order required preferential treatment of blacks in violation of section 703(j) of Title VII.[108] The fifth circuit disagreed, stating the order only prohibited future discrimination by enjoining the continued exclusion of blacks which had been accomplished through the application of an apparently neutral union membership system, originally entered into with discriminatory intent.[109] The court held that under section 706(g), the district court had legitimately exercised its power to order such affirmative action as it deemed appropriate.[110]

The *Local 53* decision was based on the fifth circuit's own definition of a quota. While the union had characterized the quota as unlawful preference under section 703(j), the court found the quota to be merely a means of preventing future discrimination and of establishing a racially balanced workforce. Black workers were not being "preferred," but were being treated as equals, or as they would have been treated in the absence of discrimination.[111] The court expressly recognized that, after a finding of unlawful discrimination, forcing an employer to achieve a racially balanced workforce through the use of quotas was a legitimate objective under Title VII.

The second circuit analyzed the same conflict more completely in *Rios v. Enterprise Association Steamfitters Local 638*.[112] In *Rios*, the government had instituted a pattern and practice suit[113] against the union for its refusal to admit non-whites to membership. Finding the union had engaged in such discrimination, the district court enjoined the union from discriminating and

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recommendations, the approval of a majority of union members voting at a secret meeting, and four years experience as an improver.

105. *Id.* at 1051.

106. *Id.* The court enjoined the use of union members' endorsements for entry into the union and specifically ordered that proven discriminatees be admitted to membership.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 1055.

111. *Id.* at 1054.

112. 501 F.2d 622 (2d Cir. 1974). *See also* Patterson v. American Tobacco Co., 535 F.2d 257, 273 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976) (section 703(j) only bans preferential hiring to change company's racial balance when imbalance not attributable to unlawful discrimination); Boston Chapter NAACP, Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975).

113. In 1971 when this suit was brought, the Attorney General could bring a civil suit against a union or an employer which charged a pattern or practice of discrimination, to seek such relief "as he deems necessary to insure the full enjoyment of the rights herein described." 42 U.S.C. §2000e-6a (1976). The 1972 amendment to Title VII effected a transfer of authority concerning "pattern or practice" suits from the Attorney General to the Equal Employment Opportunity Commission. See Equal Employment Opportunity Act of 1972, P.L. 92-261, 86 Stat. 103 (amending 42 U.S.C. §§2000e to 2000e-17 (1970)). For an explanation of the effect of this amendment, see United States v. City of Miami, 614 F.2d 1322, 1327 (5th Cir. 1980).

ordered it to achieve a minimum goal of thirty percent non-white union membership out of a surrounding labor pool that was twenty percent non-white.[114] The union appealed, arguing that the goal constituted preferential treatment in violation of section 703(j) of the Act. The second circuit disagreed, stating the language of section 703(j) was intended only to bar preferential quota hiring used to rectify a racial imbalance caused by factors other than unlawful discriminatory acts. According to the *Rios* decision, section 703(j) does not prohibit the use of quotas to recompense the effects of past discriminatory practices.[115]

Nevertheless, the *Rios* court noted that the objective of a remedial quota is limited to placing minority members in a position they would have enjoyed but for the discrimination. The percentage goal for integrating was within the lower court's discretion to the extent of the percentage of minorities in the union's territorial jurisdiction.[116] After the percentage goal was reached, the union would no longer be under any obligation to hire a fixed percentage of non-whites, as long as no further discriminatory practices were used.

Goals set to establish specific levels of minority participation in an employer's workforce are unequivocally acceptable remedies under the *Rios* court's interpretation of Title VII, although they are not aimed at compensating individual victims of discrimination, as are other Title VII remedies. The purpose of hiring quotas is to compensate members of an affected class for harms inflicted on the entire group.[117] This interpretation of Title VII rem-

114. 501 F.2d at 625-27. It is interesting to note that the district court set the quota at a higher percentage than there were non-whites in the surrounding labor pool. The Second Circuit remanded on this issue, stating that the district court should, in setting the goal, be guided by the most precise standards and statistics available, "in view of the delicate constitutional balance that must be struck in the use of such goals or quotas between the elimination of discriminatory effects, which is permissible, and the involvement of the court in unjustifiable 'reverse racial discrimination,' which is not." *Id.* at 633. For the view that courts should not impose quotas in excess of parity, see *The Supreme Court, 1978 Term, supra* note 79, at 252. Setting quotas in excess of parity would be awkward for several reasons. First, it would be impossible to identify any limiting principle. Second, it would be unfair to minorities not included in the quota. Third, such quotas would be perceived as unfair by all excluded groups. *Id.* at 252-53.

115. 501 F.2d at 630. The court expanded: "Where a racial imbalance is unrelated to discrimination, §703(j) recognizes that no justification exists for ordering that preference be given to anyone on account of his race or for altering an existing hiring system or practice. But where the imbalance is directly caused by past discriminatory practices, it is readily apparent that if the rights of minority members had not been violated, many more of them would enjoy those rights than presently do so and that the ratio of minority members enjoying such rights would be higher. No longer are we dealing with an 'imbalance' attributable to non-discriminatory causes. The effects of such past violation of the minority's rights cannot be eliminated merely by prohibiting future discrimination, since this would be illusory and inadequate as a remedy." *Id.* at 631. *See also* United States v. International Union of Elevator Constructors Local 5, 538 F.2d 1012, 1019 (3d Cir. 1976) (neither §703(j) nor (h) limit §706(g)); United States v. Wood, Wire & Metal Lathers Int'l Union Local 46, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973), quoted in Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974).

116. 501 F.2d at 631.

117. *Id.* at 632. The *Rios* court stated that the objective of a remedial quota is to place eligible minority members in the position which the minority would have enjoyed but for

edies conflicts to a certain extent with that of the Supreme Court, which is that the government is justified in preferring one individual over another only if the preferred individual has suffered a particular statutory or constitutional injury.[118] In addition, section 703(j) arguably prohibits quota hiring.[119] Therefore, the *Rios* court's collective compensation theory is problematic.

The first point made in *Rios* remains, nonetheless, compelling. If an employer has no blacks in his workforce and there are fifteen percent eligible black workers in the surrounding population, those blacks have been injured because they have not been hired in the percentage they would have been absent the discrimination. Arguably this class should be collectively compensated in the same way an individual is redressed for his injury,[120] because the injury in both cases is identical and stems from the same harm Title VII addresses: the exclusion of minorities and women from the workforce.[121]

The *Rios* court also observed that the Act cannot effectively fulfill its equal employment objective without resort to goals and quotas.[122] The court defined equal employment to require the percentage of minorities and women employed to equal the percentage in the surrounding population.[123] Such parity cannot be achieved if a court cannot impose a goal on an employer because other Title VII remedies only compensate individual victims for past discrimination and prevent future discrimination. Under *Rios*, such an individualized approach would frustrate the objective of equal employment.[124]

Although the reasoning in *Rios* is cogent, the second circuit panel relied on a creative interpretation of the goal of Title VII.[125] There is no evidence in Supreme Court decisions or the legislative history of the Act which supports the contention that the workforce should mirror the general population.[126] At most,

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the discrimination. The court went on to observe that it was undisputed in this case that a certain percentage of minority workers within the union's territorial labor force would have been eligible for union membership. *Id.*

118. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). See notes 73-76 and accompanying text, *supra*.

119. See notes 22-23 and accompanying text, *supra*.

120. *See* Sape, *supra* note 6, at 496-500.

121. *See* Edwards & Zaretzky, *supra* note 2, at 3-6.

122. 501 F.2d at 631.

123. *Id.*

124. *Id.*

125. In a widely cited dissent to *Rios*, Judge Hays sharply disagreed with the majority's interpretation of §703(j). *Id.* at 634. Focusing on the legislative history of Title VII, Judge Hays argued that §703(j) prohibits any kind of preferential treatment, regardless of the cause of the imbalance in the employer's work force. Congress clearly intended employers under Title VII to hire without regard to race. Quotas "fly in the face of that intent" and make "racism respectable." *Id.* at 639. Judge Hays' argument is similar to the one adopted by the dissenters in United Steelworkers v. Weber, 443 U.S. 193, 228 (1979) (Burger, C.J. & Rehnquist, J., dissenting).

126. In a footnote to International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977), Justice Stewart rejected the argument that evidence of statistical disparity between the racial, ethnic and sexual composition of the community and that of the workforce is sufficient to make out a prima facie case of employment discrimination. He did note, however, that evidence of gross disparity may be significant because it is a telltale sign of discrimination.

implicit in the statute is the notion that if all employment discrimination were eliminated, such parity would exist. More important as a policy question, the interests of white, male employees who stood to be deprived of the economic opportunities conferred on the affected class were not considered in *Rios*. Given these factors, some courts have attempted to articulate a test which would restrict the circumstances in which a quota should be imposed.

Judicial Limitations on Quotas

Two years after *Rios*, a different panel of the second circuit developed a test which must be satisfied before a quota is justifiably imposed. In *Equal Employment Opportunity Commission v. Local 638, Sheet Metal Workers' International Association*,[127] the court adopted a test first developed in *Kirkland v. New York State Department of Correctional Services*[128] for the imposition of racial quotas, notwithstanding that *Kirkland* was decided under 42 U.S.C. §1983[129] and *Local 638* was a Title VII case. The *Kirkland* court established a two-prong test for the imposition of temporary hiring quotas. First, racial goals were to be imposed only when past discrimination had been clear cut and egregious,[130] because only in such cases would no other method of relief suffice. Second, the effects of reverse discrimination must be diffused among an unidentifiable group of unknown, potential applicants rather than a group of easily ascertainable persons.[131] The court's rationale in developing this criterion was that racial tension would be exacerbated if incumbent employees were deprived of employment opportunities in order to compensate unknown individuals for unlawful discrimination.

In *Local 638*, the district court found that the union and the Joint Apprenticeship Committee had made it impossible for blacks and hispanics to become members.[133] Future discriminatory practices were enjoined and an affirmative

However, he cautioned, "section 703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population." *Id.* at 340 n.20.

127. 532 F.2d 821 (2d Cir. 1976).

128. 520 F.2d 420 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976).

129. (1976).

130. 42 U.S.C. §1983, 532 F.2d at 828.

131. It is interesting to note how the *Local 638* court justified using *Kirkland* as opposed to *Rios* as controlling, in light of the fact that *Kirkland* was a §1983 case, and *Rios* a Title VII case. The *Local 638* court held that the *Rios* court satisfied the *Kirkland* test, insofar as there was evidence of "purposive past discrimination" and the union in *Rios* was capable of expanding its membership so as to dilute the impact of the remedy to non-minority persons. *Id.*

The *Rios* court, however, did not ask whether non-minority persons were identifiable and this did not enter the court's decision. The *Rios* court merely referred to the fact that the union did not have a fixed number of members, and consequently as a constitutional (not statutory) matter, the imposition of a quota was distinguishable from DeFunis v. Odegaard, 416 U.S. 312 (1974), which involved the constitutionality of preferential law school admissions.

132. The Joint Apprenticeship Committee had the power to determine who could become a union apprentice. See note 142 *infra*.

133. The facts of *Local 638* are similar to those in Local 53, Int'l Ass'n of Heat & Frost Insulators v. Vogler, 407 F.2d 1047 (5th Cir. 1969). See notes 101-111 and accompanying text, *supra*. Local 638 admitted individuals to its membership in four ways — by graduation from an apprenticeship program administered by the Joint Apprenticeship Committee, a body of

action plan imposed which dictated that the percentage of non-white workers had to be increased from three to twenty-nine percent within seven years.[134] The all-white Joint Apprenticeship Committee was ordered to retain one minority member. The union appealed the finding of discrimination and the remedy ordered by the district court, arguing the remedy constituted preferential treatment and reverse discrimination prohibited by section 703(j) of Title VII.[135]

In analyzing the district court's remedy, the second circuit applied the *Kirkland* test,[136] viewing the issue in terms of the underlying, conflicting policy considerations which permeate the Title VII area. The court noted mathematical membership goals are sometimes necessary to force recalcitrant unions to comply with the Act. As a practical matter, however, use of such goals keeps individuals out of the union only because of their non-minority status.[137] The court complained that such reverse discrimination contradicted "our basic assumption that individuals are to be judged as individuals, not as members of particular racial groups."[138] The tension between these two policy considerations is demonstrated by the facially contradicting provisions of Title VII: section 703(j) which prohibits preferential treatment,[139] and section 706(g), which gives the court broad power to frame equitable relief.[140]

three representatives from the union and the Contractor's Association; by transfer from a "sister" union; by passage of an examination; and by employment in a non-union shop which would be taken over by Local 638 if the union subsequently organizes their shop. The district court found that all routes into Local 638 had been blocked to minority group members as a result of the discriminatory practices of the union and the committee. 532 F.2d at 828. The tests used disqualified minority members in disproportionate numbers and were not sufficiently job related under the requirements set forth in Griggs v. Duke Power Co., 401 U.S. 424 (1971). See notes 28-32 and accompanying text, *supra*. Moreover, in response to an order by a 1964 New York decision, State Comm'n for Human Rights v. Farrell, 43 Misc. 2d 958, 252 N.Y.S.2d 649, 652 (Sup. Ct. 1964), requiring Local 638 to use an objective test instead of nepotistic criteria for admission, Local 638 established crash courses for relatives of present union members to prepare them for entrance tests. The Second Circuit held that this constituted bad faith on the part of Local 638. Further, Local 28 consistently accepted white transferees from allied construction unions while denying transfer to blacks with equivalent qualifications. 532 F.2d at 828.

134. 532 F.2d at 829. The district court order was entered July 1974 and the union was ordered to comply by 1981. *Id.* at 825, 829. The union was also compelled to offer a non-discriminatory test for entrance into the apprenticeship program once a year and allow transfer on a non-discriminatory basis. To ensure a broad applicant pool for these tests and transfers, the union and the committee had to embark on an extensive recruitment and publicity campaign. Lastly, persons improperly rejected for union membership were awarded back pay. *Id.*

135. *Id.* at 824.

136. *Id.* at 827. See text accompanying notes 130-131 *supra*.

137. *Id.*

138. It is not clear what the court was referring to when it stated that reverse discrimination contradicts "our" basic assumption that individuals are not to be treated as members of particular racial groups. At least under Title VII, there is a Congressional assumption that certain individuals are treated differently because they are members of certain racial groups. See note 19 and accompanying text, *supra*.

139. The *Local 638* court adopted Judge Hays' interpretation of §703(j). 532 F.2d at 827. See note 125 *supra*.

140. *Id.* at 827.

The *Local 638* court reasoned that adoption of the *Kirkland* test would resolve the tensions between these conflicting provisions and accordingly modified the district court's order.[141] The decision to replace one of the Joint Apprenticeship Committee representatives with a minority member was reversed because under the *Kirkland* test victims of reverse discrimination must not be identifiable, and the committee member replaced was identifiable.[142] The twenty-nine percent hiring quota imposed on the union was left undisturbed because, according to the court, the quota would have only a diffuse and amorphous effect on reverse discriminatees.[143]

THE INADEQUACY OF THE KIRKLAND TEST — ALTERNATIVE GUIDELINES

The *Local 638* court, as have all courts which have approved the use of quotas, first assumed equal employment is the intended goal of Title VII.[144] Construing this objective to require the racial, ethnic and sexual profile of the workforce to reflect that of the surrounding population, the court found hiring or promotion aimed at reaching a fixed goal was necessary.[145] In adopting the *Kirkland* test, however, the *Local 638* court recognized this interpretation was problematic since nothing in the legislative history, the text of the Act, or the existing Supreme Court decisions provides that equal employment per se is Title VII's goal.[146] Facially, the Act does not extend as far as the *Local 638* court construed it, largely because of fears that the interests of white, male employees would be too severely impaired if Title VII explicitly required equal employment to be achieved by court-ordered quotas.[147] In addition, section

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141. *Id.* at 831.

142. *Id.* The court's objection to the replacement of one white committee union representative with a minority union representative was based on the observation that such an order would mandate that one-third of the committee membership be of minority descent, and that this quota had to be met by bumping a white incumbent. Under *Kirkland,* quotas are only permissible if the effect of the goal does not fall on an identifiable victim of reverse discrimination.

143. *Id.* The second modification made by the *Local 638* court was made in response to the plan adopted by the court-appointed administrator calling for a one-to-one acceptance vote into the apprenticeship program even if this required accepting a minority applicant who scored lower on the apprenticeship test than had a white applicant. *Id.* at 831. The court, divided on this issue, held that under *Griggs,* see notes 28-32 and accompanying text, *supra,* results of job related tests are to be honored, since they are genuinely neutral in intent and effect, and it would be inconsistent to administer neutral tests and then set the results aside to fill a quota. 532 F.2d at 831. Judge Smith, who wrote the opinion, nonetheless disagreed with the majority on this point, and would hold that it was necessary to take minority applicants with lower scores to correct the legally established racial make-up of the present membership and consequently this is permissible under Title VII. Further, Judge Smith noted that such a selection procedure would only temporarily dislocate non-minority applicants. *Id.*

144. *Id.* at 827.

145. *Id.*

146. *Id. See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 341 n.20 (1977) (Title VII imposes no requirement that the work force mirror the general population). See also note 126 and accompanying text, *supra.*

147. See notes 22-23 and accompanying text, *supra.*

703(j) of the Act, particularly when read with its legislative history, casts doubt on the legality of such hiring or promotion quotas.[148] The rationale behind this section is not only that white males should be protected from having their jobs taken by minorities or women to fill quotas. Some courts have articulated a further concern that the imposition of a quota contraverts the democratic ideal of a system ostensibly based on individual merit. Quota hiring, according to the *Kirkland* court. mandates that individuals be chosen for a job on the basis of race or sex, not merit.[149] Therefore, this view of equal employment is contradicted by both legal and policy arguments.

Nonetheless, there are arguments to justify court imposed quotas in some circumstances. Although the Supreme Court has not directly spoken to this issue, it would be very difficult to hold after *Weber*,[150] that although voluntary quotas are permissible, court imposed quotas are impermissible. The courts of appeals with near unanimity have construed the prohibition against preferential treatment in section 703(j) to apply only to situations where there is no finding of discrimination, but merely an imbalance in the composition of the workforce, and have approved quotas as the only effective remedy in the face of particularly egregious discrimination.[151]

In light of these conflicting considerations, it is necessary for courts ordering Title VII relief through quotas to strike a balance which will accommodate the interests of both the minority and non-minority employees. The *Kirkland* test adopted by the *Local 638* court is an attempt to balance these interests and embodies many limitations courts already impose on themselves when formulating remedies under Title VII. Under the *Kirkland* test, there must have been a clear-cut pattern of protracted and egregious discrimination. Every federal appellate decision which has approved a quota has determined that such discrimination was present.[152]

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148. *Id.*

149. Kirkland v. New York State Dep't of Correctional Servs., 520 F.2d 420, 427 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976).

150. *See* United Steelworkers v. Weber, 443 U.S. 193 (1979). See notes 79-93 and accompanying text, *supra.*

151. *See* Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974).

152. *See* United States v. City of Miami, 614 F.2d 1322 (5th Cir. 1980); Detroit Police Officers' Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3558 (U.S. Jan. 10, 1980) (No. 79-1080); United States v. International Union of Elevator Constructors Local 5, 538 F.2d 1012 (3d Cir. 1976); Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976); Boston Chapter NAACP, Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); United States v. N.L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973); Southern Ill. Builders Ass'n v. Ogilvie, 471 F.2d 680 (7th Cir. 1972); United States v. Wood, Wire & Metal Lathers Int'l Union Local 46, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); Vogler v. McCarty, Inc., 451 F.2d 1236 (5th Cir. 1971); United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970); United States v. I.B.E.W. Local 38, 428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970); Local 53, Int'l Ass'n of Heat & Frost Insulators, 407 F.2d 1047 (5th Cir. 1969); Dozier v. Chupka, 395 F. Supp. 836 (S.D. Ohio 1975); Fowler v. Schwarzwalder, 351 F. Supp. 721 (D. Minn. 1972); Buckner v. Goodyear Tire & Rubber Co., 339 F. Supp. 1108 (N.D. Ala. 1972), *aff'd*, 476 F.2d 1287 (5th Cir. 1973).

Another limitation courts generally impose is not to require an employer to hire any unqualified minority member or woman.[153] This constraint serves to counter the accusation that quotas are antithetical to a merit-based system. Although not always applicable, the advantage of such a limitation would be to dispel the taint of paternalism implicit in quota hiring.

If at all possible, a court should not permit an affirmative action plan which excludes white employees indefinitely. Most courts insist that the plan require employing a fixed number of minority members or women only until a percentage goal is reached.[154] According to the courts which impose them, quotas are not instituted to maintain percentage parity, but serve only an initial remedial function. Therefore, once a percentage goal is reached, the discrimination is remedied and quota hiring should be terminated.[155]

The second prong of the *Kirkland* test, which states a quota should not be imposed if its effects fall on identifiable victims of reverse discrimination,[156] implies the courts are aware white, male employees will be adversely affected by quota hiring but if the victims are not visible, the injury is less onerous. There

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But see Taylor v. Safeway Stores, Inc., 524 F.2d 263, 272 (10th Cir. 1975) (reversed district court affirmative action order because there was no statistical disparity between blacks employed by defendant and blacks living in Standard Metropolitan Statistical Area). Another factor usually present when a court imposes a quota is that other Title VII remedies, voluntarily undertaken or judicially imposed, have been tried and have failed. *See* United States v. City of Miami, 614 F.2d 1322 (5th Cir. 1980); Detroit Police Officers' Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3558 (U.S. Jan. 10, 1980) (No. 79-1080); Equal Employment Opportunity Comm'n v. Local 638, Sheet Metal Workers' Int'l Ass'n, 532 F.2d 821 (2d Cir. 1976); Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); Vogler v. McCarty, Inc., 451 F.2d 1236 (5th Cir. 1971); Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970); Local 53, Int'l Ass'n of Heat & Frost Insulators v. Vogler 407 F.2d 1047 (5th Cir. 1969). *See also* A. LARSON, *supra* note 5, §57.00.

153. *See* United States v. City of Miami, 614 F.2d 1322 (5th Cir. 1980); United States v. City of Alexandria, 614 F.2d 1358 (5th Cir. 1980); Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976); Equal Employment Opportunity Comm'n v. Local 638, Sheet Metal Workers' Int'l Ass'n, 532 F.2d 821 (2d Cir. 1976); Boston Chapter NAACP, Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975).

154. *See, e.g.*, United States v. City of Alexandria, 614 F.2d 1358 (5th Cir. 1980) (goal permissible because they are temporary and will terminate when manifest imbalances are eliminated); United States v. City of Miami, 614 F.2d 1322 (5th Cir. 1980) (goal permissible in part because it is temporary); Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 402 (3d Cir.), *cert. denied*, 429 U.S. 1041 (1976) (quota imposed by district court reversed partly because it had no expiration date); Equal Employment Opportunity Comm'n v. Local 638, Sheet Metal Workers' Int'l Ass'n, 532 F.2d 821, 831 (2d Cir. 1976) (quota imposed permissible because it only reduced opportunities of non-minority applicants temporarily until illegal past discrimination remedied); Boston Chapter NAACP, Inc. v. Beecher, 504 F.2d 1017, 1027 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975) (decree remains in force until local fire department has percentage of minorities approximately equal to the percentage of minorities in the locality; then department freed from decree and may make appointments on non-discriminatory basis); Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622, 628 n.3 (2d Cir. 1974) (once goal is achieved by union, union not obligated to maintain it as long as union does not engage in discriminatory conduct).

155. *See* Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622, 628 n.3 (2d Cir. 1974).

156. Equal Employment Opportunity Comm'n v. Local 638, Sheet Metal Workers' Int'l Ass'n, 532 F.2d 821, 830 (2d Cir. 1976).

should be no pretense that if the effects of reverse discrimination cannot be seen, they are less serious. An eighteen year old white male refused a job because the employer must hire a certain percentage of minority employees by court order, is not identifiable under the *Kirkland* test. However, an older, white, male, incumbent employee who is denied entry into a training program for similar reasons is identifiable. The eighteen year-old should have an equally valid complaint. Discrimination claims should be taken into consideration whether the victims are identifiable or not.[157]

CONCLUSION

Whether the Supreme Court will concur in the interpretation given section 703(j) by the lower federal courts, which permits the imposition of a hiring or promotion quota pursuant to a Title VII violation, is questionable. Strong policy arguments can be made in favor of such quotas.[158] Black, hispanic and female employees have not advanced noticeably within the economy in the fifteen years since the passage of the Act.[159] Stronger efforts are necessary if Title VII's broad goal of improving the plight of these groups is to be reached.[160] Quotas have a far more dramatic impact on the employment opportunities of these affected classes than do other types of relief under Title VII.[161] The legal argument supporting the imposition of a quota also stands on solid ground. The prohibition against quotas in section 703(j) has been construed as inapplicable to situations where there has been a finding of discrimination.[162] Given the broad grant of power to the district courts in section 706(g)

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157. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) (courts should balance interests of discriminatees against interests of white employees). The second prong of the *Kirkland* test applies most clearly to situations in which there is a promotion goal and the court orders the employer to give an immediate promotion to an employee who was discriminatorily refused one. The newly promoted employee now threatens to "bump" a white employee out of his or her job. Many courts say that bumping should be avoided, primarily because of the ill will created within the workforce. *See* Patterson v. American Tobacco Co., 535 F.2d 257, 268 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976); United States v. N.L. Indus., Inc., 479 F.2d 354, 374 (8th Cir. 1973). The interests of the discriminatee and the white employee under these conditions can be balanced by awarding the discriminatee back pay at promotion level from the time of the discriminatory refusal to promote. Actual transfer into the new position, however, should not occur until a vacancy exists. *See* Patterson v. American Tobacco Co., 535 F.2d 257, 269 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976); Hairston v. McLean Trucking Co., 520 F.2d 226, 234 (4th Cir. 1975); United States v. United States Steel Corp., 371 F. Supp. 1045, 1060 n.38 (N.D. Ala. 1973), *modified on other grounds*, 520 F.2d 1043 (5th Cir. 1975).

158. Support for racial quotas can be drawn from other areas of Supreme Court review. In Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), the Supreme Court held that school authorities have the power to prescribe for each school a ratio of black to white students reflecting the proportion for the district as a whole. *See* Edwards & Zaretzky, *supra* note 2, at 10-12.

159. *See* Edwards & Zaretzky, *supra* note 2, at 3-5.

160. *See* Blumrosen, *supra* note 2, at 676.

161. *See* Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974).

162. *Id.*

to order any appropriate affirmative action,[163] as a matter of purely statutory interpretation, a strong pro-quota argument can be made.

Nevertheless, the issue would be presented to a Court which has consistently maintained that it is only when there has been a judicial, legislative or administrative finding of statutory or constitutional violations that the government has a greater interest in preferring one individual over another.[164] Whether the Court would be willing to extend a similiar analysis to a generalized finding of discrimination is debatable. When a quota is imposed after an adjudication of discrimination under Title VII, part of the Court's test is satisfied because a generalized statutory violation has been found. However, what has not been found is discrimination against each member who will benefit by the quota by being preferred over a white employee for a particular job. Arguably, the prohibition against preferential treatment embodied in section 703(j) specifically addresses this issue and forces the conclusion that such quotas are impermissible under the Act.

There are also policy considerations which support an anti-quota result. Unless quotas are filled only by qualified employees, this remedy thwarts the ideal that jobs should be awarded according to merit alone.[165] The central notion of Title VII is that jobs should be merit-based without consideration of extraneous racial, ethnic and sexual factors. Quotas are also undesirable as a matter of public policy in that they generate allegations of reverse discrimination.[166] This is a socially divisive concept which implies blacks and women have achieved equal status in employment and now are preferred, to the detriment of white, male employees.[167] This notion misstates reality because minorities and women have not achieved equal footing in employment.[168] Courts should accordingly frame relief keeping in mind the desirability of minimizing claims of reverse discrimination.

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163. *See* Slate, *supra* note 15, at 317.

164. See notes 73-77 and accompanying text, *supra*.

165. *See* Kirkland v. New York State Dep't of Correctional Servs., 520 F.2d 420 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976).

166. *See generally* Baldwin & Nagan, *supra* note 64. Reverse discrimination is a term which obscures a spectrum of legal and philosophical concepts. Discrimination under Title VII is a concept legislatively designed to provide a mechanism for members of affected classes to redress injury to themselves caused by employer and union prejudice. When a white employee brings a reverse discrimination suit, it is not racial prejudice which caused his alleged injury, but something quite different. In McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976), white employees were fired while black employees were not, but not because the company was prejudiced against the white employees, but in all likelihood, because the company management feared a Title VII lawsuit if they fired the black employees.

The concept of reverse discrimination seems to suggest that discrimination is discrimination, whether it be against whites or blacks. Although the Supreme Court acknowledged the truth of this statement, in *McDonald v. Santa Fe Trail*, the fact remains that only discrimination against groups traditionally excluded from the economic mainstream was isolated by Congress as a national problem in 1964 which in the interest of public policy needed to be remedied. See note 2 *supra*.

167. *See* Baldwin & Nagan, *supra* note 64, at 844. *See generally* R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

168. See note 4 *supra*.

All of these considerations warrant an articulation by the courts of quota limitations. To maintain the balance, quotas should be limited to situations where other remedies would clearly be ineffectual. There should be a showing of lengthy, clear-cut and egregious discrimination. Other remedies should have been tested and proven ineffectual, or there is reason to believe they would be. Fulfilling the quota should not depend on lowering standards for the job in question. The quota should be temporary in duration, and the displacement of non-minority employees should be minimal without significantly impeding the goal of equal employment.[169] Without such limitations, the Supreme Court is more likely to construe Title VII narrowly and prohibit quotas. More importantly, the public perception that quotas are freely imposed costs Title VII the endorsement of many who would otherwise be sympathetic.

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169. See notes 144-157 and accompanying text, *supra*.
170. *See* Blumrosen, *supra* note 2, at 678.