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Constitutionality of Remedial Minority Preferences in Employment

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Note: Constitutionality of Remedial Minority Preferences in Employment

During the past decade, a growing controversy has developed concerning effective judicial implementation of equal employment opportunity.[1] The issue central to this controversy is whether a federal district court is empowered to fashion a remedy in employment discrimination cases which accords preferential treatment based on race, specifically, whether minority preferences in employment are a permissible means of accomplishing equal employment opportunity.

Cases of employment discrimination may arise in the federal courts under three separate statutory provisions. Acts of public discrimination for the most part are covered by the Equal Protection Clause of the Fourteenth Amendment[2] and Section 1981 of Title 42 of the United States Code.[3] Private acts of discrimination, on the other hand, are governed by Title VII of the Civil Rights Act of 1964[4] and possibly by Section 1981.[5]

Effective redress of a violation of these rights relies on the

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1. *See generally* Note, *The Philadelphia Plan: Remedial Racial Classification in Employment*, 58 GEO. L.J. 1187, 1187-88 (1969-70).

2. U.S. CONST. amend. XIV.

3. Civil Rights Act of 1870, 42 U.S.C. § 1981 (1970). This section was originally enacted as Section 1 of the Civil Rights Act of 1866, Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27, pursuant to the then recently ratified Thirteenth Amendment. At least in part because of doubts as to the Congressional power to enact this provision under the Thirteenth Amendment, Congress reenacted it in 1870 after the passage of the Fourteenth Amendment. Act of May 31, 1870, ch. 114, § 18, 16 Stat. 144. *See* Note, *Racial Discrimination in Employment Under the Civil Rights Act of 1866*, 36 U. CHI. L. REV. 615, 617-21 (1969). Section 1981 reads:

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

4. 42 U.S.C. §§ 2000e *et seq.* (1964).

5. Until 1968 it was not thought that Section 1982 (42 U.S.C. § 1982) reached private acts of discrimination. But Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), applied that section to all acts of discrimination, private as well as public. Although the Court has not addressed itself to the similar issue with respect to Section 1981, argument by analogy suggests that Section 1981 of the Civil Rights Act of 1870, 42 U.S.C. § 1981 (1870), is likewise applicable to private acts of discrimination.

vast equitable power vested in the federal district court.[6] It is the permissible scope of this power which has been the subject of growing concern. The declaration that separate educational facilities are inherently unequal[7] forced the federal courts to devise new remedies adequate to deal with the effects of discrimination. These courts were faced with the alternative of merely rendering a decree which proscribed future discrimination or awarding remedial relief as well to eliminate the vestiges of past discrimination. The resolution of this problem can be found in the language of *Louisiana v. United States*,[8] wherein the Supreme Court described the role of a court, once discrimination had been shown, as:

> not merely the power, but the *duty* to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.[9]

Accordingly, the courts have not adopted a restrictive attitude in ordering affirmative relief in discrimination cases. As a result, with respect to the civil rights of minority groups, significant efforts have been made to promote such policies as open and fair housing,[10] desegregation of public facilities,[11] equal voting rights[12] and school integration.[13]

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6. The extent of this power was recently emphasized by the Supreme Court:

> Once a right and a violation have been shown, the scope of a district court's equitable power to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.

Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 15 (1971).

7. Brown v. Board of Ed., 347 U.S. 483, 493 (1954).

8. 380 U.S. 145 (1965).

9. Louisiana v. United States, 380 U.S. 145, 154 (1965).

10. James v. Valtierra, 402 U.S. 137 (1971) (discrimination prohibited in determination of eligibility for and administration of low cost housing); Hunter v. Erickson, 393 U.S. 385 (1969) (repeal of open housing law violates equal protection); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (congressional prohibition on private discrimination in sale or lease of property valid under Thirteenth Amendment and Civil Rights Act of 1866); Reitman v. Mulkey, 387 U.S. 369 (1967) (state may not grant right to private discrimination in sale of land); Shelley v. Kraemer, 334 U.S. 1 (1948) (racial covenants in real property contracts cannot be enforced).

11. Palmer v. Thompson, 403 U.S. 217 (1971) (swimming pool); Daniel v. Paul, 395 U.S. 298 (1969) (swimming pool); Katzenbach v. McClung, 379 U.S. 294 (1964) (restaurant); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (restaurant and motel).

12. Oregon v. Mitchell, 400 U.S. 112 (1970) (voters' qualifications); Gaston County v. United States, 394 U.S. 285 (1969) (literacy test); Handott v. Amos, 394 U.S. 358 (1969) (candidates' qualifications); Allen v. State Bd. of Elections, 393 U.S. 544 (1969) (voters' qualifications).

13. Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1 (1971)

In many instances current discrimination and present effects of past discrimination can be abolished in a single stroke as, for example, in the case of desegregation of a swimming pool. Yet in areas which require affirmative action to achieve equality of opportunity, judicial remedies have fallen short of achieving racial balance and eliminating the vestiges of past discrimination. A possible explanation for this shortcoming is an apparent hesitation to fashion a remedy which treats races differently. It is the thesis of this note that a minority preference is one effective remedy which has been avoided for this reason and, consequently, those areas in which this kind of preference is the only appropriate remedy have fallen well behind other fronts in the struggle to eliminate the effects of past discrimination.

This note will examine whether a remedial minority preference, in fact, falls within the scope of the Supreme Court's mandate in *Louisiana v. United States*.[14] By tracing the development of employment discrimination cases, the focus will be on the social and legal consequences of the award of a minority preference. In particular, it will examine whether minority preferences are permitted by or, indeed, proscribed by Civil Rights legislation (Section 1981 of the Civil Rights Act of 1866[15] or Title VII of the Civil Rights Act of 1964)[16] and, ultimately, whether minority preferences are constitutionally permissible.

I. EMPLOYMENT DISCRIMINATION CASES

Some sort of compensatory measures are necessary in employment discrimination cases to prevent the vestiges of past discrimination from enduring well beyond the issuance of the order banning future discrimination. The reason for this is the relative infrequency with which persons generally change employment, which tends to freeze the current racial composition of the labor force. In other words, unless affirmative programs directed at more than merely barring future discrimination are instituted upon the finding of past discrimination, it may well

(effective, immediate desegregation); Dowell v. Board of Ed., 396 U.S. 269 (1969) (immediate desegregation); Alexander v. Holmes County Bd. of Ed., 396 U.S. 19 (1969) (immediate desegregation); Green v. County School Bd., 391 U.S. 430 (1968) ("freedom of choice" integration unconstitutional).

14. 380 U.S. 145 (1965).

15. Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (now 42 U.S.C. § 1981 (1970)).

16. 42 U.S.C. §§ 2000e, *et seq.* (1964).

be an entire generation before that particular industry reflects a cross-section of a nondiscriminating society.

Apparently aware of this reality, courts have included in their decrees various affirmative measures aimed at eliminating the effects of past discrimination. Typical of such measures found in employment discrimination cases are: elimination of high school diploma requirements where no significant relation between the possession of a high school education and the nature of the employment has been shown,[17] disregard of arrest records and felony convictions as an absolute bar to employment,[18] orders requiring a process of test validation[19] for examinations administered as a prerequisite for employment[20] and, finally, implementation of affirmative minority recruitment programs.[21]

However, in the last five years, judicial decrees have included more far reaching relief when it became apparent that these affirmative measures would fall short of significantly reducing the effects of past discrimination.[22] These decrees sug-

17. Griggs v. Duke Power Co., 401 U.S. 424 (1971); Roman v. Reynolds Metal Co., 3 (CCH) E.P.D. ¶ 8072 (S.D. Tex., Nov. 18, 1970).

18. Schware v. Board of Examiners, 353 U.S. 232 (1957); Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (C.D. Calif. 1970). *See also*, Comment, *Arrest Records as a Racially Discriminatory Employment Criterion*, 6 HARV. CIV. RIGHTS & CIV. LIBERTIES L. REV. 165 (1970); Note, *Discrimination on the Basis of Arrest Records*, 56 CORNELL L. REV. 470 (1971).

19. The process of test validation involves a sociological study to determine whether an examination incorporates any "cultural bias" which would screen out minority applicants or whether the results on the examination would be in fact predictive of actual performance on the job. *See, e.g.*, Carter v. Gallagher, No. 4-70 Civ. 399, 3 (BNA) F.E.P. 692 (D. Minn. March 9, 1971).

20. Griggs v. Duke Power Co., 401 U.S. 424 (1971); Hicks v. Crown Zellerbach Corp., 319 F. Supp. 314 (E.D. La. 1970); Arrington v. Massachusetts Bay Trans. Authority, 306 F. Supp. 1355 (D. Mass. 1969). *See also* Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598 (1969); Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education*, 68 COLUM. L. REV. 691 (1968).

21. United States v. Sheet Metal Workers, 416 F.2d 123 (8th Cir. 1969). *Cf.* Durham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970).

22. *See, e.g.*, Carter v. Gallagher, No. 4-70 Civ. 399, 3 (BNA) F.E.P. 692 (D. Minn. March 9, 1971), *aff'd in part, rev'd in part*, 452 F.2d 315, 317-27 (8th Cir. 1971), *modified on rehearing en banc*, 452 F.2d 315, 327-32 (8th Cir. 1972), *cert. denied*, 40 U.S.L.W. 3557 (May 23, 1972) (No. 71-1265); United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir. 1971), *appeal from* 315 F. Supp. 1202 (W.D. Wash. 1970), *cert. denied*, 404 U.S. 984 (1971); Local 53, Asbestos Workers v. Vogler,

gest a trend toward the use of an absolute minority preference in hiring designed to function somewhat similar to a veterans' preference.[23] Such a minority preference, however, would not continue indefinitely as does the veterans' preference, but rather would operate for a fixed period[24] or on a one-time basis.[25] Whether such a trend exists can better be evaluated after an examination of recent case developments in the area and an analysis of the factors underlying the basic reluctance to order these affirmative remedies.

In 1967 a Title VII action by the United States against a union allegedly guilty of discriminatory employment practices, *United States v. Asbestos Workers, Local 53*,[26] was consolidated with an action by an individual workman against the same union, *Vogler v. McCarty, Inc.*[27] The district court issued a preliminary injunction requiring the immediate admission of four specified minority persons to membership in an all-white union. Those four persons previously had sought referrals to jobs within the union's jurisdiction with no success. The injunction further provided for the future referral of blacks on an alternating basis with whites. The Fifth Circuit upheld this one-for-one referral as the only meaningful means of countering the present effects of past discrimination[28] after apparently considering the

407 F.2d 1047 (5th Cir. 1969); United States v. Local 10, Sheet Metal Workers, 3 (CCH) E.P.D. ¶ 8068 (D. N.J. 1970); United States v. Central Motor Lines, Inc., 325 F. Supp. 478 (W.D. N.C. 1970).

23. A veterans' preference is achieved by either absolutely preferring a veteran who has at least attained the minimum qualifying score over any other applicant or by designating a number of bonus points which a veteran may add to the score he received on an employment test. Almost every state has such an act. *See generally*, 56 AM. JUR. 90, *Veterans and Veterans Acts* § 11. The main problem with analogy to the veterans preference is that the great majority of jobs, especially those for which large numbers of blacks are closest to being qualified, are not filled through the type of white collar tests to which such preferences are usually keyed. Also, the analogy is inapposite since the courts traditionally have determined that equal protection and due process require at least that any government action which is predicated upon race must be necessary to the attainment of an overriding governmental purpose. Where classifications not on the basis of race are pronounced, it is only necessary to demonstrate a reasonable basis for such classifications. *But see* note 127 and accompanying text *infra*.

24. *E.g.*, until racial balance in a particular industry is achieved.

25. *E.g.*, when coupled with other affirmative relief.

26. 294 F. Supp. 368 (E.D. La. 1967).

27. *Id.*

28. Local 53, Asbestos Workers v. Vogler, 407 F.2d 1047, 1055 (5th Cir. 1969). The court specifically approved the alternative referral system on the basis of the authorization in Section 706(g) of the Civil Rights Act of 1964 "to order such affirmative action as may be appropriate." 42 U.S.C. § 2000e 5(g).

respective merits of alternative remedies. That formula was subsequently continued by the district court in its final grant of relief.[29] The court order did not limit the relief to blacks who had worked or attempted to work with the union although it did give them priority.[30] *Vogler* was the first instance of a court providing any such "preference" in hiring accorded solely on the basis of race.

Subsequently the Ninth Circuit also sanctioned relief of this nature. In *United States v. Ironworkers Local* 86,[31] a district court order was upheld directing three Joint Apprenticeship and Training Committees which previously had discriminated against blacks to fill 30 per cent of their future training classes with blacks to the extent that qualified black applicants were available. Here again, the court required no showing that the beneficiaries of the remedial relief would be identified victims of past discrimination. The court, citing *Vogler*,[32] approved the validity of the trial court order on the basis of the district court's broad remedial power under Title VII to remove the vestiges of past discrimination, eliminate the present obstacles and assure the nonexistence of future barriers to the full enjoyment of equal job opportunities by qualified black workers.[33]

The one-for-one formula developed in *Vogler* has been followed by the district courts. In *United States v. Central Motor Lines, Inc.*,[34] on a motion for a preliminary injunction in a "pattern or practice"[35] Title VII case, the court ordered the immedi-

29. Vogler v. McCarty, 1970 Lab. Cas. (70-62 at 6611) ¶ 9411 (E.D. La., Feb. 19, 1970).

30. *Id.* at 6615.

31. 443 F.2d 544 (9th Cir. 1971), *appeal from* 315 F. Supp. 1202 (W.D. Wash. 1970), *cert. denied*, 404 U.S. 984 (1971).

32. 407 F.2d 1047 (5th Cir. 1969).

33. United States v. Ironworkers Local No. 86, 443 F.2d 544, 553 (9th Cir. 1971).

34. 325 F. Supp. 478 (W.D. N.C. 1970).

35. "Pattern or practice" cases are generic actions arising under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e, *et seq.* (1964). The phrase derives from 42 U.S.C. § 2000e-6(a): "Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this [title] . . . ." The phrase is not defined in Title VII, but some guidance is offered by the legislative history and court interpretation of this and other Civil Rights Acts employing the same terminology. The rule seems to be that such a pattern or practice is present where the denial of rights is more than an isolated, sporadic or accidental incident, but is repeated, routine or of a generalized nature. United States v. Ironworkers Local 86, 443 F.2d 544, 552 (9th Cir. 1971); United States v. Mayton, 335 F.2d 153, 158 (5th Cir. 1964); United States v. Ramsey, 331 F.2d 824, 834 (5th Cir. 1964)

ate employment of six black over-the-road drivers and further ordered that any subsequent hiring of over-the-road drivers be done on a one-to-one ratio of whites to blacks. In *United States v. Local 10, Sheet Metal Workers*,[36] also a Title VII action, the district court ordered that referrals of temporary apprentices or seasonal help be made on a one-for-one basis. Finally, in two cases arising under the Equal Protection Clause, *United States v. Frazer*[37] and *NAACP v. Allen*,[38] the one-for-one formula was incorporated in the remedy. In the former case the court ordered that the ratio of black to white temporary appointments be equivalent to the ratio of black to white population in the state. In the latter, the court required subsequent hiring be on a one-for-one basis until 25 per cent of the work force was black. In addition to the cases mentioned above, relief similar to that approved in *Vogler* has been incorporated in numerous consent decrees in Title VII[39] and Section 1981[40] actions.

All of the preceding decrees are minority preferences to the extent that the one-to-one ratio does not reflect the proportion of minority-to-white persons in the employment market in the relevant population area.[41] Yet these decrees, of course, do not

(Judge Revas concurring and dissenting in part); *Hearings Before the House Committee on the Judiciary on H.R. 1037*, 86th Cong. 2nd Sess. 13; 110 Cong. Rec. 14270 (1964).

36. 3 (CCH) E.P.D. ¶ 8068 (D. N.J. 1970).

37. 317 F. Supp. 1079 (M.D. Ala. 1970).

38. Civ. Action No. 2709-N (M.D. Ala., Feb. 10, 1972).

39. United States v. Nevada Resort Ass'n, Civ. Action No. LV 1645 (D. Nev. 1971) (one-for-three black referral and hiring ratios); United States v. Virginia Electric and Power Co., Civ. Action No. 638-70-R (E.D. Va. 1971) (25% of new bargaining unit hired to be blacks); United States v. Dillon Supply Co., 3 (CCH) E.P.D. ¶ 8306 (E.D.N.C. 1971) (next six welder learners, mechanic learners or machinist learners to be blacks); United States v. Local 302, Operating Engineers, 3 (CCH) E.P.D. ¶ 8149 (N.D. Miss. 1971) (hire two blacks for each white); United States v. Libbey-Owens-Ford Co., 3 (CCH) E.P.D. ¶ 8052 (N.D. Ohio 1971) (two out of next four foremen in the Assembly Press Department and two out of next four men in the Plastic Department to be female); United States v. Local 46, Wood, Wire & Metal Lathers, No. 68 Civ. 2116 (S.D.N.Y. 1970) (invalidated apprentice waiting lists and required immediate indenture of 25 non-white apprentices).

40. Coffey v. Braddy, No. 71-44 Civ. J. (M.D. Fla., Aug. 12, 1971).

41. Simple cognizance of the laws of probability reveals that, given the absence of discriminatory barriers to employment, the sample of those seeking employment in a particular industry would reflect roughly the composition of the region's population. This, of course, is a superficial conclusion. Those industries requiring special skills, training or education could expect that the sample would vary proportionately to the composition of the group actually possessing those skills or education. For example, among college graduates the percentage of blacks is less than the percentage of blacks in the population as a whole. Racial

have the impact of an absolute minority preference such as was before the court in *Carter v. Gallagher*.[42]

Carter was a class action seeking the effective implementation of equal employment opportunity.[43] At the time the suit was initiated there were no minority employees in the 540-man Minneapolis Fire Department, and in the preceding quarter century that department had employed only one black fire fighter. The lower court found evidence of past racial discrimination in hiring practices in violation of 42 U.S.C §§ 1981 and 1983 and the Equal Protection Clause of the Fourteenth Amendment. Prospective relief was ordered similar to that commonly awarded in other employment discrimination actions. The decree provided for the elimination of any high school diploma requirement,[44] disregard of arrest records and felonies as an absolute bar,[45] test validation,[46] adjustment of entry level ages[47] and implementation of affirmative recruitment programs.[48] Also, upon the finding that changes in employment practices which recently had been implemented or would be implemented pursuant to the court's order would be ineffective to remedy the vestiges

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ratios in jobs requiring a college education, then, must reflect this subclass of the population. *See also* Chance v. Board of Examiners, 3 (CCH) E.P.D. ¶ 8282 (S.D.N.Y. July 14, 1971).

42. No. 4-70 Civ. 399, 3 (BNA) F.E.P. 692 (D. Minn. March 9, 1971) *aff'd in part, rev'd in part*, 452 F.2d 315, 317-27 (8th Cir. 1971), *modified on rehearing en banc*, 452 F.2d 315, 327-32 (8th Cir. 1972), *cert. denied*, 40 U.S.L.W. 3557 (May 23, 1972) (No. 71-1265).

43. Two of the plaintiffs represented the class of all minority applicants for the position of fire fighter with the Minneapolis Fire Department. One represented a class of minority persons who felt that there was insufficient opportunity for a minority person to become a fire fighter and therefore refused or neglected to seek such employment. The remaining two men represented a class of persons who seek civil service employment in Minneapolis and who are veterans but who were unable to qualify for a veterans preference pursuant to MINN. STAT. § 197.45 (1969) because they have not lived in the State of Minnesota and in the City of Minneapolis for a period of five years. Defendants were the Minneapolis Civil Service Commissioner, the Minneapolis Fire Chief and the Personnel Director of the Civil Service Commission. Subsequently, the Minneapolis Commission on Human Rights intervened on behalf of the plaintiffs.

44. *See* text accompanying note 17 *supra*.

45. *See* text accompanying note 18 *supra*.

46. *See* text accompanying note 20 *supra*.

47. Plaintiffs cited no cases as supporting this type of remedial relief *per se*. Rather the reduction in entry level minimum was apparently supported on the ground that it was a reasonable provision in an effective recruitment program. *See* text accompanying note 21 *supra*. The temporary expansion of the maximum age requirement was justified by reason of past discrimination.

48. *See* text accompanying note 21 *supra*.

of past racial discrimination and upon the authority of Section 1981,[49] the court ordered the immediate certification of 20 qualified minority applicants.

This district court decree, subsequently found unconstitutional by the Eighth Circuit Court of Appeals,[50] was the first instance of an absolute minority preference in hiring offered to minorities as a class, rather than to identified, direct victims of past discrimination. It differs from other one-for-one decrees in at least three significant ways. First, with the exception of *United States v. Central Motor Lines, Inc.*,[51] most other one-for-one orders involved admission to unions or union referrals. Such decrees at most affect the frequency with which a union member attains employment and not the fundamental procurement of employment itself. That is, no one is deprived of a permanent job when a court orders a union to refer its members to jobs on a one-for-one basis. Those union members adversely affected by such modifications of employment frequency, although suffering some hardship (or alternatively, not enjoying as great a benefit), are not actually deprived of employment through the operation of the one-for-one formula.

Second, even where, as in *Central Motor Lines*, the one-for-one formula is applied to actual hiring, it can be argued that the one-for-one formula is in fact only a lesser form of a minority preference. Indeed, in *Carter v. Gallagher*, absolute minority preference had been ordered in the lower court for 20 minority applicants. Yet there were in fact 40 openings in the Minneapolis Fire Department.[52] Numerically, then, the effects of the absolute preference in *Carter* and the one-for-one decrees in other actions are indistinguishable. However, the dissimilarity lies in the seniority and tenure principles operative in each case. Tenure generally is based on duration of employment. In the event that both defendant employers were to lay off on a seniority basis a number of employees sometime subsequent to the operation of the beneficial formula, theoretically an equal number of whites and minority workers would be terminated

49. Plaintiffs proceeded under 42 U.S.C. § 1981 (1970) to avoid the possibility of convening a three judge court if the minority preference was considered on constitutional grounds. *Memorandum in Support of Plaintiffs Motion for Injunctive Relief*, at 56, dated February 19, 1971, Carter v. Gallagher, No. 4-70 Civ. 399 (D. Minn. March 9, 1971).

50. Carter v. Gallagher, 452 F.2d 315, 327-32 (8th Cir. 1972) (rehearing *en banc*).

51. 325 F. Supp. 478 (W.D. N.C. 1970).

52. Appendix at 156-57, Carter v. Gallagher, No. 4-70 Civ. 399, 3 (BNA) F.E.P. 692 (D. Minn. March 9, 1971).

in a one-for-one case, whereas this would not be true in the absolutely preferred case. Those beneficiaries of the preference would be the last to go since they are the first to be hired.

Finally, unlike other precedents, the lower court's preference in *Carter* was not designed to achieve racial balance in the Minneapolis Fire Department.[53] Once the ordered certification had been accomplished, there was to be no attempt to regulate subsequent hiring on a ratio basis. Rather, it was the finding of the lower court that the minority preference in conjunction with the other prospective remedies would be sufficient both to dispel the effects of past discrimination as well as bar discrimination in the future.[54]

Apparently the issue of "reverse discrimination" troubled the Eighth Circuit, since the court concluded that "section 1981 and the Fourteenth Amendment proscribe any discrimination in employment, whether the discrimination be against whites or against blacks."[55] So far only one other court has adopted this view. In *Castro v. Beecher*,[56] the court made the following findings: the statistics did not make out a prima facie case of discrimination; none of the defendants had any intent, motive, plan, or like purposeful policy to discriminate against any plaintiff; no affirmative recruitment program could legally be imposed on the defendant employer; and, while the educational

53. The minority population in Minneapolis comprises 6.44% of the total population. Finding 22, Carter v. Gallagher, No. 4-70 Civ. 399, 3 (BNA) F.E.P. 692, 695 (D. Minn. March 9, 1971). Thus, a true racial balance would require the certification of 35 minority applicants.

54. Findings 139 and 140, Carter v. Gallagher, No. 4-70 Civ. 399, 3 (BNA) F.E.P. 692, 707 (D. Minn. March 9, 1971), state:

> 139. The practical result of the failure or refusal of the Court to grant a minority preference would be, in all probability, to limit the number of successful minority applicants, even if additional fire fighters are certified, to a very small number.
> 140. Even if adequate steps are taken to revise the fire fighter qualifications to remove existing requirements which create barriers to employment that affect a disproportionate number of minority persons, the addition of such a small number of minority persons to the Minneapolis Fire Department will not overcome the continuing effects of past discrimination and will not dispell [sic] the continued effects of that Department's bad reputation for fair employment practices with respect to minority persons. What is needed now to correct the effects of the past twenty-five years is the immediate certification of at least twenty minority fire fighters.

See also text accompanying notes 44-48 *supra*.

55. Carter v. Gallagher, 452 F.2d 315, 325 (8th Cir. 1971).

56. 334 F. Supp. 930 (D. Mass. 1971). *Castro* was an action under the Civil Rights Act of 1866 and 1871 by Negro and Spanish-surnamed applicants for employment with various police forces against the Massachusetts Civil Service Commission.

and physical job qualifications had the effect of excluding certain races, they were nevertheless valid since they had some reasonable basis. Accordingly the district court declined to follow plaintiffs' proposals for preferential hiring of blacks and Spanish-surnamed persons. However, the court did find that the employment intelligence test did not bear a significant relationship to qualifications for policeman and therefore ordered that any such test may be validated for relevance to employment performance.[57]

On petition for rehearing in *Carter*, the Eighth Circuit sitting *en banc* reversed the initial panel decision. That final decision did little to resolve this issue of reverse discrimination. The court merely said, in essence, that some degree of reverse discrimination is essential and is therefore justifiable at least to the extent of the court's order in the instant case. The court held that

> the absolute preference ordered by the trial court would operate as a present infringement on those non-minority group persons who are equally or superiorly qualified for the fire fighter positions; and we hesitate to advocate implementation of one constitutional guarantee by the outright denial of another. Yet we acknowledge the legitimacy of erasing the effects of past racially discriminatory practices.[58]

To accommodate those conflicting considerations and yet make the constitutional guarantees against racial discrimination meaningful in the immediate future, the court concluded that more than a token representation should be afforded a limited

57. This court's decision was later modified on appeal to the United States Court of Appeals for the First Circuit. Castro v. Beecher, No. 71-1180, No. 71-1395, No. 71-1396 (1st Cir. April 26, 1972). The basic guidelines for compensatory relief ordered by the appellate court consisted of: (1) preparation of a new, non-discriminatory examination made available to all applicants; (2) creation of a "priority pool" for all black and Spanish-surnamed applicants who failed any of the 1968-70 examinations, but pass the new examination and are otherwise qualified; (3) creation of a second pool to consist of those on present eligibility lists followed by those who pass the new examination and are otherwise qualified but are not placed in the priority pool; (4) certification by the Director of Civil Service in response to requisition requests submitted by police departments on the basis of "some ratio." The court declined to fix such a formula. Rather it left this matter to the district court upon remand. *Id.* at 20. In effect, the appellate court's decree creates a preference only for those specific minority members who are shown to be the object of the past racially discriminatory effects of the employment examination. The probable rationale for not extending this relief to minority classes as a whole is that the court found that none of the plaintiffs represented the class of minority members who in the past had been deferred from taking the examination. *Id.* at 10.

58. Carter v. Gallagher, 452 F.2d 315, 330 (8th Cir. 1972).

preference in hiring. The court ultimately recognized that fashioning a remedy in such cases is a practical question which may differ substantially from case to case and therefore adopted a one-for-two formula[59] to the extent that 20 qualified minority applicants were certified. The court apparently believed that such a one-for-two formula avoids the legal issues peculiar to the absolute minority preference.

There is another line of cases which raises issues similar to those involved in remedial minority preferences. At the center of this debate is Executive Order 11,246,[60] which requires bidders on federal or federally assisted construction contracts to submit programs including specific percentage goals for the utilization of minority workers. Essentially, the Executive Order imposes two distinct obligations on employers. First, those seeking government contracts must adopt a hiring policy that is nondiscriminatory.[61] Second, such contractors must undertake a program of affirmative action to improve representation of minority workers.[62] In general, the Executive Order makes it clear that a neutral posture or inaction by the employer is not

59. The one-for-two formula ordered by the court contemplates the hiring of one minority applicant out of every three persons hired by the Fire Department. The court explained that it adopted the one-for-two formula "as a method of presently eliminating the effects of past racial discriminatory practices and in making meaningful in the immediate future the constitutional guarantees against racial discrimination." Carter v. Gallagher, 452 F.2d 315, 331 (8th Cir. 1972). The court reasoned that most one-for-one precedents appear to be in areas and occupations with a more substantial minority population than the Minneapolis area and thus a one-for-two ratio would be more appropriate in *Carter*.

60. 3 C.F.R. 339 (1964-65 Comp.).

61. Executive Order 11,246, at § 202, 3 C.F.R. 339, 340 (1964-65 Comp.).

62. The responsibilities for affirmative action differ depending on the nature and amount of the government contractor's business. Five typical categories of government contracts are:

1. Less than $10,000: not subject to E.O. program. 41 C.F.R. 60-1.5 (1970).
2. Less than $50,000 or less than 50 employees: required to take affirmative action to ensure equal employment opportunity but not responsible for a written program of compliance. 41 C.F.R. 60-1.40(a) (1970).
3. More than $50,000 and more than 50 employees: subject to affirmative action requirements including written program complying with government regulations. 41 C.F.R. 60-1.40 (a) (1970).
4. Non-construction contracts more than $50,000 and more than 50 employees: subject to more limited, affirmative action. 41 C.F.R. 60-2.1 *et seq.* (1970).
5. Construction contracts subject to specific affirmative action requirements of area plans.

sufficient.[63] That is, under the Executive Order affirmative action is required even when there has been no judicial determination that an employer in fact has discriminated. The legality of this order has been consistently upheld even in light of the greater, yet seemingly less justifiable, imposition on employers here than in the context of remedial relief in a Title VII or Section 1981 action.

Three cases[64] in particular are representative of the controversy over the validity of specific percentage goals for minority employment in the context of this Executive Order program. In each of these cases, the court concluded that affirmative hiring remedies for minority persons are a permissible means of overcoming present effects of past discriminatory practices. Although in none of these cases was there an explicit finding of past discrimination, apparently these decisions are based on the somewhat circular reasoning that no affirmative alteration in minority representation would be necessary if the composition of the work force reflected an industry free of past discriminatory practices.

It is apparent that several court orders have incorporated elementary forms of minority preferences in their relief to the extent that a one-for-one formula is inherently a type of minority preference.[65] Yet, there appears, to be a judicial reluctance to award an absolute minority preference. This hesitation to award such a preference is apparently based on the objection that an absolute preference results in reverse discrimination.[66] The only court which has thus far faced a plea for an absolute minority preference[67] ordered instead a one-for-two formula and suggested that such a formula avoids the constitutional infirmities inherent in the absolute preference.[68] Yet a comparison be-

63. *See generally Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109 (1971).

64. Contractors Ass'n of E. Penn. v. Shultz, 442 F.2d 159 (3rd Cir. 1971), *cert. denied*, 40 U.S.L.W. 3155 (Oct. 12, 1971); Southern Ill. Builders Ass'n v. Ogilvie, 3 (CCH) E.P.D. ¶ 8259 (S.D. Ill.), *amended*, 3 (CCH) E.P.D. ¶ 8260 (S.D. Ill. 1971); Joyce v. McCrane, 320 F. Supp. 1284 (D.N.J. 1971).

65. To the extent that one-for-one does not represent the ratio of minority-to-white population, the minority group is preferred. *See* note 41 *supra* and accompanying text.

66. *See, e.g.*, Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971).

67. Carter v. Gallagher, No. 4-70 Civ. 399, 3 (BNA) F.E.P. 692 (D. Minn. March 9, 1971), *aff'd in part, rev'd in part*, 452 F.2d 315, 317-27 (8th Cir. 1971), *modified on rehearing*, 452 F.2d 315, 327-32 (8th Cir. 1972), *cert. denied*, 40 U.S.L.W. 3557 (May 23, 1972) (No. 71-1265).

68. Carter v. Gallagher, 452 F.2d 315, 329-30 (8th Cir. 1972).

tween any such formulas and an absolute preference suggests otherwise, for the one-for-one formulas[69] raise many of the same issues as the absolute preference.

First, if the issue of reverse discrimination is present in an absolute preference, then it is also present in a one-for-one formula. Regardless of whether the courts ordering one-for-one remedies have specifically discussed that issue, such orders necessarily involve reverse discrimination unless the class upon which the ratio operates is already 50% black and 50% white. To the extent that the ratio does not represent the composition of the class upon which it operates, the smaller group is preferred.[70]

Second, neither the absolute preference nor the one-for-one formulas attempt to prefer incompetent minority members, for none of the ordered preferences require the certification of any minority applicant irrespective of qualifications. On the contrary, in order to claim the minority preference, an applicant must obtain the passing score required of all applicants seeking employment with that employer.[71]

Finally, it is conceivable that the reverse discrimination issue would not be reached in either the one-for-one case or the absolute preference. The reverse discrimination argument is based on the fact that the preference will operate to award a job to a minority member who, although qualified, did not attain as high a score on an employment test as a non-preferred white person. However this is true only if the concept of merit-based hiring underlies the employment process and if the precise scores on an employment test are in fact a necessary element to the concept of merit-based hiring.

Several observations raise serious doubt as to the validity of these underlying assumptions. First, it might be advanced that there is no definite legal committment to merit-based hiring in our system. Although it seems to be the predominant theme of Title VII, it is conceivable that it is so merely because

69. The term "one-for-one formulas" will be used to refer to all such formulas since it is by far the most common. The same considerations hold true, however, as to one-for-two formulas as employed in *Carter*.

70. *See* note 38 *supra* and accompanying text.

71. Carter v. Gallagher, 452 F.2d 315, 331 (8th Cir. 1972); United States v. Ironworkers Local 86, 443 F.2d 544, 548 (9th Cir. 1971); Local 53, Asbestos Workers v. Vogler, 407 F.2d 1047, 1050 (5th Cir. 1969); United States v. Central Motor Lines, Inc., 325 F. Supp. 478, 479 (W.D. N.C. 1970). In this respect the minority preference parallels the veterans preference acts. *See* note 23 *supra* and accompanying text.

merit-based hiring is an obvious assurance against discriminatory hiring practices. Second, it is arguable that merit-based hiring really never exists in practice. In many forms of employment, preference tiers are superimposed upon the group of qualified applicants.[72] Purely personal preferences as between two equally qualified applicants or legally sanctioned preferences, as, for example, the veterans' preference, might combine to result in a particular order of preference which would be quite a departure from the order of achievement on an employment test. As practical matter, employment is seldom granted purely in the order of achievement on the employment test. Any number of variables, legally imposed or discretionary, might determine the criteria for employment. The third consideration weighing against a committment to merit-based hiring is that the concept of merit is essentially a myth, at least in view of present testing technology. Any concept of merit-based hiring is founded on the underlying assumption that an employment test measures with accuracy ultimate performance on the job. However, several commentators have suggested that no test is capable of measuring with precision any such ultimate performance.[73] This becomes increasingly true when superior qualifications are determined on the basis of a finely differentiated absolute score. That is, while the passing score may be indicative of a qualified employee, to argue that a score of 88 is superior to a score of 86 is just not possible under current testing standards. Thus, with no valid criteria for measuring levels of qualification, the concept of infinitely differentiated merit-based hiring might well be a specious goal. Another approach in attacking the concept of merit-based hiring might be to judicially re-define it, *i.e.*, use a definition operative only regarding the point of minimum qualification. But to state that a passing score qualification system is really equivalent to true merit hiring is merely to resort to a game of semantics. Such an approach can better be justified on the grounds that more distinct differentiation of qualifications simply cannot be accurately measured.

It appears, then, that judicial reluctance in ordering absolute minority preferences is unfounded in light of the current

72. *See, e.g.*, Finding No. 36, Carter v. Gallagher, No. 4-70 Civ. 399, 3 (BNA) F.E.P. 692, 696 (D. Minn. March 9, 1971).

73. *See, e.g.*, Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1637-69 (1969).

use of one-for-one formulas. Neither remedy attempts to prefer incompetent minority employees, and in terms of numbers both involve some degree of reverse discrimination. The argument that such preferences are a departure from the concept of merit-based hiring is unpersuasive. It is not at all clear that there is any legal commitment to merit-based hiring, and in practice it probably does not exist today. Moreover, that merit can be measured beyond mere qualification and non-qualification (*i.e.*, a passing score) is probably a myth, at least absent more advanced test validation procedures.

II. LEGISLATIVE AND CONSTITUTIONAL OBSTACLES TO MINORITY PREFERENCES

Several sociological arguments against minority preferences in employment have been suggested. The following considerations are representative of such arguments: an effective preference system may be extremely expensive both in its implementation[74] and in its effects;[75] such preference is unfair to those workers in competition with the preferred minority member; there are no criteria to suggest when the preference should cease; it creates the problem that institutionalizing preferential treatment establishes a principle which encourages constant effort by other ethnic groups to achieve the same kind of treatment and that this result would involve the government in the administration of racial classifications.[76] Such arguments are outside the scope of this discussion. However, the particular legal problems involved in minority preferences will be analyzed in three distinct contexts: whether remedial preferences are proscribed by Title VII, whether such remedies are available under Section 1981 and whether such remedies are constitutionally permissible.

A. TITLE VII

Title VII raises two distinct issues: first, whether a minor-

74. Active minority recruitment requires a monetary outlay which is not necessary under normal recruitment conditions.

75. This result is true only when it is assumed that the preference operates to grant employment to a minority member who, although qualified, is less qualified than a non-preferred applicant. It is argued that the marginal productivity of that minority applicant is less than that of the more qualified and results in economic inefficiency.

76. *See generally* Kaplan, *Equal Justice in An Unequal World: Equality For the Negro—The Problem of Special Treatment*, 61 NW. U.L. REV. 363, 372 (1969).

ity preference is an available remedy where there has been a violation of Title VII; and, second, whether the award of a minority preference itself amounts to a violation of Title VII.

For those actions brought under Title VII of the Civil Rights Act of 1964,[77] there would appear to be an initial obstacle to the award of a minority preference. That is, the central objective of Title VII is to improve minority employment by requiring employers to use color-blind standards in their hiring and promotion decisions.[78] Indeed, it has been argued that the principal enforcement effort under Title VII should be directed at hiring.[79] Accordingly, Section 707(a) of the Act gives the Attorney General in a "pattern or practice"[80] action the authority to request "such relief, including an application for a permanent injunction, restraining order, or other order . . . as he deems necessary to insure the full enjoyment of the rights [t]herein described."[81]

In framing such decrees affecting employment, a court must carefully distinguish between compensatory relief and injunctions prohibiting further discrimination. Prevention of further discrimination should not be considered discretionary. It is the minimal relief required in any discrimination case.[82] Compensatory relief, on the other hand, is designed to make injured members of minority groups whole with respect to the losses flowing from employers' unlawful conduct.

The courts have gone to great lengths in ordering affirmative relief to fulfill the promise of the statute. Court decrees have ordered the merger of unions,[83] the establishment of new seniority systems,[84] the development of new objective criteria for union membership,[85] and the publication of new nondis-

77. 42 U.S.C. §§ 2000e, *et seq.* (1964).

78. *See generally Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109 (1971).

79. Blumrosen, *The Duty of Fair Recruitment Under the Civil Rights Act of 1964*, 22 RUTGERS L. REV. 465, 468 (1968).

80. *See* note 35 *supra* and accompanying text.

81. 42 U.S.C. § 2000e-6(a) (1964). *See* note 91 *infra* for the text of this section.

82. Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1637-69 (1969).

83. United States v. Papermakers Local 189, 301 F. Supp. 906 (E.D. La.), *aff'd*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

84. *Id.*

85. United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir. 1971); Local 53, Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir.

criminatory union practices.[86] Pattern or practice actions have obtained relief both for specfically named individuals who were not parties to the action and for minorities as a class.[87]

The only statutory limitation on the use of affirmative relief is the anti-preferential treatment provision of Section 703 (j).[88] This section and Section 703(a)[89] are the sources of the argument that Congress has proscribed preferences in employment. These two sections suggest that the use of numerical hiring objectives which tend to discriminate against white applicants is illegal since preferential treatment of one group necessarily results in "discrimination" against the other. Read together, Sections 703(a) and 703(j) indicate that the policy of Title VII is to insure the neutrality of the hiring process.

However, these provisions must be read in conjunction with the fundamental purposes of the statute[90] and the sections au-

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1969). *See also* United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969).

86. United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969).

87. United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir. 1971); Local 53, Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969); United States v. Central Motor Lines, Inc., 325 F. Supp. 478 (W.D.N.C. 1970); United States v. Local 10, Sheet Metal Workers, 3 (CCH) E.P.D. ¶ 8068 (D.N.J. 1970); United States v. Frazer, 317 F. Supp. 1079 (M.D. Ala. 1970); United States v. Plumbers Local 73, 314 F. Supp. 160 (S.D. Ind. 1969).

88. 42 U.S.C. § 2000e-2(j) (1964). That section provides:

> Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section or other area, or in the available work force in any community, State, section, or other area.

89. Section 703(a) of the Act, its general anti-discrimination provision, makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a) (1964).

90. 42 U.S.C. § 2000e-2(c) (1964). That section provides as follows:

> It shall be unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

thorizing affirmative relief.[91] Moreover, color-consciousness has been deemed appropriate in Title VII remedies.[92] Courts which have addressed this issue of reconciling the Title VII language have concluded that Sections 703(a) and 703(j) cannot be construed as a ban on affirmative relief against continuation of effects of past discrimination. As a basis for this conclusion, it has

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(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

91. 42 U.S.C. § 2000e-5(g) (1964); 42 U.S.C. § 2000e-6 (1964). The pertinent parts of those sections provide:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

42 U.S.C. § 2000e-5(g) (1964).

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

42 U.S.C. § 2000e-6(a) (1964).

92. Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 931 (2d Cir. 1968); Offermann v. Nitkowski, 378 F.2d 22, 24 (2d Cir. 1967); Porcelli v. Titus, 302 F. Supp. 726 (D. N.J. 1969), *aff'd*, 431 F.2d 1254 (3rd Cir. 1970), *cert. denied*, 402 U.S. 944 (1971).

been said that "Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the Act."[93] Consequently, the Sixth Circuit concluded in *United States v. International Brotherhood, Local 38*, that "any other interpretation would allow the complete nullification of the stated purpose of the Civil Rights Act of 1964."[94]

These anti-preferential sections also have provoked continuing controversy over the validity of the statistical "goals" required of prospective government contractors under Executive Order 11,246.[95] Such numerical employment objectives, it is argued, place serious pressures on the merit-based hiring process contemplated by Title VII.[96] Yet numerical objectives may be the only feasible way to move employment practices in the direction of true neutrality.

This specific issue was before the Third Circuit in *Contractors Association of Eastern Pennsylvania v. Schultz*.[97] There the court concluded that to read Section 703(j) as a proscription against numerical objectives would be "to attribute to Congress the intention to freeze the status quo and to foreclose remedial action under other authority designed to overcome existing evils."[98] Although the Philadelphia Plan was found to be color-conscious, the court rejected the contention that Title VII prevents the President acting through the Executive Order program from attempting to remedy the absence of minority tradesmen in the construction industry. Other courts also have upheld the legality of Executive Order 11,246 as not inconsistent with the provisions of Title VII.[99] In other words, these courts

93. Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 514 (E.D. Va. 1968). The *Quarles* case rejected the contention that existing non-discriminatory seniority arrangements were so sanctified by Title VII that the effects of past discrimination in job assignments could not be overcome.

94. United States v. International Brotherhood Local 38, 428 F.2d 144, 149-50 (6th Cir. 1970), *cert. denied*, 400 U.S. 943 (1970). *See also* United States v. Ironworkers Local 86, 443 F.2d 544, 553-54 (9th Cir. 1971); Local 53, Asbestos Workers v. Vogler, 407 F.2d 1047, 1053-55 (5th Cir. 1969).

95. *See* note 60 *supra* and accompanying text.

96. *See generally Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109 (1971).

97. 442 F.2d 159 (3d Cir. 1971).

98. *Id.* at 173.

99. Southern Ill. Builders Ass'n v. Ogilvie, 3 (CCH) E.P.D. ¶ 8259 (S.D. Ill.), *amended*, 3 (CCH) E.P.D. ¶ 8260 (S.D. Ill. 1971); Joyce v. McCrane, 320 F. Supp. 1284 (D. N.J. 1970).

have concluded that the minority preferences in the Executive Order do not amount to a *violation* of Title VII.

A possible authority for the argument that minority preferences are proscribed by Title VII can be found in the recent Supreme Court decision of *Griggs v. Duke Power Company:*[100]

> Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination or because he is the member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

The decision in *Carter v. Gallagher* extended this language, citing it as authority for the proposition that "section 1981 and the Fourteenth Amendment proscribe any discrimination in employment, whether the discrimination be against Whites or against Blacks."[101] This language was relied on as authority for the proposition that any preferential treatment in hiring for minorities is unconstitutional.

However, this language requires closer examination before it may be argued that the minority preference is inconsistent with the *Griggs* decision. First of all, it is relevant that the issue before the Supreme Court in that case was not the validity of the type of relief available in Title VII actions, but rather the legality under Title VII of certain employment testing requirements. Since the remedy issue was not directly before the court such language assumes the quality of dicta.

In context, the passage from *Griggs* refers to a minority member's lack of qualifications for a particular job. The Court is commenting on the consistently low score attained by minority applicants on the written examination given by Duke Power Company. This, the Court says, is a direct result of inferior education received in segregated schools.[102] However, merely because racial discrimination in the schools indirectly affects black eligibility for employment, the Court suggests that such discrimination does not, in itself, entitle blacks to employment for it overlooks an underlying inability to perform the job.

100. 401 U.S. 424, 430-31 (March 8, 1971).

101. Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971), *citing* Carter v. Gallagher, 452 F.2d 315, 325 (8th Cir. 1971).

102. Gaston County v. United States, 395 U.S. 285 (1969).

Yet this entire discussion was ancillary to the Court's findings, for the Court concluded that the test was not, in fact, a demonstrably reasonable measure of job performance.

Second, the passage from *Griggs*, cited in *Carter*, relates to the question of what constitutes a *violation* of Title VII, not to the question of what constitutes a proper *remedy*. The passage simply makes clear that it is not a violation of Title VII to refuse to hire a minority person who is not qualified for the job in question, or less qualified than a white who is hired. In other words, the passage indicates that the Civil Rights Act of 1964 is not designed to accord members of a minority race a special privilege or right merely because of their race, creed or color. However, the passage does not preclude the use of minority preferences to correct the effects of past discrimination. To interpret *Griggs* so restrictively doubtless would frustrate the Supreme Court's mandate to eliminate the present effects of past discrimination.[103] In the absence of some kind of preferential treatment to minorities, the only relief available in many instances would be the elimination of present *causes* of past discrimination. Yet it is imperative to provide effective and timely relief to dispel the continuing effects of past discrimination.[104]

Finally, it must be noted that up to the present, the Eighth Circuit has been the only circuit to use the language from *Griggs* to ban affirmative relief. All other citations of *Griggs* to date deal with the legality of testing requirements.[105] Indeed, the Eighth Circuit subsequently recognized *en banc* that such a remedy might well be available under Title VII and that the language did not warrant application in a Section 1981 action:

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103. *See* text accompanying note 9 *supra*.

104. Compare the development in almost two decades of school desegregation cases which demonstrates that relief which is immediately effective must be given in racial discrimination cases. For years the courts and school districts proceeded with "all deliberate speed" in accordance with Brown v. Board of Ed., 349 U.S. 294 (1954). Finally the lower courts in Jackson v. Marvell School Dist. No. 22, 416 F.2d 380 (8th Cir. 1969), and the Supreme Court in Green v. County School Board, 391 U.S. 430 (1967), and in United States v. Montgomery County Bd. of Ed., 395 U.S. 225 (1965), declared the demise of the all-deliberate-speed doctrine and mandated affirmative steps effectively geared to end segregation.

105. Diaz v. Pan Am World Airways, 442 F.2d 385, 389 (5th Cir. 1971); Contractors Ass'n of E. Penn. v. Schultz, 442 F.2d 159, 172 (3rd Cir. 1971); Baker v. Columbus Municipal School Dist., 3 (CCH) E.P.D. ¶ 8308 (N.D. Miss. 1971); Chance v. Board of Examiners, 3 (CCH) E.P.D. ¶ 8282 (S.D. N.Y. 1971); Rios v. Enterprise Ass'n of Steam Fitters Local 638, 326 F. Supp. 198, 202 (S.D. N.Y. 1971); Armstead v. Starkville Municipal Separate School Dist., 325 F. Supp. 560, 570 (N.D. Miss. 1971).

> [T]he anti-preference treatment section of the new Civil Rights Act of 1964 does not limit the power of a court to order affirmative relief to correct the effects of past unlawful practices.[106]

Thus it would appear that a minority preference does not offend the provisions of Title VII if the preference is fashioned as remedial relief to correct the effects of past discrimination or as a numerical goal designed to move employment practices in the direction of true neutrality.

B. Section 1981

Even if minority preferences are found to be a remedy inconsistent with Title VII, several viable arguments may be advanced that a court is nevertheless free to award minority preferences in a Section 1981 action. Section 1981 and Title VII differ in several substantive ways. In general, the scope of Section 1981 is broader than the scope of Title VII. Title VII reaches fewer acts of discrimination, offers less immediate access to the courts, and has a shorter operative statute of limitations.[107]

Since 1880, the Supreme Court has recognized that Congress intended Section 1981 to have as broad a scope as the Fourteenth Amendment.[108] On its face, that section appears to prohibit acts of racial discrimination by private individuals. But it was rendered ineffectual by cases holding that it and Section 1982 were never intended to reach private acts of discrimination,[109] but were intended only to implement the Fourteenth Amendment and thus required some degree of state action,[110] and could not be supported by the Thirteenth Amendment, which was concerned only with the abolition of slavery.[111] However, the

106. Carter v. Gallagher, 452 F.2d 315, 329 (8th Cir. 1972) (rehearing *en banc*).

107. *See generally* Comment, *Racial Discrimination in Employment Under the Civil Rights Act of 1866*, 36 U. Chi. L. Rev. 615 (1969); Note, *Is Section 1981 Modified by Title VII of the Civil Rights Act of* 1964, 1970 Duke L.J. 1223.

108. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 407, 422-36 (1966); McLaughlin v. Florida, 379 U.S. 184, 192 (1964); Hurd v. Hodge, 334 U.S. 24, 32 (1948); Buchanan v. Warley, 245 U.S. 69, 77-79 (1917); Yick Wo v. Hopkins, 118 U.S. 356, 368-69 (1886); Virginia v. Rives, 100 U.S. 313, 317-18 (1880); Strauder v. West Virginia, 100 U.S. 303, 312 (1880).

109. Jones v. Alfred H. Mayer Co., 392 U.S. 407, 454 (1966) (dissenting opinion); Civil Rights Cases, 109 U.S. 3, 16-17 (1883).

110. Hurd v. Hodges, 334 U.S. 24, 31-32 (1948); Virginia v. Rives, 100 U.S. 313, 317 (1880).

111. Corrigan v. Buckley, 271 U.S. 323, 330 (1926); Hodges v. United States, 203 U.S. 1, 16-18 (1906).

Civil Rights Act of 1866 was revitalized in *Jones v. Alfred H. Mayer Co.*, when the Court held that "section 1982 bars all racial discrimination, private as well as public."[112]

Section 1981 does not specify the manner of judicial relief available in such an action. Yet this fact should not limit the courts in framing appropriate relief. Its counterpart, Section 1982, is likewise framed only in declaratory terms, but the Supreme Court has held that a federal court is not thereby precluded from fashioning an effective equitable remedy.[113] The substantive scope of relief available, then, is a matter of the equitable powers of the federal courts.

Indeed, this substantive scope of relief offered by Section 1981 might well be broader than that of Title VII. Section 1981 contains no explicit prohibition of minority preferences. Moreover, even if such a prohibition is found inherent in Title VII it does not necessarily mean that remedies under Section 1981 are similarly limited. It is well settled that Title VII did not implicitly repeal Section 1981.[114] Also, Section 1981 may provide a broader remedy than Title VII because in addition to the injunctive relief, reinstatement, and award of back pay available under Title VII, Section 1981 includes at least the possibility of exemplary damages.[115]

C. Constitutionality of Remedial Preferences

Since neither act explicitly proscribes this type of remedy, the controlling question would seem to be not whether a court is precluded by Title VII or Section 1981 from awarding a remedial

112. Jones v. Alfred H. Mayer Co., 392 U.S. 407, 413 (1966).

113. Jones v. Alfred H. Mayer Co., 392 U.S. 407, 414 (1966). *See also* Culpepper v. Reynolds Metal Co., 421 F.2d 888 (5th Cir. 1970); Spotted Eagle v. Blackfeet Tribe, 301 F. Supp. 85, 89 (D. Mont. 1969).

114. *See* Spring v. International Tel. & Tel., 438 F.2d 757 (3rd Cir. 1971); Sanders v. Dobbs House, Inc., 431 F.2d 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); Waters v. Wisconsin Steel Works of International Harvester Co., 427 F.2d 476 (7th Cir. 1970), *cert. denied sub nom* United Order of American Bricklayers, Local 21 v. Waters, 400 U.S. 911 (1970) and International Harvester Co. v. Waters, 400 U.S. 911 (1970). *See also* Note, *Racial Discrimination in Employment Under the Civil Rights Act of 1866*, 36 U. Chi. L. Rev. 615 (1969).

115. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969). *See also* Note, *Is Section 1981 Modified by Title VII of the Civil Rights Act of 1964?*, 1970 Duke L.J. 1223. *But see* Note, *Racial Discrimination in Employment Under the Civil Rights Act of 1866*, 36 U. Chi. L. Rev. 615, 640 (1969), for the suggestion that except for avoiding a delay of up to 120 days, a plaintiff can accomplish nothing under Section 1981 which he cannot under Title VII.

minority preference in a discrimination case, but rather, whether such a preference is constitutionally permissible. Classification by race to some extent is a necessary corollary of *Louisiana v. United States*.[116] This method may be unlawful under a possible Fourteenth Amendment *per se* rule against the imposition of burdens or denial of benefits on a racial basis,[117] that is, a "colorblind" interpretation of the equal protection clause. The concept originated in Justice Harlan's dissent in *Plessy v. Ferguson*.[118] Yet most commentators agree that the Court has never given majority support to the doctrine of the "colorblind" Constitution, rejecting a *per se* rule proscribing the legitimacy of classifications by race.[119]

Rather, racial classifications in almost all contexts have been described as "suspect"[120] and, while not absolutely precluded by the Constitution, must be subjected to a rigorous scrutiny.[121] Indeed, when framing equitable relief in discrimination cases, the federal courts have not hesitated to consider race.[122] For example, the courts have rejected the proposition that faculty assignments by race consitute prohibited racial discrimination,[123] and have affirmed that classification by race is a permissible, indeed a constitutionally mandated, means to achieve equal treatment of the races:

> What we have said may require classification by race. That is something which the Constitution usually forbids *not because*

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116. 380 U.S. 145 (1965). *See* note 9 *supra* and accompanying text.

117. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 13 (1967) (Stewart, J., concurring); McLaughlin v. Florida, 379 U.S. 184, 198 (1964) (Stewart, J., joined by Douglas, J., concurring); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 566 (1947) (Rutledge, J., dissenting). *Cf.* Edwards v. California, 314 U.S. 160, 184-85 (1941) (Jackson, J., concurring).

118. 163 U.S. 537, 558 (1896).

119. *See Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1088-91 (1969), for this suggestion.

120. Loving v. Virginia, 388 U.S. 1, 9 (1967).

121. Korematsu v. United States, 323 U.S. 214, 216 (1944).

122. The classic statement of the necessity of such relief was made by Judge Wisdom in United States v. Jefferson County Bd. of Ed., 372 F.2d 836, 876 (5th Cir. 1966):

> The Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. But the Constitution is color conscious to prevent discrimination being perpetrated and *to undo the effects of past discrimination.* The criteria is the relevancy of color to a legitimate governmental purpose. (Emphasis added.)

123. Clark v. Board of Ed., 426 F.2d 1035 (8th Cir. 1970) (*Clark II*), *cert. denied*, 402 U.S. 952 (1971); Kemp v. Beasley, 389 F.2d 178 (8th Cir. 1968) (*Kemp II*).

> *it is inevitably an impermissible classification,* but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining a racial inequality. Where it is drawn for the purpose of achieving equality it will be allowed, and to the extent it is necessary to avoid unequal treatment by race, it will be required.[124]

Although this statement was made in reference to school integration,[125] the necessity for such relief is central to all discrimination cases.

It might be suggested that when the purpose of a classification by race is compensatory in nature, it is even possible that such classifications need not be subjected to the usual strict standard of equal protection review.[126] Clearly the social effects of such remedial classifications are very different from those in other contexts which the courts have come to view as invidious.[127] Consequently, a court might apply a permissive rather than strict standard of review and still comport with constitutional principles of equal protection.[128]

However, the constitutional argument is best met in the recognition that racial classifications are inherently suspect and must therefore meet a rigorous standard of equal protection review.[129] A compelling governmental justification for the minority preference can exist when other available affirmative relief is ineffective to dispel the continuing effects of past discrimination. Minority preferences should not be held unconstitu-

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124. Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 931-32 (emphasis added). *See also* Porcelli v. Titus, 302 F. Supp. 726 (D. N.J. 1969); Vierra, *Racial Imbalance, Black Separatism, and Permissible Classification By Race*, 67 MICH. L. REV. 1553 (1969).

125. School integration cases can be distinguished on the basis that unlike a minority preference in employment which operates to exclude one applicant, no constitutional rights of whites are deprived in decrees ordering school busing. Whites have no constitutional right to insist on segregated schools. Presumably, a student receives the same state approved education when he is bused to another school as he would have received had he remained in a segregated school.

126. *See* note 121 *supra* and accompanying text.

127. *See Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1104-1120 (1969). *See also* Leiken, *Preferential Treatment in the Skilled Building Trades: An Analysis of the Philadelphia Plan*, 56 CORNELL L. REV. 84, 98-100 (1970). *But see* Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—the Problem of Special Treatment*, 61 NW. U.L. REV. 363, 363-88 (1966).

128. The main objection to this is the possible illogic of a position that distinguishes between constitutional and unconstitutional racial classifications solely on the basis that most are "bad" but remedial ones are "good".

129. *See* notes 120 & 121 *supra* and accompanying text.

tional without such a consideration of the shortcomings of other relief.

III. CONCLUSION

Where clearly discriminatory practices have been applied in the employment context and non-preferential affirmative relief is not a timely remedy, the courts should not abdicate its responsibility to effectively remedy these past denials of equal employment opportunity. A minority preference, in some instances, can be the only practical way to correct the adverse social and economic effects of employment discrimination. Recent case law suggests a trend toward the eventual recognition of the propriety of minority preferences as remedies in discrimination cases. However, because of the possible constitutional overtones, such preferences must either be truly compensatory as a remedy for past discrimination or necessary to the attainment of a compelling governmental purpose.