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The Use of Racial Preferences in Employment: The Affirmative Action/Reverse Discrimination Dilemma

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I. INTRODUCTION

The statutory and constitutional status of voluntary affirmative action programs in employment, particularly those using quotas or numerical goals, remains open to question. The affirmative action/reverse discrimination debate persists in employment, and recent Supreme Court rulings on reverse discrimination challenges

in educational admissions[1] and reapportionment under the Voting Rights Act[2] have not resolved the issue whether a preference based on race necessarily discriminates against whites so as to violate the Constitution[3] or Title VII of the Civil Rights Act of 1964.[4]

The voluntary affirmative action issue raises three questions. First, is affirmative action—something more than mere neutrality toward race in hiring, promotions, and other employment decisions—permissible under the federal laws and Constitution?[5] If so, may an employer or an employer and union acting together undertake an affirmative action program voluntarily?[6] Last, may a voluntary affirmative action program use goals or quotas?[7]

Affirmative action is a significant tool for achieving the national policy of equal employment expressed in Title VII.[8] Neutrality toward race will not create equality if one class of applicants or employees begins at a disadvantage created by societal stereotypes and discrimination or by prior specific discrimination.[9] The Su-

1. Regents of the Univ. of Cal. v. Bakke, 98 S.Ct. 2733 (1978).

2. United Jewish Organizations v. Carey, 430 U.S. 144 (1977).

3. U.S. CONST. amend. XIV.

4. 42 U.S.C. §§ 2000e to 2000e-15 (1976), *as amended by* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. §§ 2000e to 2000e-17 (1976)). All subsequent references to Title VII will be cited only to the *United States Code.*

5. *See* Part III *infra.* Affirmative action and the statutory prohibitions against discrimination also involve discrimination based on sex, religion, and national origin. Litigation over the latter two issues has been relatively infrequent. *But see* Trans World Airlines v. Hardison, 432 U.S. 63 (1977); Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973). Sex discrimination has been the subject of frequent litigation, but the Supreme Court has not yet ruled that sex is a suspect classification. Frontiero v. Richardson, 411 U.S. 677 (1973). Thus, at least in suits presenting equal protection questions, the courts apply different standards to charges of sex and race discrimination. Because differing standards introduce analytical confusion, this Note will address race discrimination only; however, considerations similar to those discussed here should apply to affirmative action programs imposing preferences in favor of women.

6. *See* Part V *infra.*

7. *See generally* N. GLAZER, AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY (1975); REVERSE DISCRIMINATION (B. Gross ed. 1977); Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment,* 61 NW. U.L. REV. 363, 367-88 (1966).

8. *See, e.g.,* Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964,* 31 VAND. L. REV. 905, 952-54 (1978); Brest, *Forword: In Defense of the Antidiscrimination Principle,* 90 HARV. L. REV. 1, 31-43 (1976); Deutsch, *The Jurisprudence of Affirmative Action: A Post-Realist Analysis,* 65 GEO. L.J. 879, 880 (1977); Ely, *The Constitutionality of Reverse Racial Discrimination,* 41 U. CHI. L. REV. 723 (1974).

9. Courts and commentators often employ racing metaphors to describe the problem. In Robinson v. Lorillard Corp., 319 F. Supp. 835 (M.D.N.C. 1970), *aff'd in part, rev'd in part,* 444 F.2d 791 (4th Cir.), *cert. dismissed,* 404 U.S. 1006 (1971), the court states:

> [I]f two race cars are placed evenly, one beside the other, and started at the same instant, one being allowed to accelerate to 50 m.p.h. in 7 seconds and the other in 10 seconds, with both vehicles to remain at 50 m.p.h. indefinitely, there will be an evident distance gap between the two. Even though the constant speed limit of 50 m.p.h. affects each car equally, it also serves to preserve and perpetuate the gap created when one, at an earlier time, was denied an advantage allowed the other. Persuasive and controlling

preme Court has approved affirmative action measures ordered by lower courts to remedy prior discriminaton by an employer or union[10] and has allowed affirmative action programs established by consent decree to stand.[11] Thus the Court has accepted the principle that under certain circumstances neither the Constitution nor the statutes require absolute neutrality toward race but instead mandate some consideration of race in order to move toward equality. The Court, however, has not defined the parameters of lawful affirmative action undertaken through voluntary programs and quotas.[12]

The question of voluntary affirmative action is of particular importance to the employer. Voluntary programs have a three-fold purpose: compliance with Executive Order 11,246, which mandates affirmative action by employers with government contracts;[13] avoidance of investigation and possible suits by the Equal Employment Opportunity Commission (EEOC), the Justice Department, or private plaintiffs claiming the employer has discriminated against minorities;[14] and observance of the national policy set forth in Title VII.[15] Yet voluntary programs, entered into in an effort to obey the

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authority correctly has termed such practice unlawful when applied to an individual's employment status because of race, color, religion, sex, or national origin.

Id. at 840.

10. *See* Franks v. Bowman Transp. Co., 424 U.S. 747 (1976). The lower courts have frequently ordered affirmative action as a remedy. *See, e.g.*, Rios v. Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974) (union ordered to admit minorities to meet membership quota); Erie Human Relations Comm'n v. Tullio, 493 F.2d 371 (3d Cir. 1974) (quota hiring ordered by court although parties had stipulated that there was no intent to discriminate); Morrow v. Crisler, 491 F.2d 1053 (5th Cir.) (*en banc*), *cert. denied*, 419 U.S. 895 (1974) (reversible error for court to refuse to order quota hiring when extreme discrimination existed); Carter v. Gallagher, 452 F.2d 315 (8th Cir.) (*en banc*), *cert. denied*, 406 U.S. 950 (1972) (quota hiring permissible to eradicate effects of past discrimination but absolute preference unlawful).

11. *See* EEOC v. American Tel. & Tel. Co., 556 F.2d 167 (3d Cir.), *cert. denied*, 98 S.Ct. 3145 (1978). In addition, a number of circuit court decisions have upheld affirmative action programs implemented under consent decrees. Oburn v. Shapp, 521 F.2d 142 (3d Cir. 1975) (whites contesting quota contained in consent decree not entitled to a temporary restraining order to halt implementation of quota); Patterson v. Newspaper & Mail Deliverers Union, 514 F.2d 767 (2d Cir. 1975) (court-approved settlement that included quota relief sustained despite reverse discrimination challenge claiming that it would put some existing white employees at a disadvantage compared to subsequently hired minorities).

12. *See* Part III *infra*.

13. 3 C.F.R. 339 (1965). Executive Order 11,246 did not prohibit discrimination on the basis of sex or require affirmative action to increase numbers of female employees. These omissions were corrected by Executive Order 11,478, 3 C.F.R. 133 (1969).

14. 42 U.S.C. §§ 2000e-5, -6 (1976). *See* Belton, *supra* note 8, at 918-31; Belton, *Title VII of the Civil Rights Act: A Decade of Private Enforcement and Judicial Developments*, 20 ST. LOUIS U. L.J. 225 (1976).

15. The policy of Title VII was described by Chief Justice Burger in Griggs v. Duke Power Co., 401 U.S. 424 (1971):

The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers

law and to preclude costly, time-consuming litigation or loss of contracts, may expose the employer to another liability—the reverse discrimination charge.[16] Such charges burden not only the employer but society as a whole. Piecemeal enforcement of Title VII and Executive Order 11,246 by the government or by private plaintiffs is slow and costly.[17] Furthermore, Congress intended that compliance with Title VII be voluntary rather than compelled.[18] Thus the question whether an employer acting alone or with a union through a collective bargaining agreement is competent to take affirmative action to equalize the proportion of minority workers in a particular work force with their proportion in the available labor pool requires a clear answer.

Even if the Supreme Court were to approve voluntary affirmative action in principle, the question of what form such action could take would remain. Affirmative action may range from posting notices or publishing advertisements that the employer is an "equal opportunity employer" to active recruitment of minorities and organization of special training programs. At its farthest reach, it may include the establishment of numerical goals or quotas for minority employment and promotion.[19] Although this latter element is the aspect of affirmative action most often opposed, quotas may offer

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that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory practices.

Id. at 429-30.

16. The reverse discrimination charge argues that Title VII makes racial preferences for minorities unlawful because those preferences have the effect of discriminating against whites on the grounds of race. *See, e.g.*, Chance v. Board of Examiners, 534 F.2d 993 (2d Cir. 1976) (court-imposed quotas altering last-hired, first-fired seniority system held to be unlawful reverse discriminaton); Rios v. Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974) (dissent).

17. The difficulties of piecemeal enforcement were shown in school desegregation in the decade following Brown v. Board of Educ., 347 U.S. 483 (1954). *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Green v. County School Bd., 391 U.S. 430 (1968).

18. *See, e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). In *Alexander* the Supreme Court read the legislative history of Title VII thus:

> Congress enacted Title VII . . . to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin. . . . *Cooperation and voluntary compliance* were selected as the *preferred means for achieving this goal.* . . . In the Equal Employment Opportunity Act of 1972 . . . Congress amended Title VII to provide the Commission with further authority to investigate individual charges of discrimination, *to promote voluntary compliance* with the requirements of Title VII, and to institute civil actions against employers or unions named in a discrimination charge.

Id. at 44 (emphasis added).

19. 41 C.F.R. § 60-2.10 (1978). *See, e.g.*, Vogler v. McCarty, Inc., 294 F. Supp. 368 (E.D. La. 1968), *aff'd sub nom.*, Local 53, Int'l Ass'n of Heat & Frost Insulators v. Vogler, 407 F.2d 1047 (5th Cir. 1969) (union that had excluded blacks ordered to refer blacks and whites on one-to-one alternating quota).

the only objective standard to measure progress toward equal employment and to insure the reality, not just the appearance, of equal employment for minorities.[20]

This Note examines the constitutional and statutory background of the affirmative action/reverse discrimination issue and analyzes judicial decisions confronting the dilemma.[21] The Note then explores grounds on which the Supreme Court might permit voluntary affirmative action using quotas.[22] Existing EEOC guidelines and Executive Order 11,246 offer both an objective basis on which to develop a voluntary program and a safeguard against misuse of affirmative action.[23] When the program is established in a collective bargaining agreement, moreover, the natonal policy of allowing free play for the bargaining process to establish terms and conditions of employment gives an additional reason for allowing voluntary affirmative action programs that use quotas.[24]

II. Constitutional and Statutory Bases for the Affirmative Action/Reverse Discrimination Dilemma

The concepts of affirmative action and reverse discrimination are so intertwined as to make a clear delineation between them exceedingly problematic. Both concepts develop from the constitutional and statutory policy of nondiscrimination. The question of reverse discrimination arises only when some form of affirmative action creates a race-conscious preference in favor of a minority group. Furthermore, the proponents of affirmative action and those who argue that affirmative action constitutes reverse discrimination point to the same constitutional and statutory provisons—primarily the equal protection clause and Title VII—but read them differently.

A. The Equal Protection Clause

The fourteenth amendment of the United States Constitution guarantees that no state shall deny any citizen equal protection of the laws on the grounds of race.[25] When the employment decision

20. *See, e.g.*, Fiss, *A Theory of Fair Employment Law*, 38 U. Chi. L. Rev. 235 (1971); Karst & Horowitz, *Affirmative Action and Equal Protection*, 60 Va. L. Rev. 955 (1974).

21. *See* Parts II-V *infra*.

22. *See* Part VI *infra*.

23. *See* Part VI(B) *infra*.

24. *Id.*

25. The equal protection clause provides that:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

includes state action, the government and private plaintiffs have argued that the employer's discriminaton against minorities violates the Constitution as well as the statutes.[26] Although the Supreme Court initially interpreted the fourteenth amendment as protecting only blacks,[27] the Court has steadily expanded the coverage of the clause.[28] The characterization of race as a "suspect classification"[29] requiring strict scrutiny has made it possible for members of majority as well as minority races to assert that they have been unconstitutionally denied equal protection.

When no state action is present, plaintiffs may turn to the thirteenth amendment and to statutes derived from it.[30] The Supreme Court has recognized that statutes based on the thirteenth amendment give a remedy for racial discrimination by private entities.[31] Furthermore, the Court has ruled that this protection extends to whites and minorities alike when disparate treatment in private employment is based on race.[32]

B. Title VII of the Civil Rights Act of 1964

The basic law of employment discrimination appears in Title VII of the Civil Rights Act of 1964, which makes it unlawful for an employer, employment agency, or labor union to "discriminate against any individual" in hiring, promotion, or other employment relationships on grounds of "race, color, religion, sex, or national origin."[33] Some judges and scholars have read this mandate as call-

26. *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976); Bridgeport Guardians, Inc. v. Civil Serv. Comm'n, 482 F.2d 1333 (2d Cir. 1973), *on appeal*, 497 F.2d 1113 (2d Cir. 1974), *cert. denied*, 421 U.S. 991 (1975); Carter v. Gallagher, 452 F.2d 315, *modified on rehearing en banc*, 452 F.2d 327 (8th Cir. 1972).

27. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). *See* McLaughlin v. Florida, 379 U.S. 184, 189-90 (1964).

28. *See, e.g.*, Carrington v. Rash, 380 U.S. 89 (1965); Skinner v. Oklahoma, 316 U.S. 535 (1942); Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

29. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

30. The thirteenth amendment to the United States Constitution, which abolished slavery and empowered Congress to pass legislation to enforce that prohibition, made no mention of state action. The Supreme Court has ruled that the thirteenth amendment is the source of the Civil Rights Act of 1866 and that subsequent statutes derived from that Act reach private conduct. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

31. Runyon v. McCrary, 427 U.S. 160 (1976) (42 U.S.C. § 1982 creates right of action against private school for racial discrimination); Johnson v. Railway Express Agency, 421 U.S. 454, 459-60 (1975) (42 U.S.C. § 1981 creates right of action for racial discrimination in private employment); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (42 U.S.C. § 1982 creates cause of action against private individual for housing discrimination).

32. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 285-96 (1976).

33. 42 U.S.C. § 2000e-2(a)(1) (1976).

ing for "colorblind" decisions and thus have concluded that it prohibits any plan that creates a preference based on race except as a make-whole remedy for identifiable victims of discrimination.[34] Others, however, argue that the legislative history of the Act demonstrates congressional concern with discrimination against minorities and congressional intent to protect those who traditionally had been excluded from employment.[35] The latter reading has led to development of affirmative action concepts; the former, to charges of reverse discrimination.

A further tension in Title VII interpretation arises from an apparent contradiction between section 706(g),[36] which grants the courts broad powers to order whatever equitable relief they find appropriate, and section 703(j),[37] which states that no employer shall be required to give preferential treatment based on race because of an imbalance in percentages of employees of a particular race. Although the courts have rejected arguments that section 703(j) limits them in granting quota relief,[38] it is unclear whether 703(j) bars voluntary affirmative relief. As a mandate, section 703(j) is directed to entities that might compel an employer to use a quota and does not forbid an employer from choosing to remedy an imbalance in numbers of minority employees.[39]

Title VII also created the Equal Employment Opportunity Commission,[40] which is authorized to investigate complaints of discrimination,[41] to conciliate,[42] to intervene in civil suits brought by private plaintiffs,[43] and to furnish assistance when requested by persons seeking to comply with Title VII.[44] By emphasizing "informal methods of conference, conciliation, and persuasion"[45] in Title VII, Congress clearly envisioned voluntary compliance with the national policy of nondiscrimination as a key to the success of the legislation.

In *McDonald v. Santa Fe Trail Transportation Co.*,[46] the Su-

34. *See* note 7 *supra* and accompanying text.
35. *See* note 8 *supra* and accompanying text.
36. 42 U.S.C. § 2000e-5(g) (1976).
37. *Id.* § 2000e-2(j).
38. The courts have sustained quota relief on the grounds that § 703(j) does not apply once discrimination is found. *See, e.g.*, Patterson v. Newspaper & Mail Deliverers Union, 514 F.2d 767 (2d Cir. 1975); Rios v. Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); Local 53, Int'l Ass'n of Heat & Frost Insulators v. Vogler, 407 F.2d 1047 (5th Cir. 1969).
39. 42 U.S.C. § 2000e-3(j).
40. *Id.* § 2000e-4.
41. *Id.* § 2000e-5(b).
42. *Id.*
43. *Id.* § 2000e-5(f).
44. *Id.* § 2000e-4(g)(3).
45. *Id.* § 2000e-5(b).
46. 427 U.S. 273 (1976).

preme Court ruled that Title VII applied to protect whites as well as minority employees. Plaintiffs in *McDonald,* two white employees, were charged along with a black employee with theft from their employer. Only the white employees were discharged. The Supreme Court found that Title VII proscribes racial discrimination against whites as well as against blacks.[47] The Court, however, expressly stated that in so ruling it was not determining the permissibility of an affirmative action program.[48] Rather, the Court confined itself to a specific situation in which identically situated individuals received disparate treatment based on race.

C. *Executive Order 11,246*

In an effort to broaden implementation of Title VII's policy of equal employment, the executive branch issued Executive Order 11,246 in 1965.[49] This Order required any firm with a government contract to analyze its employment practices and to develop a plan to bring minorities into its workforce in a percentage equal to their presence in the available labor market. Regulations issued pursuant to the order established a three-step procedure for affirmative action by the contractor: (1) a study by the employer to determine areas in which minorities are "underutilized"; (2) articulation of a plan with specific steps to be taken to reach equal employment; and (3) establishment of goals and timetables for equal employment.[50]

The first major affirmative action plan adopted under Executive Order 11,246 was the Philadelphia Plan, which established goals for increasing the number of minority workers in the construction trades.[51] The courts considered the legality of the Philadelphia Plan in *Contractors Association of Eastern Pennsylvania v. Secretary of Labor.*[52] Plaintiff contractors asserted that the plan constituted social legislation enacted by the executive branch without legislative authority and argued that the requirement of specific numerical or percentage hiring goals violated Title VII prohibitions against hiring or classifying employees on the basis of race.[53] The

47. *Id.* at 278-80.

48. The Court stated: "Santa Fe disclaims that the actions challenged here were any part of an affirmative action program, . . . and we emphasize that we do not consider here the permissibility of such a program, whether judicially required or otherwise prompted." *Id.* at 281 n.8.

49. *See* note 13 *supra.*

50. 41 C.F.R. §§ 60-1.40, 60-2.10 (1978).

51. *See* Note, *The Philadelphia Plan: A Study in the Dynamics of Executive Power,* 39 U. CHI. L. REV. 723 (1972).

52. 442 F.2d 159 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971).

53. The court analyzed the order in terms of the categories of executive actions delineated in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952): (1) executive actions undertaken pursuant to implied or express congressional authorization; (2) executive actions

court rejected plaintiffs' position, stating that such an interpretation of the statute would serve only to perpetuate the status quo and to preclude any remedies for discrimination.[54] The court further ruled that nothing in Title VII prevented the executive branch from conditioning its contracts on the use of goals to remedy the lack of minority workers in the construction trades.[55]

III. JUDICIALLY IMPOSED AND CONSENT DECREE AFFIRMATIVE ACTION PLANS

A. *Affirmative Action as a Court-Ordered Remedy*

Section 706(g) of Title VII empowers the courts to order hiring, reinstatement, back pay, or "any other equitable relief as the court deems appropriate"[56] to correct unlawful employment practices. The Supreme Court has approved the use of racial preferences as part of a make-whole remedy imposed by courts after finding prior discrimination by the employer. In *Franks v. Bowman Transportation Co.*[57] the Court approved the award of "constructive" seniority to minorities and rejected the argument that the constructive seniority had an impermissible effect on the existing seniority of white employees. In *Franks* the lower courts had found that Bowman Transportation had discriminated by refusing to hire blacks who applied for jobs as over-the-road truck drivers.[58] The lower courts, however, had denied seniority relief to nonemployees who had applied and been rejected for employment, limiting relief to enjoining the employer from continuing the discriminatory practices and requiring notification to the minority nonemployees that they would be given priority in future hiring.[59] The Supreme Court granted certiorari on the issue of retroactive seniority awards[60] and ruled

undertaken without either a legislative grant or denial of the authority to act; and (3) executive actions that contradict the express or implied legislative will. 442 F.2d at 167-72. *See* 42 U.S.C. §§ 2000e-2(a), (h), (j) (1976).

54. The court stated that to read the statute as plaintiffs did would "attribute to Congress the intention to freeze the status quo and to foreclose remedial action under other authority designed to overcome existing evils. We discern no such intention from the language of the statute or from its legislative history." 442 F.2d at 173. The court cited Porcelli v. Titus, 302 F. Supp. 726 (D.N.J. 1969), *aff'd*, 431 F.2d 1254 (3d Cir. 1970); Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920 (2d Cir. 1968); and Offerman v. Nitkowski, 378 F.2d 22 (2d Cir. 1967), as having approved color consciousness as a remedial measure.

55. 442 F.2d at 173. Subsequent cases upholding similar affirmative action plans include Schlafly v. Volpe, 495 F.2d 273 (7th Cir. 1974); Southern Ill. Builders Ass'n v. Ogilvie, 471 F.2d 680 (7th Cir. 1972); Joyce v. McCrane, 320 F. Supp. 1284 (D.N.J. 1970); and Weiner v. Cuyahoga Community College Dist., 19 Ohio St. 2d 35, 249 N.E.2d 907 (1969).

56. 42 U.S.C. § 2000e-5(g) (1976).

57. 424 U.S. 747 (1976).

58. *Id.* at 751-52.

59. *Id.* at 752.

60. *Id.*

that an award of constructive or "fictional" seniority would be proper as the only means of achieving the make-whole purpose of Title VII.[61]

Defendants in *Franks* argued that the award of retroactive seniority would injure the economic interests of existing white employees by diminishing the value of their accrued seniority.[62] The Court pointed out that seniority is not an indefeasibly vested right and may be modified by statute and by collective bargaining agreements when strong public policy reasons justify modification.[63] Furthermore, the Court stated that denial of constructive seniority "on the sole ground that such relief diminishes the expectations of other, arguably innocent, employees would if applied generally frustrate the central 'make-whole' objective of Title VII."[64] Thus possible injury to white employees did not bar a grant of constructive seniority if the employer had discriminated against minorities. The Second Circuit in *Acha v. Beame,*[65] a suit alleging that the New York Police Department had discriminated against women, allowed constructive seniority not only to those women who had applied and been rejected but also to those who could show that they would have applied but were deterred by the knowledge of the employer's discrimination.

Although lower courts have ruled that preferential quotas do not constitute reverse discrimination when they are necessary to eradicate the effects of past discriminatory practices, the Second Circuit has shown recurrent concern with limiting quota relief. In *Kirkland v. New York State Department of Correctional Services,*[66] the Second Circuit indicated that court-imposed quotas were proper only if plaintiffs demonstrated a clear-cut pattern of long-standing and egregious racial discrimination by the employer and produced evidence that the quota would not affect an identifiable group of nonminority persons. The *Kirkland* court also examined the duration of the quota relief ordered by the lower court, which had set no time limit on the promotional quota.[67] Finding insufficient proof of prior discriminaton, the Second Circuit held that imposing "permanent quotas to eradicate the effects of past discriminatory practices" was unwarranted.[68] The Second Circuit again applied the

61. *Id.* at 767-68.
62. *Id.* at 773.
63. *Id.* at 778-79.
64. *Id.* at 774.
65. 531 F.2d 648 (2d Cir. 1976).
66. 520 F.2d 420 (2d Cir. 1975).
67. *Id.* at 428.
68. *Id.*

Kirkland standard in *EEOC v. Local 638,*[69] a suit against a union that had barred minorities from membership. In *Local 638* the lower court had ordered both the use of a goal to increase minority membership and the removal of one member of the union's governing committee with the position to be filled by a minority union member.[70] The Second Circuit invalidated the latter portion of the order but affirmed the use of a goal for increased minority membership because "entry-level goals have less identifiable impact upon reverse discriminatees and are therefore less objectionable as temporary remedies."[71] The Second Circuit thus has limited court-imposed quota relief to temporary programs that remedy egregious discrimination without an impact on identifiable white individuals. The Supreme Court, however, has not addressed the validity of these restrictions on court-ordered quota relief.

B. Consent Decree Affirmative Action Programs and Quotas

The Supreme Court has allowed to stand affirmative action programs imposed by consent decrees. Under a consent decree the employer does not concede that he has discriminated in the past, nor does the court make a finding of discrimination. Thus a consent decree involves no proof of prior discrimination as a prerequisite for affirmative action. The Court recently denied review of lower court refusals to modify a consent decree entered into by American Telephone & Telegraph[72] that provided for goals, targets and "affirmative action override" for promotions to improve the status of minority and female employees.[73] The lower court had held that section 706(g) of Title VII did not proscribe relief to classes containing nonidentifiable victims of specific discrimination.[74]

In *Jersey Central Power & Light Co. v. IBEW Local Unions,*[75] a suit to resolve a conflict between an affirmative action program entered into by a consent decree and the seniority provisions of a

69. 532 F.2d 821 (2d Cir. 1976).

70. *Id.* at 829.

71. *Id.* at 830. *See also* Chance v. Board of Examiners, 534 F.2d 993 (2d Cir. 1976); Acha v. Beame, 531 F.2d 648 (2d Cir. 1976); Patterson v. Newspaper & Mail Deliverers Union, 514 F.2d 767 (2d Cir. 1975); Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333 (2d Cir. 1973), *on appeal,* 497 F.2d 1113 (2d Cir. 1974), *cert. denied,* 421 U.S. 991 (1975).

72. EEOC v. American Tel. & Tel. Co., 556 F.2d 167 (3d Cir.), *cert. denied sub nom.,* Communications Workers v. EEOC, 98 S.Ct. 3145 (1978). The consent decree is reproduced at 8 LAB. REL. REP. (BNA) 431:73. *See also* 8 LAB. REL. REP. (BNA) 431:125 (steel industry consent decree); 8 LAB. REL. REP. (BNA) 431:53 (General Electric conciliation agreement). The steel industry consent decree received court approval in United States v. Allegheny-Ludlum Indus., 517 F.2d 826 (5th Cir.), *cert. denied,* 425 U.S. 944 (1975).

73. *See* Communications Workers v. EEOC, 98 S.Ct. 3145 (1978).

74. Communications Workers v. EEOC, 556 F.2d at 175.

75. 508 F.2d 687 (3d Cir. 1975), *cert. denied,* 425 U.S. 998 (1976).

collective bargaining agreement, the employer sought a declaratory judgment as to whether the consent decree or the collective bargaining agreement governed layoffs. The collective bargaining agreement provided for layoffs on a last-hired, first-fired basis.[76] Although all parties conceded that the layoff provision would have a disproportionate effect on minorities hired under the affirmative action plan,[77] the Third Circuit held that the seniority clause providing for layoffs in reverse order of seniority was permissible.[78] The Supreme Court, however, remanded *Jersey Central* for consideration in light of its holding in *Franks*.[79] This decision indicates that the *Franks* principle of constructive seniority is applicable to consent decrees as well as to judicially constructed affirmative action remedies. Under *Franks* existing seniority could be modified to place minorities in the seniority status that they would have had, absent the employer's prior discrimination. Thus, if given constructive seniority, minorities hired to meet consent decree goals and timetables would no longer be in the "first-fired" position in the event of layoffs.

In sum, the Supreme Court has rejected reverse discrimination attacks on affirmative action when the plans using racial preferences were judicially created or approved in consent decrees. When there had been prior discrimination, whether found by the court or tacitly conceded by the employer under a consent decree, the effect of the programs on white employees was not unlawful.

IV. Supreme Court Consideration of Reverse Discrimination in Nonemployment Contexts

A. *Reapportionment Under the Voting Rights Act*

In *United Jewish Organizations v. Carey*[80] members of a Hasidic Jewish community challenged a state redistricting plan instituted under the Voting Rights Act of 1965. The redistricting plan increased the voting strength of blacks and Puerto Ricans but decreased that of the Jewish group, which had constituted a majority in its former district but was now split between two districts having nonwhite majorities.[81] The Jewish group argued that the redistricting plan was unlawful because it diluted their voting power solely to achieve a racial quota and assigned voters to electoral districts

76. *Id.* at 691.

77. *Id.* The affirmative action plan had established certain goals and timetables for implementation.

78. *Id.* at 710.

79. 425 U.S. 987 (1976).

80. 430 U.S. 144 (1977).

81. *Id.* at 149-52.

on a racial basis.[82] The Supreme Court rejected their reverse discrimination argument, holding that a state could adopt a redistricting plan upon a ruling by the Attorney General or a court that the plan did not have a racially discriminatory purpose.[83] Furthermore, the Court stated that the use of racial considerations in drawing district lines in complying with the Voting Rights Act is not unconstitutional[84] and may be appropriate for purposes other than eliminating past discriminatory apportionment.[85] The Court further held that mere use of numerical quotas in redistricting did not violate the equal protection clause and that New York's redistricting plan did no more than was proper under the nonretrogression principle approved by the Court in earlier rulings.[86]

Of particular importance was the Court's recognition of the congressional intent behind the Voting Rights Act. The majority opinion noted that Congress had relied on the United States Commission on Civil Rights' findings that community redistricting plans endangered the voting strength of minorities by dividing them among predominantly white voting districts.[87] The Court noted prior cases, *Beer v. United States*[88] and *City of Richmond v. United States*,[89] in which it had established the principle that redistricting was not proper when it reduced or "would lead to a retrogression" in the voting strength of racial minorities.[90] The *Carey* Court reasoned that implicit in these decisions was the proposition that the fourteenth amendment did not bar a state from creating or preserving black majorities in particular districts.[91] Furthermore, the Court refused to confine the use of racial criteria for redistricting to the elimination of past discriminatory apportionment.[92] It should be noted that redistricting under the Voting Act is undertaken by the state, not by a private entity, and must be approved by either the attorney general or a court, differing in that respect from affirmative action voluntarily undertaken by an employer. Nonetheless, the Court's recognition that congressional findings may provide a basis

82. *Id.* at 152-53.
83. *Id.* at 157.
84. *Id.* at 160.
85. *Id.* at 161.
86. *Id.* at 165. *See* text accompanying notes 88-90 *infra*.
87. 430 U.S. at 158.
88. 425 U.S. 130 (1976). In the words of the Court: "Beer established that the Voting Rights Act does not permit the implementation of a reapportionment that 'would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'" 430 U.S. at 159.
89. 422 U.S. 358 (1975).
90. 430 U.S. at 159-61.
91. *Id.* at 161.
92. *Id.* The Court stated: "The permissible use of racial criteria is not confined to eliminating the effects of past discriminatory districting or apportionment." *Id.*

for affirmative action on behalf of minorities and that the use of racial criteria is not confined to remedying past discrimination is relevant in the employment context as well.

B. *Affirmative Action in Educational Admissions: The* Bakke *Ruling*

Regents of the University of California v. Bakke[93] presented the Court with a reverse discrimination challenge to an affirmative action program instituted voluntarily by a university in an effort to comply with the national policy of increased minority enrollment and with Title VI of the Civil Rights Act of 1964. Allan Bakke, a white applicant to the university's medical school, had been denied admission twice.[94] In both years, under its special admissions program for the "economically and/or educationally disadvantaged," the school admitted individuals with lower scores on the Medical College Admission Test, lower admissions "benchmark" ratings, and lower grade point averages than those of Bakke.[95] Bakke brought suit alleging violations of the equal protection clause and Title VI.[96] The California Supreme Court ordered Bakke's admission to the medical school and enjoined the university from considering race in subsequent admissions decisions.[97]

The United States Supreme Court affirmed that part of the California court's decision ordering Bakke's admission and finding the admissions program at issue unlawful, but ruled that the school could consider race in admissions under certain circumstances.[98] The Court was fragmented in its decision: four members—Chief Justice Burger, and Justices Stewart, Rehnquist, and Stevens—argued for full affirmation of the California ruling,[99] and four—Justices Brennan, White, Marshall, and Blackmun—asserted that the lower court decision should be reversed in its entirety.[100] The pivotal vote was cast by Justice Powell, who held that Bakke should be admitted and that the program at issue was unlawful but that race could be considered as a factor in achieving diversity in a student body.[101]

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93. 98 S.Ct. 2733 (1978).

94. *Id.* at 2741.

95. *Id.* at 2741-42. White students could and did apply to the special admissions program. *Id.* at 2742 n.5.

96. *Id.* at 2742.

97. *Id.* at 2743-44.

98. *Id.* at 2739.

99. *Id.*

100. *Id.*

101. *Id.*

(1) The Powell Opinion

Writing for the Court, Justice Powell applied equal protection analysis to the Title VI issue.[102] He began by questioning whether Title VI imposed a "color-blind" standard.[103] After examining the legislative history Justice Powell concluded that Congress had not considered the possibility that preferences for minority citizens might arise in the future, but rather had focused on the elimination of existing discrimination against minorities by institutions receiving federal funds.[104] Justice Powell further interpreted the legislative history as indicating that Congress intended Title VI to incorporate the constitutional equal protection standard and therefore concluded that Title VI proscribed "only those racial classifications that would violate the Equal Protection Clause."[105]

Having reached this conclusion, Justice Powell next considered the appropriate degree of judicial scrutiny. He rejected the argument that the Court should not apply strict scrutiny because Bakke, a white male, was not a member of a "discrete and insular minority": discreteness and insularity were not prerequisites to finding a classification invidious.[106] Any classification based on race, Justice Powell stated, is inherently suspect and subject to strict scrutiny.[107] Justice Powell further rejected the legitimacy of heightened judicial protection for minority groups under the equal protection clause.[108] On this point, Justice Powell disagreed with the four Justices who would have reversed the lower court ruling in its entirety. As Justice Powell read their opinions, those Justices would require only that the group receiving preferential treatment had been the victim of past societal discrimination and that it be reasonable to believe that the disparate impact of the program was the ultimate result of that societal discrimination.[109] Justice Powell found this theory excessively broad and speculative because it could be applied to numerous ethnic and racial groups and required spec-

102. Title VI, 42 U.S.C. § 2000d (1976), provides that no person shall be excluded on grounds of race from any program receiving federal funds. Justice Powell did not specify whether he was treating the issue of Bakke's exclusion from the school as a constitutional issue or using the equal protection analysis as a guide to the proper interpretation of the statute in question. Thus whether the decision is constitutional or statutory remains unclear.

103. 98 S.Ct. at 2745. Justice Powell also considered whether Title VI created a private right of action and assumed, for the purpose of this suit only, that it did. *Id.* at 2744-45.

104. *Id.* at 2746. Justice Powell stated: "There simply was no reason for Congress to consider the validity of hypothetical preferences that might be accorded minority citizens; the legislators were dealing with the real and pressing problem of how to guarantee those citizens equal treatment." *Id.*

105. *Id.* at 2747.

106. *Id.* at 2748.

107. *Id.* at 2749.

108. *Id.* at 2748-52.

109. *Id.* at 2751 n.36.

ulation as to a causal link between general discrimination and a specific program.[110] Such an approach would compel the Court to make political and sociological determinations as to the extent of societal discrimination toward a given minority group, the degree of harm to the group, and the point at which the prejudice and harm exceed a tolerable level.[111] The only principled basis on which to apply the equal protection clause, Justice Powell asserted, was to guarantee to every individual, whatever his race, the same degree of judicial scrutiny of a racial classification which impinges on his personal rights— "a judicial determination that the burden he is asked to bear . . . is precisely tailored to serve a compelling governmental interest."[112]

Justice Powell next rejected the applicability of school desegregation, employment discrimination, and sex discrimination cases in which, the university argued, the Court had applied a lesser degree of scrutiny. According to Justice Powell, racial classifications in the school cases were allowed in order to remedy constitutional violations determined by the courts.[113] Similarly, the employment decisions rested on findings by the courts, legislature, or administrative agencies that the employer or industry had discriminated against minorities.[114] The sex discrimination cases were not analogous because the Court had never found sex to be a suspect classification and because, in Justice Powell's view, gender-based classifications created more manageable issues than race-based preferences.[115]

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110. *Id.*

111. *Id.* at 2751-52. In Justice Powell's words:

> There is no principled basis for deciding which groups would merit "heightened judicial solicitude" and which would not. Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expenses of individuals belonging to other groups. Those classifications would be free from exacting judicial scrutiny. As these preferences began to have their desired effect, and the consequences of past discrimination were undone, new judicial rankings would be necessary. The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence—even if they otherwise were politically feasible and socially desirable.

Id.

112. *Id.* at 2753.

113. *Id.* at 2754.

114. *Id.* at 2754-55. The employment cases cited were Franks v. Bowman Transp. Co., 424 U.S. 747 (1975); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Associated Gen. Contractors, Inc. v. Altschuler, 490 F.2d 9 (1st Cir. 1973), *cert. denied,* 416 U.S. 957 (1974); Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333 (2d Cir. 1973), *on appeal,* 497 F.2d 1113 (2d Cir. 1974), *cert. denied,* 421 U.S. 991 (1975); Carter v. Gallagher, 452 F.2d 315, *modified on rehearing en banc,* 452 F.2d 327 (8th Cir. 1972); Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971).

115. 98 S.Ct. at 2755. Justice Powell found gender-based classifications "less likely to

Justice Powell also addressed the university's argument that recent decisions under Title VI and the Voting Rights Act expressed judicial approval of preferences granted to minorities without application of strict scrutiny.[116] Justice Powell noted three elements in those decisions that were absent from *Bakke:* an administrative finding of discrimination, a total foreclosure of minorities from a right, and nonexistent or innocuous effects of the remedy on the majority race.[117] In *Bakke* no governmental branch had found that the university had discriminated, minority students were not foreclosed totally from medical school, and the program excluded some applicants from sixteen places in the class.[118]

Although Justice Powell stressed findings of specific prior discrimination as prerequisites for permissible affirmative action, he suggested in a footnote the possibility that a more general finding might be sufficient. He recognized "the special competence of Congress to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate measures."[119] Thus Justice Powell might have read Title VI as embodying a congressional finding of past discrimination and a congressional mandate for correction of the effects of discrimination.[120] This reading might have enabled Justice Powell to rule in favor of the university's voluntary affirmative action program; given an appropriate determination of prior discrimination, the school and employment cases distinguished by Justice Powell would have justified not applying strict scrutiny.

Justice Powell, however, was unable to accept the university's voluntary implementation of a program to increase minority student enrollment without an accusation or finding of past racial discrimination, despite the presence of statistics showing that minority admissions were almost nonexistent prior to the affirmative action program.[121] Justice Powell argued that an individual state institution lacked competence to make a finding of discrimination and to establish a remedial program: "isolated segments of our vast gov-

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create . . . analytical and practical problems" than racial preferences because "[w]ith respect to gender there are only two possible classifications." *Id.*

116. *Id.* The cases cited were Lau v. Nicholas, 414 U.S. 563 (1974), which had required that the San Francisco school system provide special remedial English instruction for students of Oriental extraction, and United Jewish Organizations v. Carey, 430 U.S. 144 (1977), in which the Court approved a voting reapportionment plan that used racial considerations.

117. 98 S.Ct. at 2755-56.

118. *Id.*

119. *Id.* at 2755 n.41.

120. Justice Powell himself appeared to recognize that Congress had made a finding of societal discrimination and passed legislation to remedy it. *See id.* at 2745-47.

121. *Id.* at 2739.

ernmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria."[122]

Thus Justice Powell concluded that in the absence of a legislative, executive, or judicial finding of prior discrimination, a state program established under Title VI that employs a racial classification is subject to strict scrutiny.[123] In applying strict scrutiny, Justice Powell examined four "compelling state interests" advanced by the university. First, he stated that the need to attain a specific percentage of minority students in the student body was not a substantial interest and was invalid as discrimination for its own sake.[124] Second, although recognizing a substantial state interest in ameliorating the effects of discrimination, Justice Powell held that interest inapplicable because specific prior discrimination had not been established.[125] Third, Justice Powell found that the state interest in improvement of health care services to underserved communities was insufficient to meet strict scrutiny because the university did not show that their affirmative action program would bring about any improvement.[126]

Last, however, Justice Powell agreed that diversity of a student body was a compelling state interest sufficient to justify racial classification in admissions programs.[127] Justice Powell viewed the university's freedom to choose a diverse student body as an aspect of academic freedom, protected under the first amendment.[128] The program at issue in *Bakke,* however, failed the second part of the strict scrutiny test: the method of attaining the compelling state interest of diversity was not the least restrictive alternative for reaching that goal.[129] Justice Powell cited the Harvard admissions program as an example of permissible use of race in admissions.[130] The Harvard program treats race as a "plus" factor, but uses it as only one of several factors in admissions decisions.[131] Thus Justice Powell concluded that an educational institution may consider the

122. *Id.* at 2758-59.

123. It remains unclear whether the program was subject to strict scrutiny because it allegedly violated the equal protection clause or because it allegedly violated Title VI, which Justice Powell read as proscribing "only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." *Id.* at 2747.

124. *Id.* at 2757.

125. *Id.* at 2757-59.

126. *Id.* at 2759-60.

127. "[A]ttainment of a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education." *Id.* at 2760.

128. *Id.*

129. *Id.* at 2761-64.

130. *Id.* at 2762-64.

131. *Id.* at 2762.

race of its applicants and may seek deliberately a racially diverse student body through a "properly devised admissions program."[132]

(2) The Pro-Affirmative Action Opinions

Four of the Justices addressing Bakke's reverse discrimination challenge would have found the university's affirmative action program statutorily and constitutionally permissible.[133] Justice Brennan found voluntary affirmative action under Title VI a proper remedy for the effects of societal discrimination.[134] The legislative history of Title VI, according to Justice Brennan, showed that Congress intended to give the executive branch the power to end federal funding of programs that discriminated against minorities.[135] Congress further intended that compliance should be voluntary and could include "race-conscious remedies."[136] Justice Brennan concluded that institutions subject to Title VI should be given "considerable latitude" in their voluntary efforts to prevent the exclusion of minorities.[137]

Justice Brennan then turned from Title VI to the equal protection issue. Neither strict scrutiny nor the rational basis test was appropriate: Justice Brennan considered that the university's purpose to remedy the effects of past societal discrimination to be sufficient justification "where there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities to the medical school."[138] Justice Brennan reasoned that when Congress has authorized race-conscious relief, findings of specific prior discrimination are not necessary so long as the beneficiaries of the affirmative action are within a class of persons who have suffered discrimination in society at large.[139] Although questioning the existence of a private right of action under Title VI,[140] Justice White concurred with Justice Brennan and with those portions of Justice Powell's opinion that recognized the right of a university admissions program to use race as a factor.[141]

After tracing the history of discrimination against minorities,

132. *Id.* at 2764.

133. Justices Brennan, White, Marshall, and Blackmun would have reversed the California Supreme Court ruling in its entirety. *Id.* at 2767.

134. *Id.* at 2768.

135. *Id.* at 2768-74.

136. *Id.* at 2772.

137. *Id.*

138. *Id.* at 2789.

139. *Id.* at 2791.

140. *Id.* at 2794-98.

141. *Id.* at 2798 n.7.

Justice Marshall rejected the use of the equal protection clause as a barrier to affirmative action.[142] He concluded that individuals receiving preferential treatment under affirmative action need not have been specific victims of direct discrimination; being members of a minority group that had suffered pervasive, long-term discrimination was enough.[143]

Justice Blackmun argued that, even given Justice Powell's thesis that the fourteenth amendment "embraces a 'broader principle' " than its original theory of protection for blacks, the amendment did not prohibit the affirmative action program at issue.[144] For Justice Blackmun, the broadening of the fourteenth amendment did not alter its original purpose of preventing discrimination against blacks, a purpose promoted by affirmative action.[145]

Thus four Justices rejected both the reverse discrimination challenge to voluntary affirmative action and the use of the equal protection clause and strict scrutiny to block voluntary race-conscious remedies aimed at alleviating the continuing effects of recognized societal discrimination. The effect of affirmative action on whites was neither a denial of equal protection nor a violation of Title VI's prohibition of discrimination based on race.

(3) The Anti-Affirmative Action Position

The four Justices who opposed the affirmative action program gave the controversy and the statute a narrow reading, never reaching the equal protection question.[146] Justice Stevens, who wrote the opinion of this faction of the Court, defined the controversy as one between an individual and a school that had denied him admission and thus found no need to evaluate the permissibility of racial classifications or preferences in general.[147] For Justice Stevens, the statement in section 601 of Title VI that no person shall be discriminated against on the ground of race was an absolute bar to excluding

142. *Id.* at 2798-2803.

143. *Id.* at 2804-06.

144. *Id.* at 2807.

145. *Id.* In Justice Blackmun's words:

> This enlargement does not mean for me, however, that the Fourteenth Amendment has broken away from its moorings and its original intended purposes. Those original aims persist. And that, in a distinct sense, is what "affirmative action," in the face of proper facts, is all about. If this conflicts with idealistic equality, that tension is original Fourteenth Amendment tension, constitutionally conceived and constitutionally imposed, and it is part of the Amendment's very nature until complete equality is achieved in the area.

Id.

146. Chief Justice Burger, Justices Stevens, Stewart, and Rehnquist would have affirmed the California Supreme Court opinion in its entirety. *Id.* at 2815.

147. *Id.* at 2810.

anyone on racial grounds from a program receiving federal funds.[148] Justice Stevens concluded that Bakke had been excluded from medical school because he was white and thus that the school had violated Title VI.[149] It should be noted, however, that the university did not bar Bakke from applying to both the regular and special admissions programs. In fact, a number of whites did apply to both.[150] Given Bakke's scores in relation to those of disadvantaged applicants admitted, Bakke would have had a significantly better chance of being admitted had he been both black and economically or educationally disadvantaged. The university program, however, would have provided no special advantage for Bakke had he been black but from a middle-class background. Thus, Justice Stevens' conclusion that Bakke's exclusion was based solely on race is not entirely justified.

(4) Analytical Difficulties in the *Bakke* Holding

The ruling in *Bakke* offered support to both advocates and opponents of affirmative action. The decision reasserted the propriety of affirmative action and quota relief when based on a finding that the entity instituting the program had discriminated in the past. It also approved the voluntary use of race-conscious criteria in educational admissions. At the same time, the decision prohibited the specific voluntary affirmative action program at issue and its use of quotas.

The emphasis on a finding of prior discrimination as a prerequisite to affirmative action with quota relief raises two related questions: first, who is competent to make such a finding; and second, could either party to a reverse discriminaton suit reasonably be expected to prove prior discrimination?

Justice Powell did not insist that the finding of prior discrimination be made only by a court, recognizing that legislative and administrative findings had been sufficient in employment and school discrimination cases.[151] In the context of educational admissions, however, he refused to recognize Title VI and the Civil Rights Act as embodying a legislative mandate and as delegating to the EEOC the power to make rules and guidelines for affirmative action.

The validity of requiring a finding of prior discrimination in order to reject a reverse discrimination challenge must be evaluated in terms of whether either party to the suit will introduce such

148. *Id.* at 2811.
149. *Id.* at 2815.
150. *Id.* at 2740 n.5.
151. *See* notes 119-20 *supra* and accompanying text.

evidence.[152] In a *Bakke*-type suit, neither party has reason to try to establish past discrimination against minorities. The plaintiff clearly would avoid proof of prior discrimination that might justify the challenged affirmative action program and thereby defeat his reverse discrimination claim. The defendant, on the other hand, could not assert his prior discrimination as a defense because such an admission would expose him to suits by minorities and the government. Thus the key element that Justice Powell requires for quota-type affirmative action will be absent almost inevitably from reverse discrimination litigation.

A further issue needing examination is Justice Powell's treatment of Title VI and the equal protection clause as coextensive and coterminous.[153] In Justice Powell's analysis the statutory issue was imperceptibly transformed into the constitutional issue, and any logical distinction between statutory and constitutional grounds for the ruling became blurred. The test for a Title VI violation thus became identical to that for an equal protection violation. Whether the equal protection clause strict scrutiny test is appropriate in evaluating alleged violations of other portions of the Civil Rights Act remains an open question.

V. Voluntary Affirmative Action in Employment: *Weber v. Kaiser Aluminum & Chemical Corp.*

The Fifth Circuit recently analyzed the validity of racial preferences in an affirmative action program established by collective bargaining agreement in *Weber v. Kaiser Aluminum & Chemical Corporation.*[154] Kaiser Aluminum and the United Steelworkers of America had agreed in their collective bargaining agreement to take minority employees into on-the-job training programs on a one-to-one ratio with whites in order to increase the number of minority members of craft families.[155] Individual Kaiser plants were to use the program until the proportion of minority craft workers at the plant was roughly equal to the percentage of minorities in the relevant available work force.[156] Separate seniority lists—one for whites, one for blacks—were established solely for this program.[157] Brian Weber, a white employee at Kaiser's Gramercy, Louisiana, plant

152. *See* Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 231 (5th Cir. 1977) (Wisdom, J., dissenting), *cert. granted,* 47 U.S.L.W. 3401-02 (December 12, 1978).

153. *See* notes 102-12 *supra* and accompanying text.

154. 563 F.2d 216 (5th Cir. 1977).

155. *Id.* at 218. The agreement became effective in February 1974.

156. *Id.*

157. *Id.* All other seniority benefits were conferred on the basis of a single seniority list. The two lists were used only to determine eligibility for the special on-the-job training program. *Id.* at 218 n.1.

brought a class action suit under Title VII charging that blacks with less seniority had obtained positions in the training program.[158] The district court found that the program constituted unlawful reverse discrimination and enjoined the use of the quota at the Gramercy plant.[159] On appeal the Fifth Circuit affirmed.[160]

The Fifth Circuit defined the problem as properly distinguishing between permissible affirmative action and unlawful reverse discrimination.[161] The court examined the question solely in statutory terms; because the employer and union were private entities, the constitutional equal protection issue was not raised, obviating any need to look to equal protection analysis as a guide to statutory analysis. The Fifth Circuit read Title VII as permitting racial preference only as a make-whole remedy for victims of the employer's prior discrimination.[162] According to the *Weber* court, the remedial element was the common factor in previously approved affirmative action and quota plans.[163] The *Weber* court therefore concluded that "[q]uotas imposed to achieve the 'make whole' objective of Title VII rest on a presumption of some prior discrimination."[164] The court, however, rejected the lower court's holding that only the judiciary could impose a quota. Noting Title VII's emphasis on voluntary compliance, the Fifth Circuit cited federal court approval of consent decrees that included quotas.[165]

The Kaiser affirmative action plan was neither court-imposed nor developed as part of a consent decree after an administrative investigation. The employer and union instituted the plan in an effort to comply with Executive Order 11,246, a purpose which the Fifth Circuit found inadequate to justify the use of racial preferences detrimental to white workers in the absence of proof of prior discrimination by the employer.[166] The court relegated to a footnote the argument that, because traditional craft union discrimination had prevented minority workers from gaining the experience required for on-the-job training before 1974, the affirmative action

158. *Id.* at 218.

159. 415 F. Supp. 761, 770 (E.D. La. 1976).

160. 563 F.2d at 227.

161. *Id.* at 219. The court posed the question thus: "When does preferential treatment become illegal reverse discrimination?" *Id.* The phrasing of the question presupposed that reverse discrimination creates a valid cause of action.

162. *Id.* at 226.

163. *Id.* at 219-21.

164. *Id.* at 221.

165. *Id.* at 223-24. The district court had distinguished between the power of a court to establish affirmative action remedies and the right of other entities to do so, stating that great caution must be used in imposing quota systems and "*only the judiciary* should be entrusted with fashioning and administering such relief." *Id.* at 223 (emphasis in original).

166. *Id.* at 226-27.

plan was necessary to ameliorate the present effects of past union discrimination.[167] Furthermore, the court confined its inquiry to the Gramercy plant alone: in the period from 1964 to 1974, twenty-six white employees and two black employees attained craft positions through Kaiser's pre-affirmative action training program.[168] The court found this sampling too small to establish that the craft-experience requirement discriminated against blacks, particularly in the light of evidence that Kaiser actively recruited black employees in the 1964-1974 period.[169] While conceding that the lack of black craft workers may have been due to societal discrimination, the court required that responsibility for discrimination be assigned directly to the employer in order to justify affirmative action.[170] The court disregarded any question of prior discrimination by the union, also a party to the suit and to the collective bargaining agreement, as a justification for the program.[171]

According to the Fifth Circuit, Title VII forbids preferences for either minority or majority groups based on race but allows "preferences favoring victims of discrimination."[172] The court distinguished a preference in favor of an entire group from one granted to a specific individual, reasoning that the latter is justified not because the victim of discrimination was a member of a minority race, but because he was a victim.[173] When the preference compensates a victim, its harmful effect on another employee does not invalidate it.[174] Furthermore, the court reasoned that if race was the basis of the initial arbitrary deprivation, race may also be the arbitrary factor by which the formerly favored employees are deprived of advantages unfairly gained.[175]

The conclusion that quotas are permissible as remedies for specific individual injuries led the court to reject societal discrimination as a sufficient basis for racial preferences. The court stated that Title VII strictly forbids preferences based on race except "to restore employees to their rightful places within a particular employment scheme."[176] In the Fifth Circuit's view, those minority workers admitted to the training program with less seniority than whites also seeking admission had not been displaced previously from their

167. *Id.* at 224 n.13.
168. *Id.* at 224-26.
169. *Id.* at 226.
170. *Id.* at 225-26.
171. *Id.* at 224 n.13.
172. *Id.* at 224.
173. *Id.* at 224-25.
174. *Id.* at 225.
175. *Id.*
176. *Id.*

rightful places within this specific employment scheme and therefore had no right to be advanced past their white competitors:[177] "Whatever other effects societal discrimination may have, it has had . . . *no effect* on the seniority of any party here."[178] For that reason, the court found the affirmative action plan unlawful as it affected seniority at the Gramercy plant.[179]

Thus the Fifth Circuit resolved the affirmative action/reverse discrimination question by construing Title VII as a broad prohibition of any racial preference, whether granted to majority or minority races. Only a finding of identifiable discrimination against specific victims can justify what otherwise would be an unlawful preference: the finding of specific prior discrimination transforms an illegal preference into a permissible make-whole remedy. Societal discrimination, according to the *Weber* court, is not sufficiently related to the specific employment situation to work this transformation.

The final point considered by the court was the contention that Executive Order 11,246 made the plan legal even if Title VII did not sanction it.[180] The Fifth Circuit found the mandate for affirmative action in Executive Order 11,246 to be in direct conflict with their reading of Title VII as barring racial preferences. Previous cases approving the executive order had not conflicted with the statute because there had been findings in each case of prior discrimination.[181] In the absence of such a finding in *Weber*, compliance with Executive Order 11,246 provided no defense to a reverse discrimination challenge;[182] the executive order must give way to the statute when the two conflict.[183] The Fifth Circuit therefore ruled against the affirmative action plan as it operated in Kaiser's Gramercy plant.

In a strong dissent, Judge Wisdom argued for approval of reasonable voluntary affirmative action.[184] Judge Wisdom first contended that both the employer and the union were under pressure from the government to take affirmative action and that both feared private suits based on past exclusion of blacks when they negotiated the agreement that included the plan at issue.[185] Furthermore, the plan was modelled on a consent decree plan in the steel industry approved by the Fifth Circuit in *United States v. Allegheny-*

177. *Id.*
178. *Id.* at 226 (emphasis in original).
179. *Id.* at 225-26.
180. *Id.* at 226.
181. *Id.* at 226-27.
182. *Id.* at 227.
183. *Id.*
184. *Id.* at 228-29.
185. *Id.*

Ludlum Industries.[186] Judge Wisdom next argued that the majority's standard for evaluating the voluntary affirmative action plan—whether a court would have found prior discrimination and imposed a remedial plan—was too stringent.[187] According to Judge Wisdom, an employer often decides to institute an affirmative action plan because a realistic appraisal of his work force indicates possible liability to discrimination suits instituted by minorities or the government.[188] If the effort to avoid that liability opens the way to reverse discriminaton charges, the employer is placed in a dilemma.[189] Judge Wisdom, therefore, would require only that the voluntary affirmative action plan be "a reasonable remedy for an arguable violation of Title VII."[190] Creation of this "zone of reasonableness," Judge Wisdom asserted, would encourage private voluntary action whereas the majority holding would discourage it.[191]

The plan at issue in *Weber* fell within Judge Wisdom's zone of reasonableness. The dissent pointed out that Kaiser's past discrimination had not been litigated because no party to the suit had reason to raise the issue.[192] Judge Wisdom examined three possible Title VII violations that might have supported a finding of prior discrimination: possible discrimination against blacks applying for unskilled jobs,[193] a pre-1974 violation in the craft-experience requirement for entry into the training program,[194] and an arguable violation in requiring any training for certain craft jobs.[195] Thus Kaiser had acted reasonably in adopting a plan to forestall possible liability for Title VII violations.[196] After evaluating the potential risk of a discrimination suit, Judge Wisdom analyzed the reasonableness of the remedy adopted, listing four factors that established the plan as a reasonable response: its similarity to quotas approved by the courts,[197] the union's status as a representative of all employees in

186. 517 F.2d 826 (5th Cir. 1975).
187. 563 F.2d at 229-30.
188. *Id.* at 230-31.
189. *Id.* at 231.
190. *Id.* at 230.
191. *Id.* Judge Wisdom noted that:

> The majority's standard will lead to less voluntary compliance with Title VII. Employers and unions would be liable unless they instituted exactly what a reviewing court felt should have been instituted. They could either bring declaratory judgment actions, or wait to be sued. Under either alternative, our dockets would be filled with more Title VII suits, the Congressional emphasis on voluntary conciliation would be frustrated, and the elimination of the blight of racial discrimination would be still further blighted.

Id.
192. *Id.* at 231.
193. *Id.*
194. *Id.* at 231-32.
195. *Id.* at 232.
196. *Id.*
197. *Id.*

negotiating the plan,[198] the minimal impact on white workers because the plan created entirely new rights or expectations,[199] and the guarantee of significant participation by whites because they were guaranteed half of the places in the training program.[200]

Judge Wisdom also rejected the majority's position on societal discrimination and found the plan at issue "a proper response to societal discrimination against blacks."[201] For Wisdom, an employer's effort to compensate an employee for societal discrimination does not violate Title VII, which does not prohibit "restorative justice."[202] When a history of discrimination against minorities exists, such as that found in the craft trades, Judge Wisdom would approve the use of racial preference to eradicate societal discrimination.[203]

Wisdom's final disagreement with the majority centered on the validity of Executive Order 11,246.[204] He rejected the majority's conclusion that Title VII conflicted with the affirmative action requirement of the executive order.[205] Affirmative action plans instituted under the executive order have survived legal challenges in a series of cases, and Congress itself, in the course of amending Title VII in 1972, gave tacit approval to the affirmative action mandate of Executive Order 11,246.[206] Thus Judge Wisdom would permit voluntary affirmative action programs using quotas in employment and would reject the reverse discrimination rationale that underlay the majority opinion in *Weber*.

VI. Conclusion: Employer Affirmative Action

A. *Strict Scrutiny Analysis in the Employment Context*

Bakke defined certain aspects of permissible voluntary affirmative action in educational admissions: a school may consider race as a factor in admissions, but absent a finding that a university has engaged in past discrimination, a quota system is unlawful. Application of *Bakke*, a case decided under Title VI, to the affirmative action/reverse discrimination issue in the employment context re-

198. *Id.* at 232-33.
199. *Id.* at 233-34.
200. *Id.* at 234.
201. *Id.*
202. *Id.* at 235.
203. *Id.* at 235-36.
204. *Id.* at 236-37.
205. *Id.* at 237.
206. *Id.* at 237-38. Judge Wisdom cited the congressional rejection of proposed amendments that would have prohibited the use of quotas and goals under Executive Order 11,246 and concluded that Congress had ratified plans like the Philadelphia Plan. *See* Part II(C) *supra*.

quires careful examination. The Justices who would have affirmed in its entirety the California Supreme Court ruling in *Bakke* looked solely at the Title VI prohibition of discrimination based on race and held the program unlawful because it excluded some applicants on racial grounds. Those Justices conceivably might interpret and apply Title VII in the same manner in an employment reverse discriminaton context and conclude that because the statute forbids discrimination on grounds of race, a voluntary affirmative action plan using quotas is unlawful racial discrimination. Similarly, the four Justices who approved of the university's affirmative action program might follow the same reasoning in an employment suit and allow voluntary race-conscious measures to remedy underrepresentation of minorities in the work force. Thus, in the employment context as well as in *Bakke,* the decisive question is whether the position enunciated by Justice Powell applies to Title VII. In equating Title VI and the equal protection clause, Justice Powell adopted the constitutional strict scrutiny standard as the statutory standard for a Title VI violation. Because Title VI and Title VII are parts of a single legislative package and because both contain language prohibiting discrimination based on race, it can be argued that affirmative action/reverse discrimination suits brought under Title VII are subject to the same analysis as such suits brought under Title VI. If Justice Powell enunciated the Court's approach not just to Title VI but to the Civil Rights Act of 1964 as a whole, then strict scrutiny has become the standard for Title VII as well.

Application of a strict scrutiny standard would require that proponents of an affirmative action program in employment demonstrate that the program fulfills a compelling interest. In *Bakke* Justice Powell found a compelling state interest in the protection of academic freedom and the promotion of diversity among the student body.[207] This finding enabled Justice Powell to rule that consideration of race as a factor in admissions was neither unlawful nor unconstitutional. The program at issue, however, was invalid because, in Justice Powell's opinion, it was not the least restrictive means of achieving a diverse student body.

Assuming that strict scrutiny is the proper test, the question arises whether any comparable interest in the employment context would meet the constitutional standard. Clearly, there is no special argument for diversity within a work force as there is for diversity within a student body. The national policy in favor of allowing the free collective bargaining process to determine labor-management relationships, however, may provide the compelling interest compa-

207. 98 S.Ct. at 2760-61.

rable to academic freedom needed to meet the strict scrutiny standard. The Supreme Court has recognized and approved the principle of industrial self-determination established by Congress in the National Labor Relations Act.[208] Restrictions on voluntary affirmative action programs would interfere with that self-determination.

The affirmative action plan in *Weber* established a special seniority system solely for selections to an on-the-job training program.[209] Past decisions of the Supreme Court explicitly approved modification of seniority systems either by statute or collective bargaining agreement in order to further strong public policy interests. In approving "constructive" seniority in *Franks v. Bowman Transportation Co.*, the Court noted that it had previously upheld a congressional award of retroactive seniority to employees returning to their former jobs after military service despite its effect on the seniority expectations of other workers.[210] Moreover, the *Franks* Court noted that a collective bargaining agreement could go beyond what the statute required in "enhancing the seniority status of certain employees for purposes of furthering public policy interests" despite the detrimental effect of the enhanced seniority on other workers' expectations based on a previous seniority plan.[211] The *Franks* Court concluded that an employer and union could modify a seniority system in order to further the national policy of ameliorating the effects of discrimination.[212]

Having recognized a compelling interest in industrial self-determination, traditional strict scrutiny would then examine whether a quota was the least restrictive means by which an employer and union could attain a racially balanced workforce. In

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208. *See, e.g.*, Franks v. Bowman Transp. Co., 424 U.S. 747, 779 (1976); Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50, 61-70 (1975); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

209. 563 F.2d at 218 n.1.

210. 424 U.S. at 778. The Court cited Tilton v. Missouri Pac. Ry., 376 U.S. 169 (1964), and Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275 (1946).

211. 424 U.S. at 778. The Court cited Ford Motor Co. v. Huffman, 345 U.S. 330 (1953), in which it had approved a provision of a collective bargaining agreement giving constructive seniority including time in the military to new employees as well as to former employees returning to their jobs.

212. 424 U.S. at 779. The Court cited Pellicer v. Brotherhood of Ry. & S.S. Clerks, 217 F.2d 205 (5th Cir. 1954), *cert. denied*, 349 U.S. 912 (1955), in which the Fifth Circuit had approved a collective bargaining agreement modification of seniority that integrated black employees and white employees and consequently diminished the seniority expectations of white employees. The *Pellicer* court stated:

> The law is that changes effectuating differentiations or unequal treatment among employees are not invalid unless some clearly expressed public policy is contravened; and that in the absence of fraud or bad faith the courts will not inquire into the motives which prompt such changes, nor will they substitute their judgment for that of the bargaining agency on the reasonableness of the modifications.

Id. at 206.

Bakke Justice Powell found the university's special admissions plan to be a quota system and therefore deemed it overly restrictive. He offered as an example of a permissible approach the Harvard admissions program, in which race is only one factor among many considered.[213] Justice Brennan, however, remained unconvinced by the distinction between admitting a specific number of qualified minority applicants and using race as a plus factor in admissions. He concluded that "[f]or purposes of constitutional adjudication, there is no difference between the two approaches."[214] At most, the distinction is between a firm quota and a flexible quota. In contrast to the University of California's reserving sixteen places for disadvantaged applicants, the Harvard plan deliberately avoids "target-quotas."[215] Yet the very existence of the plan presupposes a conscious, if unspoken, decision that a certain proportion of the student body will be qualified minority applicants. The result in either case is that some qualified individuals within a larger group of applicants receive a preference based on race.

Although the use of a flexible quota may be feasible in educational admissions, the Harvard approach is impracticable for an employer. He cannot give the time to evaluating each applicant that a university admissions committee gives. Nor are the multiple factors that an admissions committee considers relevant to employment.[216] The primary concern is whether an employee is qualified to do the job. Among applicants having the basic ability to perform the work or to learn the job, race may be the single distinguishing factor. At that point, the use of a percentage or a one-to-one ratio until a balanced workforce is attained is appropriate, and a firm quota is the least restrictive alternative.

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213. 98 S.Ct. at 2762-63. Justice Powell described the Harvard program thus:

> In such an admissions program, race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. . . . In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight. Indeed, the weight attributed to a particular quality may vary from year to year depending upon the "mix" both of the student body and the applicants for the incoming class.

Id. (footnotes omitted).

214. *Id.* at 2793.

215. *Id.* at 2762. The Harvard plan states that "10 or 20 black students" would not be enough to achieve diversity in the student body. By this statement, the plan implicitly acknowledges that it aims at some larger number. *Id.* at 2765-66.

216. The Harvard program considers such varied factors as regional background, musical talent, artistic talent, athletic ability, scientific aptitude, as well as race and ethnic origin, in choosing a diverse student body. *Id.* at 2765.

B. *The Statutory Standard for Private Action Under Title VII*

Although the equal protection strict scrutiny test can be satisfied, it is inappropriate in the Title VII context. The object of strict scrutiny is to find a compelling *state* interest that justifies the challenged classification, yet affirmative action in employment results from the decisions of a *private* individual or entity, the employer. Under the facts of *Bakke*, the Title VI and equal protection issues were closely related because the institution accused of discrimination was a state school.[217] The requisite state action to trigger the constitutional standard of strict scrutiny was present. *Weber*, on the other hand, presents action by a private employer and a union. A standard premised on state action and requiring demonstration of a compelling state interest is inapposite when the challenged action is undertaken voluntarily by private entities.[218]

Significantly, the Supreme Court itself ruled in *Washington v. Davis*[219] that the standards for an equal protection violation and for a Title VII violation were not the same: plaintiffs seeking to prove a constitutional violation must prove an intent to discriminate, but a showing of disparate impact is sufficient to establish a statutory violation. Thus the Court has distinguished between applicable standards for Title VII and the equal protection clause and held that the two should not be equated.

Because the *Bakke* strict scrutiny approach should not apply to Title VII, the Court must adopt a new standard for determining whether a voluntary affirmative action program is permissible. Judge Wisdom's dissent in *Weber* suggested a zone of reasonableness test, under which an employer's affirmative action plan is per-

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217. *Id.* at 2756.

218. Although some might argue on the basis of Shelley v. Kraemer, 334 U.S. 1 (1948), and Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961), that the effort to comply with Executive Order 11,246 introduces a sufficient element of government involvement to support a state action theory, more recent Supreme Court rulings have indicated that governmental approval or regulation does not convert action by a private entity into state action. In Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), for example, the Court held that regulation by a state liquor control board did not transform the discriminatory guest policies of Moose Lodge into state action violating the fourteenth amendment. Although the liquor control board licensed the club, the club itself developed its own policy of excluding blacks. More recently, in Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), the Court found that governmental authorization or approval of privately initiated action did not convert that action into state action. Executive Order 11,246 might be challenged as state action violating the fourteenth amendment; the lower courts, however, have rejected equal protection challenges to the executive order and quota plans instituted under it. *See* Part III *supra*. Furthermore, a constitutional challenge to the executive order would be a separate issue from the purely statutory question of the private employer's decision to use a racial preference to increase minority employees.

219. 426 U.S. 229 (1976). The Court distinguished the constitutional standard from the Title VII standard it had applied in Griggs v. Duke Power Co., 401 U.S. 429 (1971).

missible if it is a reasonable response to existing circumstances and reasonable in its formation and effects.[220] It is reasonable for the Court to allow an employer to rely on EEOC guidelines in determining whether to institute an affirmative action plan. Title VII provides that reliance on and compliance with "any written interpretation or opinion" issued by the EEOC is a defense against a discrimination suit.[221] Thus EEOC guidelines and regulations have a tacit authorization by Congress and are the logical source of affirmative action models.

The EEOC's most recent guidelines, explicitly designed to encourage voluntary action, place an obligation upon an employer to comply with nondiscrimination requirements without waiting for action by a government agency.[222] The guidelines declare that a finding of specific prior discrimination by the employer is not required for a voluntary affirmative action program and that the use of race-conscious goals is permissible whether to remedy past discrimination or to insure that present practices are nondiscriminatory. The EEOC guidelines go beyond what the Supreme Court has recognized as valid affirmative action in that they do not require a finding or an admission of prior discrimination by the entity establishing the program. However, as the Supreme Court noted in *Griggs v. Duke Power Co.*, "[t]he administrative interpretation of the Act by the enforcing agency is entitled to great deference."[223] At issue in *Griggs* was the interpretation of section 703(h) of Title VII, which permitted employers to use professionally developed ability tests. EEOC guidelines interpreted section 703(h) as allowing only job-related tests, and the Court treated those guidelines "as expressing the will of Congress."[224] Subsequently, in *Albemarle Paper Co. v. Moody*,[225] the Court looked not only to the general principle stated in the guidelines but also to their detailed criteria for validating a test as job-related.

Powell's opinion in *Bakke* offers further support for deferring to administrative guidelines enunciated pursuant to Title VII. Justice Powell pointed out that the *Bakke* decision did not "call into question congressionally authorized administrative actions, such as consent decrees under Title VII . . . ."[226] He also distinguished situa-

220. 563 F.2d at 230 (Wisdom, J., dissenting).

221. 42 U.S.C. § 2000e-12(b) (1976).

222. 29 C.F.R. § 1608 (1978).

223. 401 U.S. 424, 433-34 (1971). *See also* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279 (1976) (EEOC's "interpretations are entitled to great deference"). *But see* General Elec. Co. v. Gilbert, 429 U.S. 125, 140-45 (1976).

224. 401 U.S. at 434.

225. 422 U.S. 405 (1975).

226. 98 S.Ct. at 2755 n.41.

tions in which "there has been detailed legislative consideration of the various indicia of previous constitutional or statutory violations, . . . and particular administrative bodies have been charged with monitoring various activities in order to detect such violations and formulate appropriate remedies."[227] Congressional consideration of national employment discrimination in passing Title VII supplies the detailed legislative consideration to which Justice Powell refers, and the EEOC has been charged with monitoring employment discrimination and formulating remedies.[228] The congressional stress on conciliation and informal solutions shaped by the EEOC and the employer further supports the concept of permissible voluntary action to increase minority employees.[229] In addition, Justice Powell explicitly distinguished employment discrimination cases from the Title VI suit and noted that the courts had upheld racial preferences if a legislative or administrative body had determined that the "industries affected" had discriminated in the past.[230] This phrasing suggests that proof of specific discrimination by an individual employer is not necessary when broader discrimination in a relevant area is established. Although in *Weber* the Fifth Circuit confined its decision to a single program in a single plant,[231] the facts indicate that the entire aluminum industry was under governmental pressure to increase minority employment.[232] Furthermore, the union that was party to the collective bargaining agreement had excluded blacks unlawfully in the past and was party to consent decree affirmative action plans in other industries.[233] Thus under Justice Powell's interpretation of employment case law, the use of racial preferences in *Weber* was justified.

When an employer's circumstances justify the use of racial preferences, the use of quotas is a reasonable response if properly implemented. The EEOC guidelines, the policy statement of the Equal Opportunity Coordinating Council,[234] and regulations issued pursuant to Executive Order 11,246 all describe a three-step procedure for developing a voluntary affirmative action plan: (1) analysis of the workforce to learn whether women and minority groups are underutilized in proportion to their presence in the relevant job

227. *Id.*

228. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

229. *See* text accompanying notes 40-45 *supra.*

230. 98 S.Ct. at 2754.

231. 563 F.2d at 225-26 (Wisdom, J., dissenting).

232. *Id.* at 229.

233. *Id.*

234. *Policy Statement on Affirmative Action Programs for State and Local Governments,* 41 Fed. Reg. 38,814 (1976), *reprinted in* Appendix to Uniform Guidelines on Employee Selection Procedure, 43 Fed. Reg. 38,290 (1978).

market; (2) initiation of steps to remedy disparities revealed by this analysis, including race-conscious procedures, goals, recruitment, reorganization of work, revamping of selection instruments, and the like; and (3) establishment of the overall goal of genuine equal employment opportunity based on ability.[235]

The underutilization study provides the type of statistics recognized as establishing a prima facie case of discrimination. The leading case in the employment context is *Griggs v. Duke Power Co.*,[236] in which the Supreme Court ruled that plaintiff had established a prima facie case by showing that an employment practice neutral on its face had a disparate impact on black applicants. More recently, the Court recognized in *Hazelwood School District v. United States*[237] that a significant deviation between the proportion of minority employees and the proportion of qualified minority workers in the relevant labor pool showed discrimination. As the Court noted in *Castaneda v. Partida*,[238] a suit alleging discriminatory grand jury selection, and in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[239] a housing discrimination suit, a significant discrepancy between numbers of minorities actually present and the numbers that statistically should be present if selection were random suggests discrimination. Thus the statistics provided by an underutilization study are the kind of facts on which a court would base a finding of discrimination; consequently, such a study would enable an employer to assess his potential liability for discrimination. It could substitute, therefore, for a judicial finding of discrimination. The underutilization study also offers a safeguard against needless creation of an affirmative action plan. Only when statistical findings show a significant disparity would an employer and union be justified in setting up a voluntary plan. Moreover, when an employer finds an existing disparity, the only effective method of avoiding potential liability is the establishment of quotas to equalize the racial composition of his work force with that of the surrounding labor market.

A further justification for a *Weber*-type affirmative action plan is that the employer and union modeled their plan after one established by consent decree in the steel industry and approved by the Fifth Circuit in *United States v. Allegheny-Ludlum Industries*.[240] An employer acts reasonably when he looks to a consent decree in a

235. 41 C.F.R. §§ 60-1.40, 60-2.10 to 2.14 (1978).
236. 401 U.S. 424 (1971).
237. 433 U.S. 299 (1977).
238. 430 U.S. 482 (1977).
239. 429 U.S. 252 (1977).
240. 517 F.2d 826 (5th Cir. 1975).

similar industry in order to develop his own plan. Furthermore, because a consent decree requires no finding or admission of prior discrimination, an employer utilizing the decree as a model should not become liable to a reverse discrimination suit simply because he has not been found guilty of prior discrimination.

Additional factors indicating the reasonableness of a voluntary plan include its actual effects and the relationship between employment qualifications and the nature of the work to be performed. The plan in *Weber* created a new training program: it neither deprived white employees of an existing right to an existing training program nor affected the general seniority rights and benefits of employees.[241] Furthermore, all applicants to the program met a basic level of qualification; the blacks admitted were not unqualified individuals displacing qualified whites.[242]

An additional element of reasonableness is present when the affirmative action plan has been established as part of a collective bargaining agreement. The Supreme Court in *Franks v. Bowman Transportation Co.* recognized the right of employer and union to modify seniority standings through a collective bargaining agreement. When employer and union negotiate an affirmative action plan in the collective bargaining agreement, the employees themselves are represented in the bargaining process by their union, which has a duty of fair representation to all members.[243] The agreement negotiated by the union may displease some members, but their individual displeasure does not outweigh the need for the bargaining strength that results from the principle of exclusive representation. Furthermore, courts and the legislature have created adequate safeguards for the interests of dissenting members.[244]

The Supreme Court in *Emporium Capwell Co. v. Western Addition Community Organization*[245] applied the principle of exclusive representation to employment discrimination as well as to general labor-management relations. Reasoning that the union's position as exclusive representative of its members was essential to collective bargaining and that the courts and Congress had established adequate safeguards against majority tyranny over minority interests within the union,[246] the Court held that minority employees' racial

241. 563 F.2d at 233-34.

242. *Id.*

243. *See, e.g.*, Vaca v. Sipes, 386 U.S. 171, 177 (1967); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944).

244. *See, e.g.*, Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1975). The relevant analogy is the representative or senator elected to serve a term in Congress; his decisions and the results of his voting rarely please all of his constituents, but he represents the voters of his district during his term of office.

245. 420 U.S. 50 (1975).

246. *Id.* at 61-65.

discrimination complaints should have been processed through the grievance arbitration method provided in the collective bargaining agreement.[247] The existence of racial discrimination did not justify minority employees in bypassing grievance arbitration and picketing in violation of a no-strike clause in the contract.[248] Thus the union represents employee interests in matters of discrimination as well as in matters of wages, hours, and benefits.

If a voluntary affirmative action plan using quotas is based upon valid statistics showing underutilization of minorities, the Court should recognize the competence of the employer to institute that plan. The examination should then focus on whether the plan itself is a reasonable response to facts indicating potential liability and whether it has reasonable effects both in alleviating underrepresentation and on nonminority workers.

The affirmative action/reverse discriminaton issue poses a painful and serious dilemma to which there are no simple answers. It is not possible to achieve absolute racial neutrality in employment situations. Past societal discrimination still affects decisions made in hiring and promotion, and minorities remain at a disadvantage. Although words like "quotas" and "numerical goals" may be a frightening reduction of individuals to numbers, quotas remain at present the single objective validation of an employer's attempt to give minorities an equal chance at jobs, promotions, and other employment advantages. The Court, therefore, should not bar voluntary efforts to increase the numbers and improve the status of minority workers, nor should it exclude quotas as tools of voluntary affirmative action.

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247. *Id.* at 65-70.
248. *Id.* at 70.