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THE USE OF NUMERICAL QUOTAS TO ACHIEVE INTEGRATION IN EMPLOYMENT

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Recognition that all individuals, irrespective of race, religion, sex, or national origin, are entitled to full and equal participation in all phases of society was manifested formally in the Civil Rights Act of 1964.¹ This comprehensive legislation resulted from many years of sustained civil rights activity by various public interest groups in conjunction with a growing national awareness of the ingrained effects of the nation's antebellum societal structure and the carryover of stereotypical categorizations from that period.² The demise of these longstanding concepts was initiated by the landmark decision of *Brown v. Board of Education*,³ in which the Supreme Court rejected the "separate but equal" rule of *Plessy v. Ferguson*.⁴ Title VII of the Civil Rights Act of 1964,⁵ which mandates equal employment opportunity for all citizens regardless of "race, color, religion, sex, or national origin,"⁶ reflects the high national priority afforded the attainment of equal employment opportunity.⁷ Achieving this goal

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Auth.—The views expressed in this Article are those of the author and do not necessarily represent the position of the organizations with which he may be associated.

1. 42 U.S.C. §§ 2000a-2000b(6) (1970).

2. For discussion of the background of the Civil Rights Act of 1964, see CONGRESSIONAL QUARTERLY SERVICE, CONGRESS AND THE NATION (1945-1964), at 1596 (1965). See also Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 825-30 (1972).

3. 347 U.S. 483 (1954). For a discussion of the Supreme Court's role in breaking down racial classifications and barriers, see Freund, *Storm Over the American Supreme Court*, 21 MODERN L. REV. 345 (1958); Roche, *Plessy v. Ferguson: Requiescat in Pace?*, 103 U. PA. L. REV. 44 (1954); Note, *Race Quotas*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 128 (1973). See also Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

4. 163 U.S. 537 (1896).

5. 42 U.S.C. §§ 2000e to 2000e-15 (1970), as amended, 42 U.S.C. §§ 2000e to 2000e-17 (Supp. II, 1972). Title VII was amended by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103. For a complete discussion of the history and provisions of the 1972 amendments, see Sape & Hart, *supra* note 2.

6. 42 U.S.C. § 2000e-2(a) (1970).

7. The Supreme Court, when interpreting Title II of the Civil Rights Act of 1964, recognized that elimination of racial discrimination is a matter that "Congress considered of the

has been difficult, however; although the unconstitutional and undemocratic nature of employment discrimination is acknowledged widely, there is no consensus regarding the most appropriate remedies for such discriminatory practices.

Since the enactment of Title VII, it has become clear that the processes of employment discrimination are much more subtle and complex than originally envisioned.⁸ What was viewed initially as a function of intentional acts by readily identifiable employers to the detriment of individuals clearly protected by Title VII now is perceived to be a problem of entrenched employment practices that operate independently of intent⁹ to produce a disproportionate impact upon minorities and women. Facially neutral practices that in fact perpetuate past discrimination comprise the majority of current employment discrimination problems.¹⁰ This discovery in turn has led to the development of various methods, particularly the concept of "affirmative action," to combat employment discrimination. Affirmative action encompasses not only general positive steps to eliminate discriminatory systems, but also various specific means that courts may use to correct particular practices. The content of the latter remedies varies greatly, depending upon the nature of the violation and the degree of corrective action deemed appropriate. One such method is "quota" hiring or "preferential" treatment which requires the inclusion of specified numbers of protected individuals in the labor force.

highest priority." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). Courts quickly applied this philosophy to Title VII actions. *See, e.g., Jenkins v. United Gas Corp.*, 400 F.2d 28 (5th Cir. 1968).

8. *See, e.g., SENATE COMM. ON LABOR AND PUBLIC WELFARE, REPORT ON THE EQUAL EMPLOYMENT OPPORTUNITIES ENFORCEMENT ACT OF 1971, S. REP. NO. 415, 92d Cong., 1st Sess. 5 (1971).* The Senate report stated: "In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization. It was thought that a scheme that stressed conciliation rather than compulsory processes would be most appropriate for the resolution of this essentially 'human' problem and that litigation would be necessary only on an occasional basis. Experience has shown this view to be false." *Id.*

9. That intent to discriminate is not an essential element of Title VII was established in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), in which the Supreme Court noted that lack of intent could indicate merely that the employer was unaware of the discriminatory effect of an employment practice. *Id.* at 432.

10. Even a completely neutral practice that, by itself, has no discriminatory effect can violate Title VII if it perpetuates the effects of past discrimination by maintaining the status quo in the employment structure. *Id.* at 430.

De Funis v. Odegaard: A BYPASSED OPPORTUNITY

Although the Supreme Court's recent decision in *De Funis v. Odegaard*¹¹ did not involve employment, that case may presage resolution of the broad issue of the propriety of racial preferences to achieve integration in employment.¹² *De Funis*, concerning law school enrollment, presented a classic example of an affirmative action program designed to increase minority participation in societal development. Although the merits of the discrimination question were not reached, the opinions filed provide an excellent overview of the quota or preferential treatment problem.

In 1971, the law school of the University of Washington received 1,601 applications to fill 150 vacancies in its first-year class. The law school admissions committee utilized objective admissions criteria, combining an applicant's undergraduate grade-point average for his junior and senior years with his Law School Admission Test (LSAT) score according to a formula designed to predict the student's first-year law school grade average. If an applicant's expected average was more than 77.0, he would be admitted almost automatically; applicants with a predicted average of less than 74.5 generally were rejected, while those scoring between these extremes were given further consideration. *De Funis*, whose predicted average was 76.23, ultimately was rejected.¹³ Pursuant to an affirmative action plan to increase minority enrollment, the admissions committee considered separately the applications of blacks, Chicanos, American Indians, and Orientals, using different, less stringent criteria. *De Funis* chal-

11. 94 S. Ct. 1704 (1974).

12. The Equal Employment Opportunity Commission (EEOC), recognizing the potential consequences for the use of affirmative action remedies under Title VII, participated as amicus curiae before the Washington Supreme Court in *De Funis*. The EEOC also abandoned the Justice Department's position of nonintervention in the case before the United States Supreme Court by petitioning to participate as amicus curiae. See Motion of the Equal Opportunity Commission for Leave to File a Memorandum as Amicus Curiae and Memorandum, *De Funis v. Odegaard*, Docket No. 73-235 (Jan. 28, 1974). The EEOC noted in its memorandum that the Court's action could bear directly on the validity of affirmative action plans in employment. The Department of Justice opposed the EEOC memorandum, contending that the Commission could not participate without Justice Department authorization. The Commission, however, disagreed and filed a responsive memorandum noting that it did not seek participation as a full party but merely as the expert agency in equal employment in a matter that could affect its interests adversely. See Memorandum of the Equal Employment Opportunity Commission in Response to the Department of Justice, *De Funis v. Odegaard*, Docket No. 73-235 (Feb. 4, 1974). The Supreme Court subsequently denied the EEOC motion. 94 S. Ct. 1401 (1974).

13. 94 S. Ct. 1704, 1708-9 (1974).

lenged this procedure, contending that it resulted in admission of applicants whose scores were lower than his.¹⁴ A temporary restraining order issued to compel De Funis' admission to the school was reversed by the Washington Supreme Court because the admissions policy affirmative action plan was held to promote a compelling state interest.¹⁵

By the time of the decision by the United States Supreme Court,¹⁶ De Funis, who had been admitted to the law school pursuant to a lower court order,¹⁷ was nearing the completion of his studies. A majority of the Court therefore ruled that, because the issue was moot, the merits could not be considered.¹⁸ Two separate dissenting opinions were filed, one by Justice Brennan, joined by Justices Douglas, White, and Marshall, which was confined to the issue of mootness,¹⁹ and one by Justice Douglas, examining the merits of the case and posing several perplexing questions regarding the future role of affirmative action programs.²⁰

Douglas' dissent chastised the university for using the LSAT, which he viewed as probably racially discriminatory.²¹ He suggested that if that test is used, separate classifications for minorities may be warranted "lest race be a subtle force in eliminating minority members because of cultural differences."²² He also contended, how-

14. The law school offered admittance to 275 students, including 74 who had lower numerical scores than De Funis. These 74 included 36 minority applicants, 22 white applicants who had been granted veteran's preferences, and 16 white applicants accepted on the basis of information other than numerical scores. *De Funis v. Odegaard*, 82 Wash. 2d 11, 507 P.2d 1169, 1176 (1973).

15. *Id.*

16. The significance of the issues involved was evidenced by the filing of 26 amicus curiae briefs representing widely divergent interests. For example, the B'nai B'rith Anti-Defamation League, a long-noted activist civil rights group, filed a brief supporting De Funis, claiming that preferential treatment was unconstitutional. Similar briefs were filed by the National Association of Manufacturers and the Chamber of Commerce, traditional opponents of civil rights advocates. The AFL-CIO also supported De Funis, but briefs submitted by the United Auto Workers, the United Mine Workers, the United Farm Workers, and the American Federation of State, County, and Municipal Employees favored the university's position. The American Bar Association and several civil rights groups, such as the NAACP, also supported the school.

17. 94 S. Ct. at 1705.

18. *Id.* at 1705.

19. *Id.* at 1721 (the majority was criticized strongly for not resolving the matter while it was before the Court).

20. *Id.* at 1717-18.

21. *Id.* at 1715.

22. *Id.*

ever, that any system of giving preference to individuals because of their race is unconstitutional: "There is no constitutional right for any race to be preferred. . . . There is no superior person by constitutional standards. A *De Funis* who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter his race or color."²³

It is unclear whether the Court was fully cognizant of the import of a literal reading of Justice Douglas' dissent or whether subsequent interpretation of that dissent will curtail affirmative action remedies. The opinion certainly foreshadows a return to the "color-blindness" theory of integration that was enunciated in the immediate post-*Brown* era, even though judicial frustration at the slow pace of integration prompted the apparent abandonment of that approach in *Swann v. Charlotte-Mecklenburg Board of Education*.²⁴ After *Swann*, most commentators and civil rights practitioners assumed that numerically based, result-oriented plans to establish specific levels of minority participation were at least permissible, if not required.²⁵

The "color-blindness" approach undoubtedly did not achieve full compliance with the law; historical patterns of discrimination had produced longstanding inequities requiring specific recognition of the underutilization of minority groups to be programmed into any remedial action. Numerically based systems provided a logical solution. Nevertheless, an examination of many plans that have been used demonstrates that the proper limits for such plans have remained uncertain. The Court's inaction in *De Funis* has confounded this question, also raising doubt that the Court will hold to the

23. *Id.* at 1716. Justice Douglas continued:

The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized. The purpose of the University of Washington cannot be to produce Black lawyers for Blacks[,] Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for the Irish. It should be to produce good lawyers for Americans and not to place First Amendment barriers against anyone.

Id. at 1718 (footnotes omitted).

24. 402 U.S. 1 (1971). In *Swann* and a companion case, *Davis v. Board of School Comm'rs*, 402 U.S. 33 (1971), the Court held that in order to evaluate properly compliance with school integration requirements, numerical ratios would have to be used. The discretionary power of a local school board to adopt voluntary ratios to achieve an affirmative policy of integration also was recognized in *Swann*. 402 U.S. at 19-20.

25. See, e.g., Fiss, *The Charlotte-Mecklenburg Case—Its Significance for Northern School Desegregation*, 38 U. CHI. L. REV. 697, 702-03 (1971); *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 38, 78-79, 83-84 (1971).

insistent course concerning equal employment that it undertook in *Griggs v. Duke Power Co.*²⁶ The concept of affirmative action, in both its general context and its particular application, remains highly controversial, and anticipation of judicial resolution, heightened by the notoriety of *De Funis*, makes another confrontation by the Supreme Court inevitable.

CATEGORIES OF AFFIRMATIVE ACTION

The terms "affirmative action," "preferential treatment," and "quota hiring" are vague and do not describe sufficiently the differing types of employment plans they encompass. Generally, "affirmative action" describes the processes used to change the composition of groups of people, such as employees, according to a particular plan or formula that reflects the desired rate of participation by those group members protected by Title VII. This approach raises three basic considerations. First, there must be a determination of the legality of a modification in the racial, ethnic, or sexual composition of a group of workers. Second, assuming that the objective is permissible, a legally acceptable method for achieving that goal must be found. Finally, in close conjunction with the second question, the most appropriate method from a social standpoint must be determined. Assuming for the moment an affirmative answer to the first question, several possible solutions to the remaining problems are available. Six general categories of remedies may be identified:

(1) *Absolute Numerical Quota Plans*. Plans within this category require an employer or union to ensure that a particular minority, ethnic group, or sex constitutes a particular percentage of a certain group of workers. By definition, this type of plan would prohibit the employer or union from going below, or indeed exceeding, the specified percentage.

(2) *Minimum Quota Plans*. These plans require an employer to maintain at least a minimum number of employees of a particular race, ethnic origin, or sex in a certain work force or area. While this plan requires an employment level not less than the specified number, the employer would be free to exceed the quota. Courts have employed this approach in Title VII litigation and in cases arising under the Civil Rights Act of 1866²⁷ and 1870.²⁸ Numerous decisions

26. 401 U.S. 424 (1971). See note 9 *supra*.

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

28. Act of May 31, 1870, ch. 114, 16 Stat. 140 (codified at 42 U.S.C. § 1983 (1970)). Courts

have applied variety of plans and formulas involving minimum levels of employment,²⁹ including the hiring of minorities according to a ratio until a specified numerical level is attained,³⁰ the mandating of a percentage of minority employment that must be reached,³¹ and the ordering of the attainment of a certain level of minority employment within a specified period of time³² such as a single round of hiring.³³ Common to all of these decisions is a mandatory minimum of minority employees to be hired, expressed either as a percentage or as an identified group composition figure.

(3) *Quota Range Plans*. Rather than mandating a certain number or percentage, "quota range" plans establish a range of percentages that will be considered sufficient for compliance.

(4) *Target or Good-Faith Effort Quota Plans*. An alternative to obligatory quotas is the establishment of target figures that an employer must strive to attain. It is this type of plan that the federal government contends it is employing by formulating "goals and timetables" that may be ordered under an Equal Employment Opportunity Commission (EEOC) conciliation agreement or consent decree³⁴ or under the provisions of Executive Order 11,246.³⁵ Although this type of plan theoretically differs from the "minimum quota" plan, in practice the differences often disappear. In fact, such plans often resemble "absolute quota" plans.³⁶

have applied both the 1866 and 1870 Acts to discriminatory employment practices since the Supreme Court's ruling in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). See note 99 *infra* & accompanying text. Notwithstanding Title VII's more recent enactment, courts have based additional employment discrimination remedies upon these two statutes. See, e.g., *Johnson v. Cincinnati*, 450 F.2d 796 (6th Cir. 1971); *Caldwell v. National Brewing Co.*, 443 F.2d 1044 (5th Cir. 1971); *Young v. International Tel. & Tel. Corp.*, 438 F.2d 757 (3d Cir. 1971). See generally *Larson, The Development of Section 1981 As a Remedy for Racial Discrimination in Private Employment*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 56 (1972).

29. For an extensive listing of cases involving various plans within this category, see *Slate, Preferential Relief in Employment Discrimination Cases*, 5 LOYOLA U.L.J. (Chicago) 315, 318-20 & nn.8-10 (1974).

30. E.g., *Carter v. Gallagher*, 452 F.2d 315 (8th Cir.), *cert. denied*, 406 U.S. 950 (1972); *NAACP v. Allen*, 340 F. Supp. 703 (M.D. Ala. 1972). The numerical ratio usually is determined by the demographic distribution of the minority within the subject area.

31. E.g., *United States v. IBEW Local 212*, 472 F.2d 634 (6th Cir. 1973); *United States v. Ironworkers Local 86*, 315 F. Supp. 1202 (W.D. Wash.), *aff'd*, 443 F.2d 544 (9th Cir. 1970), *cert. denied*, 404 U.S. 984 (1971).

32. E.g., *Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Serv. Comm'n*, 482 F.2d 1333 (2d Cir. 1973); *NAACP v. Allen*, 340 F. Supp. 703 (M.D. Ala. 1972).

33. E.g., *Pennsylvania v. Sebastian*, 480 F.2d 917 (3d Cir. 1973).

34. 42 U.S.C. § 2000e-5(a) (1970). See also 29 C.F.R. § 1601.22 (1973).

35. 3 C.F.R. 169 (1974); see notes 59-75 *infra* & accompanying text.

36. See note 41 *infra* & accompanying text.

(5) *Specified Affirmative Action Plans*. This type of plan does not use obligatory numbers or percentages; rather, certain actions must be taken to bring more members of a particular class into the identified work force. For example, a plan might require advertisements in newspapers serving primarily minority or female readers, or a court could order an employer to conduct an extensive recruiting campaign at a predominately minority university.³⁷

(6) *Commitment To Ensure Nondiscriminatory Employment Practices Plans*. The final alternative is merely to require a commitment from an employer or union to do everything possible to ensure that it will not restrain minorities or women from full participation in all the "terms, conditions, or privileges" of employment.³⁸ Such general goals probably motivated the original enactment of Title VII and represented the scope of compliance envisioned for employers and unions.³⁹ Subsequently, however, practical considerations and recognition of the extent of employment discrimination⁴⁰ have moved Title VII enforcement at least into the "target" or "good-faith quota" realm, with frequent use of "minimum quota" plans.

Much sentiment exists that "target" or "good-faith quota" plans and "absolute" or "minimum" quota plans do not differ materially.

37. Frequently, a form of numerical remedy will be combined with non-numerical affirmative action requirements. For example, in *United States v. Ironworkers Local 10*, 6 FEP Cases 59 (W.D. Mo. 1973), the court not only established a specific numerical level for black and Mexican-American participation in the union, but also ordered the union to advertise available job opportunities, training, and apprenticeship programs every six months in a newspaper serving the black and Mexican-American community. *Id.* at 73. This plan, however, was "subject to the availability of qualified minority group applicants." *Id.* at 71.

38. The prohibition against any form of employment discrimination relating to the "terms, conditions, or privileges of employment" is found in section 703(a) of Title VII. 42 U.S.C. § 2000e-5(g) (Supp. II, 1972). Similar prohibitions are contained in the implementing regulations to Executive Order 11,246. 3 C.F.R. 169 (1974).

39. When the Civil Rights Act in 1964 was enacted, the "color-blindness" principle was considered the appropriate standard, evidencing a belief that employment discrimination would cease once employers were aware of its existence. Paralleling other types of discrimination, however, this "individual" view of employment discrimination quickly became discredited as a need for more sophisticated and expansive remedies surfaced. *See* note 8 *supra*.

40. The 1972 amendments were motivated in part by the conclusion that the original simplistic approach to employment discrimination had been inaccurate and that employment discrimination problems were "systemic" rather than individually oriented. *See* notes 8-10 *supra* & accompanying text. During debate on the amendments, an attempt to introduce legislation prohibiting preferential relief was defeated. Amendment No. 829 to S. 2515, 92d Cong., 2d Sess. (1972); *see* SENATE LABOR COMM., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 1042-75 (1972). The amendment was rejected after lengthy debate. *See* 118 CONG. REC. 696-703 (1972).

Suggested or "voluntary" levels of minority participation often involve a comparison of the numerical composition of the employer's work force with the numerical composition projected under the "target" plan; inevitably, anything below the suggested level is considered employment discrimination. This approach is not surprising, however, considering the impracticality of enforcing mere philosophical pronouncements about the need for affirmative action to increase minority participation with no accompanying numerical reference points. Indeed, the haziness of the distinction between quota systems and voluntary plans has been acknowledged judicially.⁴¹

Other practical considerations also have induced an effective merger of these seemingly distinct approaches. Neither the courts, nor the Office of Federal Contract Compliance, which must administer Executive Order 11,246,⁴² nor the EEOC, in view of its backlog of nearly 100,000 cases,⁴³ has the time or inclination to conduct the sophisticated monitoring necessary to gauge compliance with a good-faith standard. Consequently, monitoring and enforcement involves comparisons of employment ratios with a more general demographic determination for a particular area, such as the state or the Standard Metropolitan Statistical Area (SMSA) in which the employer is located.⁴⁴ Significant deviation between the two frequently is treated as evidence of a *prima facie* violation.⁴⁵

41. In *Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Serv. Comm'n*, 354 F. Supp. 778, 798 (D. Conn. 1973), the court noted:

Ultimately the distinction [between quota hiring to remedy discrimination and affirmative action toward a goal] becomes illusory. As the time nears to reach the [court-ordered] goal, a member of the [group discriminated against] must be hired in preference to a majority group person as often as is required to meet the goal. A quota, for all its unhappy connotations, is simply a recognition of the reality encountered in reaching the desired goal.

42. 41 C.F.R. § 60-1.2 (1974).

43. REPORT OF THE COMMITTEE ON EQUAL EMPLOYMENT OPPORTUNITY LAW, ABA SECTION OF LABOR RELATIONS LAW—1974 COMMITTEE REPORTS 45 (1974).

44. *United States v. Carpenters Local 169*, 457 F.2d 210 (7th Cir.), *cert. denied*, 409 U.S. 851 (1972).

45. *United States v. Chesapeake & O. Ry.*, 471 F.2d 582 (4th Cir. 1972); *United States v. Carpenters Local 169*, 457 F.2d 210 (7th Cir.), *cert. denied*, 409 U.S. 851 (1972); *Bing v. Roadway Express, Inc.*, 444 F.2d 687 (5th Cir. 1971).

APPLICATION OF NUMERICAL EMPLOYMENT QUOTAS

Use of Numerical Disparities To Establish Discrimination

Since the enactment of Title VII, the perception of employment discrimination has become "systems oriented," and both Congress and the judiciary increasingly have relied upon statistics to formulate remedies. A review of employment discrimination cases evidences greater judicial reliance upon numerical analysis in recent years, with relief based upon numerical quotas becoming more commonplace.⁴⁶ Several possible explanations for this trend have been advanced by courts and commentators,⁴⁷ but the most likely cause may be rigid adherence to strict nondiscrimination standards and general remedial orders in the immediate post-*Brown* era that resulted in a mixture of misunderstanding and a lack of effective compliance which failed to eliminate pattern discrimination. Cognizant of these shortcomings, the courts turned to more specific, coercive orders.⁴⁸ This shift to a more result-oriented approach required the use of objective standards by which compliance could be gauged.

Statistical inferences of discrimination are not new to American jurisprudence. In 1886, the Supreme Court in *Yick Wo v. Hopkins*⁴⁹ recognized that such proof could establish a prima facie case of discrimination. The Court held that San Francisco ordinances had been used to discriminate against Chinese laundry operators. Based upon a showing that 150 Chinese-operated laundries had been closed down while more than 80 non-Chinese facilities operating under similar conditions had been left unmolested, the Court stated that the statistics established a showing of "an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion [of discrimination]." ⁵⁰ Signifi-

46. Review of the cases surveyed in one study indicates that most orders establishing numerical remedies have been handed down since 1970. See Slate, *supra* note 29, at 318-20 & nn.8-10.

47. See generally Slate, *supra* note 29; Note, *Race Quotas*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 128 (1973).

48. The Supreme Court's decision in *Swann* signaled a retreat from its prior "color-blindness" approach. See note 24 *supra* & accompanying text. Acceptance of numerical composition remedies in the education field inspired similar remedies in other civil rights litigation. See, e.g., *Wright v. Emporia*, 407 U.S. 451 (1971) (disparity in racial balance among several school districts could be tolerated only in the most extreme circumstances).

49. 118 U.S. 356 (1886).

50. *Id.* at 373.

cantly, when using this inference, the Court did not examine the motives of the city officials; rather, it relied upon the results as measured by numerical standards. Such reasoning comports with the current judicial approach to employment discrimination.⁵¹

Statistical inferences to establish discrimination have found continuing favor with the Supreme Court, particularly in cases involving jury selection.⁵² Although the Court has not considered directly the use of statistical evidence showing racial disparity between a particular work force and the surrounding community to establish employment discrimination, potentially liberal use is indicated. In *McDonnell Douglas Corp. v. Green*⁵³ the Court accepted statistical proof of employment discrimination, but did not determine the requisite disparity to establish a prima facie case.⁵⁴ Moreover, lower courts repeatedly have used statistics to establish prima facie cases of discriminatory employment practices.⁵⁵ As equal employment enforcement has gained complexity, plaintiffs' counsel have contended that virtually any disparity establishes at least that much, thus requiring further judicial inquiry.⁵⁶ Such claims have had varying degrees of success. While the usefulness of statistics as a means to discern a pattern of discrimination has been acknowledged, statistical disparities have been quite substantial in most cases in which they were given significant weight.⁵⁷

51. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), reflects the same understanding that motive is not dispositive in civil rights litigation. See note 9 *supra*. By maintaining this position, the Court seemingly precludes use of a "color-blind" standard in employment cases, because that standard would remove objectivity from measurement of compliance. Because the goal is not to eliminate the motive but to eradicate the effects of discrimination, analysis of those effects requires measurement of numerical levels of minority or female participation.

52. See, e.g., *Sims v. Georgia*, 389 U.S. 404 (1967); *Coleman v. Alabama*, 389 U.S. 22 (1967); *Whitus v. Georgia*, 385 U.S. 545 (1967). See also *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 401 U.S. 424 (1971).

53. 411 U.S. 792 (1973).

54. The Court stated: "[S]tatistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire the respondent in this case conformed to a general pattern of discrimination against blacks." *Id.* at 805. The Court noted, that the district court may find that "'the [racial] composition of defendant's labor force is itself reflective of restrictive or exclusionary practices.'" *Id.* at 805 n.19, quoting *Blumrosen, Strangers in Paradise: Griggs v. Duke Power Co., and the Concept of Employment Discrimination*, 71 MICH L. REV. 59, 92 (1972).

55. See note 46 *supra*.

56. See *Reed v. Arlington Hotel Co., Inc.*, 476 F.2d 721 (8th Cir. 1973); *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421 (8th Cir. 1970).

57. E.g., *Carter v. Gallagher*, 452 F.2d 315 (8th Cir.), cert. denied, 406 U.S. 950 (1972) (535 employees of the Minneapolis fire department included no blacks, while the population was

Because of the nature of employment discrimination, it is not unusual to use statistics to demonstrate minority or female underutilization, a problem that may result from employment practices that have a disproportionately exclusionary effect. In extreme cases, the proper role for statistics is fairly clear. More difficult, however, is determination of the point at which statistical disparities, without more, are sufficient to establish a *prima facie* case. Courts generally have not found minor disparities sufficient by themselves, but rather have adopted a sliding-scale approach to determine the weight to be given to a particular imbalance, while also considering many other factors.⁵⁸

Though theoretical distinctions can be drawn between the plaintiffs' "absolute quota" and the judicial sliding-scale approaches, these distinctions blur in the day-to-day practicality of the employment environment. Frequently, statistical disparity is a sufficient showing to establish a *prima facie* violation, thereby getting the case into court, with appurtenant costs and exposure, and shifting the burden of proof to the employer to justify the disparity. Because few employers or unions can reconstruct all of their employment decisions made over an extended time period, and because many courts place upon employers a heavy burden of proof, justification is difficult. Moreover, to defend an action based upon statistical disparities is expensive and time consuming. Hence, as employers

6.44 percent black); *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421 (8th Cir. 1970) (only 51 of 2,736 employees were black; 46 of those blacks were employed in house service jobs); *Jones v. Lee Way Motor Freight*, 431 F.2d 245 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971) (542 line drivers were employed, all of whom were white; 20 percent of 38 city drivers were black).

In *United States v. Hayes Int'l Corp.*, 456 F.2d 112 (5th Cir. 1972), the defendant employed 918 whites and 6 blacks as office and technical employees, while the surrounding community's population was 30 percent black, prompting the court to observe: "These lopsided ratios are not conclusive proof of past or present discriminatory hiring practices; however, they do present a *prima facie* case. The onus of going forward with the evidence and the burden of persuasion is thus on Hayes." *Id.* at 120.

Courts generally have approached the use of statistics with some caution, however. For example, in *United States v. Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972), the court stated: "No precise mathematical formulation is workable, nor did Congress intend to impose any racial constants. Certainly, however, an employer's failure to hire or promote all or the great majority of blacks while he concurrently hires or promotes whites may well indicate racial discrimination." *Id.* at 441. *See also* *Heard v. Mueller Co.*, 464 F.2d 190 (6th Cir. 1972).

58. When the disparity is pronounced, courts have adopted a very strict approach approximating a *per se* rule. *See Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421 (8th Cir. 1970); *Rios v. Enterprise Ass'n, Steamfitters Local 638*, 326 F. Supp. 198 (S.D.N.Y. 1971).

become more aware of these difficulties, they will tend to hire in a manner that reflects local demographic conditions, minimizing the importance of qualifications or skill levels.

While this self-imposed "absolutist" approach undoubtedly will raise the employment profile of the classes protected by Title VII, there may be counterproductive consequences, both in the industry and for equal employment opportunity generally. Hiring strictly to achieve numerical balance reflects a paternalistic approach toward providing minorities and women with jobs rather than meaningful opportunities. In turn, additional hostilities among both majority and minority workers will be engendered, reinforcing racial and ethnic stereotyping and isolationism—the same traits that were to be purged from society by civil rights legislation.

Notwithstanding this counterproductive possibility, however, courts need not cease drawing inferences of discrimination when statistical disparities are significant or when accompanied by other factors indicative of a violation. But attempts to formulate plans calling for precise parity should be avoided; instead, numerical disparity should be but one objective measure of discriminatory effects, and only where appropriate should disparities alone be determinative of liability and the relief to be afforded.

Numerical Quotas Under the Executive Order Program

The first clear application of federal standards requiring numerical quotas in employment was conceived with the formulation of rules and regulations under the executive order program.⁵⁹ In conjunction with this program, which imposes specific requirements upon government contractors and employers who receive financial assistance from the federal government, the "affirmative action" terminology first was introduced into the employment field.⁶⁰ Subsequent development of the affirmative action programs required by

59. Regulation of employment practices of federal government contractors antedated adoption of the Civil Rights Act of 1964. The first executive order imposing nondiscrimination requirements upon these contractors was Executive Order 8802, signed by President Roosevelt, on June 25, 1941. 3 C.F.R. 957 (1938-43). Since then, a series of executive orders has expanded the scope of the requirements and established various committees within the Government to administer their provisions. See notes 60-75 *infra* & accompanying text.

60. Executive Order 10,925, 3 C.F.R. 448 (1959-63), signed by President Kennedy on March 6, 1961, provided in section 301(1): "The Contractor will take affirmative action to insure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin."

executive order resulted in the imposition of hiring quotas pursuant to amended Executive Order 11,246.⁶¹ The Office of Federal Contract Compliance (OFCC) was created to administer the executive order program,⁶² and in 1965 the OFCC established four regional "special area programs" as part of its "Operational Plan for Construction Compliance."⁶³ Under this plan, one element of which required assurance of representation of minority groups in all trades and in all phases of federally assisted work, the local contracting authority in the Philadelphia area adopted a "pre-award plan" to be administered by the local Federal Executive Board. This "pre-award plan" provided for an advance assessment of all anticipated contracting in the region and established an affirmative action requirement in each contract, incorporating numerical guidelines based upon factors such as local market conditions and the available labor pool. After the pre-award plan was invalidated by the Comptroller General,⁶⁴ however, a modified and restructured plan was issued by the Assistant Secretary of Labor in 1969. The new plan required each contractor bidding on a contract to submit, prior to the award of any contract, an affirmative action program "which shall include specific goals of minority manpower utilization."⁶⁵

Imposition of this so-called "Philadelphia Plan" generated extensive controversy within the Government and among employers and legal scholars.⁶⁶ The Court of Appeals for the Third Circuit upheld the plan in what was perhaps the first judicial application of numerical employment quotas,⁶⁷ in this case a "quota range" plan. The court asserted that imposition of permissible quota ranges was consistent with the Civil Rights Act of 1964, including Title VII.⁶⁸ Simi-

61. 3 C.F.R. 169 (1974). The original Executive Order 11,246, 3 C.F.R. 133 (1969), was amended by Executive Order 11,375, 32 Fed. Reg. 14303 (1967), to prohibit sex discrimination.

62. 41 C.F.R. § 60-1.2 (1974).

63. Dep't of Labor, Operational Plan for Construction Compliance (Mar. 1967).

64. William C. Cramer, 48 Comp. Gen. 326 (1968).

65. Dep't of Labor, Order of June 27, 1969.

66. See, e.g., Note, *Philadelphia Plan: Equal Employment Opportunity in the Construction Trades*, 6 COLUM. J.L. & SOC. PROB. 187 (1970); Comment, *The Philadelphia Plan and Strict Racial Quotas on Federal Contracts*, 17 U.C.L.A.L. REV. 817 (1970).

67. *Contractors Ass'n v. Secretary of Labor*, 442 F.2d 159 (3rd Cir.), cert. denied, 404 U.S. 854 (1971). The Philadelphia Plan, as upheld by the court, provided in part: "No bidder will be awarded a contract unless his affirmative action program contains goals falling within the ranges set forth . . ." *Id.* at 164. The Department of Labor order also contained a schedule of acceptable ranges of minority group employment, expressed as percentages of minority employment for six identified trades during a four-year period. *Id.*

68. *Id.* at 171-74.

larly, the court observed that the Philadelphia Plan was clearly "color-conscious" and, as such, was compatible not only with the intent of the executive order program, but also with the "color-conscious" approach expressed in other contexts.⁶⁹

The executive order program has retained the basic approach of the Philadelphia Plan. Affirmative action requirements are set out with greater specificity in the OFCC's Revised Order Number 4,⁷⁰ the Labor Department's interpretive rules and regulations for compliance with the order. Revised Order Number 4 requires government contractors to analyze all major job classifications to determine whether there is an underutilization of women or certain minorities, including blacks, Spanish-surnamed Americans, American Indians, and Orientals, in accordance with several factors:

- (i) The minority population of the labor area surrounding the facilities;
- (ii) The size of the minority unemployment force in the labor area surrounding the facility;
- (iii) The percentage of minority work force as compared with the total work force in the immediate labor area;
- (iv) The general availability of minorities having requisite skills in the immediate labor area;
- (v) The availability of minorities having requisite skills in an area in which the contractor can reasonably recruit;
- (vi) The availability of promotable and transferable minorities within the contractor's organization;
- (vii) The existence of training institutions capable of training persons in the requisite skills; and
- (viii) The degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to minorities.⁷¹

Once a contractor has determined the degree of underutilization, he then is expected to set goals to remedy any discrepancies.⁷²

The OFCC regulations indicate an intent not to establish a rigid quota system for government contractors.⁷³ Nevertheless, the regu-

69. *Id.* at 173.

70. OFCC, Revised Order No. 4, Affirmative Action Compliance Programs, 41 C.F.R. §§ 60-2.1 to -32 (1974).

71. *Id.* § 60-2.11.

72. *Id.* § 60-2.72.

73. Section 60-2.12(e) provides: "Goals may not be rigid and inflexible quotas which must

lations frequently refer to numerical determinations and quotas to establish affirmative action programs⁷⁴ and to comparative numerical ratios as compliance-evaluation tools.⁷⁵ The OFCC, as are the courts, thus is confined by a number-oriented system. Despite the OFCC's official position, that its affirmative action requirements do not require rigid numerical hiring systems but rather the attainment of "relevant" or "good faith" goals, practical experience suggests that such systems result in goal-setting that becomes a "minimum" quota. Specific numerical goals then become a "cutting edge" of compliance enforcement, providing easily identifiable signs of noncompliance.

Numerical Remedies and Title VII

Use of numerical quota remedies under Title VII developed gradually along with the increased complexity and sophistication of the concept of employment discrimination, beginning in the late 1960's with a general acknowledgment and application of "goals and timetables" or "target quotas." This change signaled movement away from the original viewpoint that equal employment opportunity could be achieved with a general commitment by employers not to discriminate. In the 1970's, and particularly since the Supreme Court's ruling in *Griggs*, courts have not hesitated to establish remedies that, although framed as "target quotas," approach "minimum quota" plans.

Authority to fashion judicial remedies under Title VII is provided by section 706(g),⁷⁶ which vests broad discretion in the courts to

be met, but must be targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work." *Id.* § 60-2.12(e).

74. For example, section 60-2.12(h) provides: "Where deficiencies exist and where numbers or percentages are relevant in developing corrective action, the contractor shall establish and set forth specific goals and timetables separately for minorities and women." *Id.* § 60-2.12(h).

75. For example, the OFCC has established, as evaluative criteria, numerical formulas to determine "adverse effect" upon women and minorities in Standardized Contractor Evaluation Procedures, 41 C.F.R. § 60-60.9(V)(B)(1) (1974).

76. Section 706 (g) of Title VII provides:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment

order "affirmative action" or to provide "any . . . equitable relief . . . [it] deems appropriate." Courts have used this provision to establish extensive remedial powers.⁷⁷ Section 703(j),⁷⁸ however, may limit this remedial power, when it is exercised to order numerical quota relief, by providing:

Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . in comparison with the total number [or] percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.⁷⁹

This language suggests prohibition of any remedy requiring strict adherence to numerical quotas defined by race, color, religion, sex, or national origin, and legislative history appears to support this interpretation. The employment discrimination legislation contained no provision comparable to section 703(j) when first introduced; numerical quotas were considered and disavowed by proponents of the legislation in both the House of Representatives⁸⁰ and

practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

42 U.S.C. § 2000e-5(g) (1970).

77. Early decisions discussed the courts' broad powers under section 706(g). *See, e.g.,* *Papermakers Local 189 v. United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); *United States v. Sheetmetal Workers Local 36*, 416 F.2d 123 (8th Cir. 1969); *Asbestos Workers Local 53 v. Vogler*, 407 F.2d 1047 (5th Cir. 1969).

78. 42 U.S.C. § 2000e-2(j) (Supp. II, 1972).

79. *Id.*

80. *See* H.R. REP. NO. 914 (Part 2), 88th Cong., 1st Sess. 29 (1963).

the Senate.⁸¹ Controversy over this question continued, however, and section 703(j) was added as one of several compromise provisions.⁸² Congressional interpretation of this amendment reinforced the plain meaning of its language.⁸³

During the 1972 amendment process, two attempts were made to prohibit explicitly any numerical remedy as part of an affirmative action plan under either Title VII or Executive Order 11,246.⁸⁴ These proposals, primarily stimulated by judicial approval of the Philadelphia Plan,⁸⁵ were defeated.⁸⁶ A co-sponsor of the 1972 amendments acknowledged that affirmative action may require the courts to set numerical remedies,⁸⁷ and it became clear that the "color-blindness" standard no longer was embraced. The 1972 amendments did not determine conclusively the limit imposed upon numerical remedies by section 703(j). That two attempts at specific prohibition were defeated, with no countervailing effort for explicit permission, however, suggests congressional deferral to judicial resolution of the issue.⁸⁸

A changed pattern of remedial orders accompanied judicial aban-

81. See 110 CONG. REC. 8921 (1964) (remarks of Senator Williams). Senator Williams' interpretation reflects the "color-blind" standard of integration accepted at that time: "[T]o hire a Negro solely because he is a Negro is racial discrimination, just as much as a 'white only' employment policy. Both forms of discrimination are prohibited by title VII of this bill. The language of that title simply states that race is not a qualification for employment. Every man must be judged according to his ability." *Id.* The floor managers of the bill in the Senate also stated that an employer could not hire or refuse to hire on the basis of race. 110 CONG. REC. 7212 (1964) (Interpretive Memorandum of Title VII of H.R. 7152 Submitted Jointly by Senator Joseph S. Clark and Senator Clifford P. Case, Floor Managers).

82. The compromise provisions, a series of amendments introduced by Senators Dirksen and Mansfield, became known as the Dirksen-Mansfield substitute. These amendments were needed to end filibustering on the bill. See generally EQUAL EMPLOYMENT OPPORTUNITY COMM'N, LEGISLATIVE HISTORY OF TITLES VII AND XI OF THE CIVIL RIGHTS ACT OF 1964, at 1-11 (1967).

83. Senator Humphrey construed the provision, which he helped to draft, as follows: "The proponents of this bill have carefully stated on numerous occasions that title VII does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group. Since doubts have persisted, subsection (j) is added to state this point expressly." 110 CONG. REC. 12,723 (1965).

84. Amendment No. 829 to S. 2515, 92d Cong., 2d Sess. (1972); Amendment No. 907 to S. 2515, 92d Cong., 2d Sess. (1972).

85. See note 67 *supra* & accompanying text.

86. 118 CONG. REC. 706 (1972); 118 CONG. REC. 4917 (1972).

87. See 118 CONG. REC. 1664 (1972) (remarks of Senator Javits).

88. Analyzing the final version of the Equal Employment Opportunity Act of 1972, Senator Williams, a sponsor and floor manager of the bill, stated that existing judicial law was adopted for any issues not addressed specifically. 118 CONG. REC. 7166 (1972).

donment of the "color-blindness" standard in equal employment litigation. As section 703(j), a product of that abandoned standard, confronted courts no longer in agreement with its philosophy, efforts were made to avert its potentially constraining effect. Despite contentions that the section precludes judicial decrees containing specific numerical or percentage employment requirements, eight courts of appeals have approved that form of relief.⁸⁹ While section 703(j) is construed to prohibit findings of discrimination based solely upon the existence of a racial imbalance in the respondent's work force, it is not viewed as a bar to numerical relief once a violation has been found.⁹⁰ Consequently, the incorporation of quotas into Title VII remedies has flourished.⁹¹

Judicial reasoning underlying the use of numerical remedies closely parallels the Supreme Court's pronouncement in *Griggs* that "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."⁹² Using this approach, as well as the principle that courts in civil rights cases are not limited to statutorily enumerated remedies,⁹³ courts have imposed numerical relief upon private employers,⁹⁴ public employers⁹⁵ who have been subject to the provisions of

89. *NAACP v. Beecher*, 504 F.2d 1017 (1st Cir. 1974); *United States v. N.L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973); *Pennsylvania v. O'Neill*, 473 F.2d 1029 (3d Cir. 1973); *United States v. IBEW Local 212*, 472 F.2d 634 (6th Cir. 1973); *United States v. Wood, Wire, & Metal Lathers Local 46*, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); *United States v. Carpenters Local 169*, 457 F.2d 210 (7th Cir.), *cert. denied*, 409 U.S. 851 (1972); *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); *Asbestos Workers Local 53 v. Vogler*, 407 F.2d 1047 (5th Cir. 1969).

90. *United States v. IBEW Local 212*, 472 F.2d 634, 636 (6th Cir. 1973).

91. For an extensive compilation of decisions using numerical quota remedies for employment discrimination, see *Slate*, *supra* note 29, at 318-20 & nn.8-10.

92. 401 U.S. at 430. *See also* *United States v. IBEW Local 38*, 428 F.2d 144, 149-50 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970), where the court observed:

When the stated purposes of the Act and the broad affirmative relief authorization . . . are read in context with [section 703(j)], we believe that section cannot be construed as a ban on affirmative relief against continuation of effects of past discrimination . . . which have the practical effect of continuing past injustices.

Any other interpretation would allow complete nullification of the stated purposes of the Civil Rights Act of 1964.

93. *See Louisiana v. United States*, 380 U.S. 145 (1965).

94. *See, e.g., United States v. N.L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973); *Patterson v. American Tobacco Co.*, 8 FEP Cases 778 (E.D. Va. 1974); *United States v. Central Motor Lines, Inc.*, 338 F. Supp. 532 (W.D.N.C. 1971).

95. *See, e.g., NAACP v. Beecher*, 504 F.2d 1017 (1st Cir. 1974); *Smith v. City of East*

Title VII since 1972,⁹⁶ and labor unions.⁹⁷ Although courts assiduously avoid the "quota" label, the relief afforded undeniably can be categorized as a minimum quota.⁹⁸

The Civil Rights Acts and Numerical Quotas

Since the Supreme Court's decision in *Jones v. Alfred H. Mayer Co.*,⁹⁹ Title VII remedies have been supplemented by redress premised upon several post-Civil War Reconstruction laws.¹⁰⁰ Claimants need not elect among the different statutory bases available to them, nor need they exhaust the remedies available under one before they can have recourse under others.¹⁰¹ The standards and bur-

Cleveland, 363 F. Supp. 1131 (N.D. Ohio 1973).

96. See note 105 *infra*.

97. *E.g.*, *United States v. IBEW Local 212*, 472 F.2d 634 (6th Cir. 1973); *United States v. Wood, Wire, & Metal Lathers Local 46*, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); *United States v. Carpenters Local 169*, 457 F.2d 210 (7th Cir.), *cert. denied*, 409 U.S. 851 (1972).

98. For example, in *Rios v. Enterprise Ass'n, Steamfitters Local 638*, 501 F.2d 622 (2d Cir. 1974), the court rejected "quota" terminology for its order that a union admit sufficient nonwhite members that by July 1977 its membership would be at least 30 percent nonwhite: "We use 'goal' rather than 'quota' throughout this opinion for the reason that while to some the two words may be synonymous, the term 'quota' implies a performance not associated with 'goal.' For our purposes the significance in the distinction lies in the fact that once a prescribed goal is achieved the Union will not be obligated to maintain it, provided, of course, the Union does not engage in discriminatory conduct." *Id.* at 628 n.3.

99. 392 U.S. 409 (1968). In *Jones* the Court held that the Civil Rights Act of 1866 was intended to bar all racial discrimination, private as well as public, in the sale or rental of property and that the statute, thus broadly construed, was a valid exercise of congressional power to enforce the thirteenth amendment. As a result of this decision, courts have extended the Civil Rights Acts of 1866 and 1870 to include remedies for discriminatory practices in employment. See note 28 *supra*.

100. The two most significant statutes are the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1970), which grants to all citizens the same rights as are enjoyed by white citizens to make and enforce contracts, and the Civil Rights Act of 1870, *id.* § 1983, which prohibits deprivation of any constitutional or legal rights or immunities under color of state law. The expanded scope of these laws after *Jones* has encouraged use of section 1981 against private employers, while section 1983 became the primary equal employment law to be asserted against state and local public employers. Both statutes originally were enacted to implement the thirteenth amendment which was intended to remove the incidents of slavery from freed citizens.

Also available in certain circumstances is the Civil Rights Act of 1971, 42 U.S.C. § 1985 (Supp. II, 1972), which prohibits conspiracies to deprive any person of equal protection of the law. This statute, based upon the fourteenth amendment, has been used to challenge race and sex discrimination. See, *e.g.*, *Pendrell v. Chatham College*, 370 F. Supp. 494 (W.D. Pa. 1974) (claim of sex discrimination). The fourteenth amendment itself has provided a jurisdictional basis for challenging discrimination by state officials. *NAACP v. Allen*, 340 F. Supp. 703 (M.D. Ala. 1972).

101. See *Young v. International Tel. & Tel. Co.*, 438 F.2d 757 (3d Cir. 1971). An attempt

dens of proof under these statutes, particularly sections 1981¹⁰² and 1983,¹⁰³ are similar to those required under Title VII, and once a finding of discrimination has been made, the remedies available are as far reaching as under Title VII, involving a similar blend of equity principles as well as numerical quotas.

In *Carter v. Gallagher*,¹⁰⁴ the Court of Appeals for the Eighth Circuit approved a plan requiring one-third of all future hiring to be from minority applicants until demographic parity with the local Standard Metropolitan Statistical Area was attained. Because the decision in *Carter* was rendered before the extension of Title VII jurisdiction to state and local government employees,¹⁰⁵ it was based upon sections 1981 and 1983; nevertheless, the court of appeals relied heavily upon Title VII precedent.¹⁰⁶ While it confirmed the availability of numerical quotas under the civil rights statutes, the opinion in *Carter* also significantly established that a complete preference for minority persons, even though qualified, would infringe upon the rights of equally qualified nonminority persons.¹⁰⁷ The district court originally had proposed an absolute preference for the first 20 qualified minority applicants before any white applicants could be considered; compromising between a desire to eradicate the effects of past discrimination and a fear of reducing job opportunities for qualified white applicants, the court of appeals approved what it believed to be a reasonable ratio for the hiring of minority applicants.¹⁰⁸ *Carter* thus initiated a series of decisions under the civil rights statutes establishing ratio hiring or promotion schemes as remedies for employment disparity.¹⁰⁹

to make Title VII the exclusive federal remedy for employment discrimination was defeated during consideration of the 1972 amendments. Amendment No. 877 to S. 2515, 92d Cong., 1st Sess. (1972); see 118 CONG. REC. 3371 (1972). See also Larson, *The Development of Section 1981 As a Remedy for Racial Discrimination in Private Employment*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 56 (1972); Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449, 477-494 (1974).

102. 42 U.S.C. § 1981 (1970).

103. *Id.* § 1983.

104. 452 F.2d 315 (8th Cir.), cert. denied, 406 U.S. 950 (1972).

105. The 1972 amendments extended Title VII protection to these employees, effective March 24, 1972. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(5), 86 Stat. 103, amending 42 U.S.C. § 2000e(f) (1970).

106. 452 F.2d at 324-25.

107. *Id.* at 329.

108. *Id.* at 331.

109. See e.g., *Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Serv. Comm'n*,

Several procedural and "coverage" differences do exist, however, between the the civil rights statutes and Title VII. Sections 1981 and 1983 establish a more direct enforcement scheme, provide greater flexibility to award monetary relief, and offer broader coverage.¹¹⁰ Moreover, the absence from the civil rights statutes of any provision comparable to section 703(j) of Title VII undoubtedly has facilitated the use of numerical relief by courts in cases decided under those statutes.

The unique history of the civil rights statutes also must be considered. When confronted with equitable issues raised under these statutes, courts have shown an awareness of the fundamental principles established under the Reconstruction amendments in areas other than employment. For example, *prima facie* proof of discrimination has been established solely on the basis of statistical disparity in cases involving jury selection,¹¹¹ voter redistricting,¹¹² and university admissions.¹¹³ Similarly, the principle set forth in *Griggs*, permitting a finding of discrimination without a showing of specific intent, previously had been established in fourteenth amendment litigation¹¹⁴ based upon the rationale that "the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme."¹¹⁵ Moreover, the principle that purportedly neutral practices are unlawful when applied in a discriminatory manner or when they result in a discriminatory effect has been recognized in cases involving jury selection¹¹⁶ and pupil assignment¹¹⁷ as well as in the cases involving

482 F.2d 1333 (2d Cir. 1973); *Commonwealth v. O'Neill*, 473 F.2d 1029 (3d Cir. 1973); *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972); *NAACP v. Allen*, 340 F. Supp. 703 (M.D. Ala. 1972).

110. The civil rights statutes do not require deferral to the states prior to federal action as does section 706(c) of Title VII, 42 U.S.C. § 2000e(5)(6) (Supp. II, 1972). There are no statutory waiting periods under the civil rights statutes comparable to those in section 706(b), *id.* § 2000e(5)(b) (requirement for conciliation), and section 706(f)(1), *id.* § 2000e(5)(f)(1) (Government has exclusive jurisdiction to bring suit for 180 days after filing of a charge of discrimination). The civil rights statutes do not limit the period prior to the filing of a complaint for which back pay may be awarded, as does section 706(g), *id.* § 2000e(5)(g).

111. *See, e.g., Turner v. Fouche*, 396 U.S. 346 (1970).

112. *See, e.g., Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

113. *See, e.g., Meredith v. Fair*, 298 F.2d 696 (5th Cir.), *cert. denied*, 371 U.S. 828 (1962).

114. *See Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom. Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969).

115. *Id.* at 497.

116. *Turner v. Fouche*, 396 U.S. 346 (1970).

117. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 401 U.S. 424 (1971).

employment.¹¹⁸ When formulating employment discrimination relief under the civil rights statutes, therefore, courts undoubtedly will look beyond the facts of a particular case to the social and political history of these statutes, that history largely having been focused upon the elimination of the badges and incidents of slavery.

The civil rights statutes should continue as a vehicle for perhaps broader relief than is available under Title VII. Their effectiveness is evidenced by the "minimum quota" relief obtained against states and municipalities.¹¹⁹ The relatively uncertain impact of Title VII also may favor use of possibly broader civil rights statute remedies. Encouraged by the absence of administrative procedures under section 1983, and by fragmented government enforcement functions under Title VII for public employee claims,¹²⁰ claimants should continue to seek numerical quota relief pursuant to the civil rights statutes.

DESIRABILITY OF QUOTA REMEDIES

The governmental and judicial development of numerical remedies to achieve integration in employment has been gradual but persistent. Such remedies have been approached cautiously and awarded only after unsuccessful attempts more nebulously premised upon good will and national recognition that employment discrimination is inherently unjust. The courts, the Congress, and government agencies reluctantly have abandoned the ideal of "color-blindness" in favor of quantified civil rights enforcement techniques. Judicial hesitancy to acknowledge use of racial preferences is reflected in the tenuous distinctions drawn in civil rights cases.¹²¹

118. See, e.g., *Western Addition Community Organization v. Alioto*, 330 F. Supp. 536 (N.D. Cal. 1971); *Armstead v. Starkville Municipal Separate School Dist.*, 325 F. Supp. 560 (N.D. Miss. 1971).

119. See, e.g., *Gilliam v. City of Omaha*, 459 F.2d 63 (8th Cir. 1972); *Johnson v. City of Cincinnati*, 450 F.2d 796 (6th Cir. 1971).

120. Although the 1972 amendments extended Title VII coverage to public employees, the Government's enforcement role was divided between the EEOC, which can investigate and attempt conciliation of discrimination charges filed by state and municipal employees, and the Department of Justice, which has the exclusive right within the first 180 days following the filing of a claim to bring a court action for such complaints. 42 U.S.C. § 2000e-5(f) (Supp. II, 1972). Potential delay and confusion due to this split jurisdiction should make section 1983 an attractive alternative.

121. For example, when establishing a priority pool of applicants comprised entirely of blacks and Spanish-surnamed Americans, the court in *NAACP v. Beecher*, 504 F.2d 1017, 1027 (1st Cir. 1974), justified its action thusly: "The goal of color blindness, so important to

Similarly, Justice Douglas' frustration in *De Funis* was evident as he struggled to apply his human perception to a problem that has assumed mechanistic proportions. The human element of motive no longer predominates; unlawful employment discrimination can exist independent of an employer's intention or perception.¹²²

Any legal system that adopts such dispassionate precepts also requires similarly neutral standards to measure its progress. The federal government measures its success in enforcing nondiscrimination in employment by the principle of management by objectives. This technique, embodied in the Performance Management System, attempts to quantify the nature and degree of social change effected by integration of the work force. Quantification inevitably causes all results to be reduced to numbers that reflect proportionate participation for comparison with other numbers such as demographic distribution. Hence, this program stresses numerical evaluation, thereby inducing a search, not for the "why's" but merely to classify the "what's." All categories of affirmative action thus are grouped into the lowest common denominator, the minimum quota, mandating accomplishment by the most straightforward means of the numerical requirements established by the enforcing authority. An employer's first objective becomes attainment of a numerical participation level in a manner that absorbs a minimum of his time and effort; minority employees will be hired, perhaps on the basis of special selection factors, reducing the available positions for nonfavored applicants.

Although some barriers to nondiscrimination clearly persist in current employment systems, the effect of numerical remedial efforts, however totally fair as perceived, may be overzealousness by employers or unions attempting to avoid further enforcement problems. Reverse discrimination against the predominant group in the work force can result. A need to evaluate such methods according to the three previously identified fundamental considerations of affirmative action programs therefore is necessary.

Congress and the courts have left little doubt concerning the legal permissibility of the goal of changing the racial, sexual, or ethnic

our society in the long run, does not mean looking at the world through glasses that see no color; it means only that all colors are moral equivalents, to be treated on an equal basis. We believe that our society is well served by taking into account color in the fashion used, and carefully limited in extent and duration"

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

composition of a particular work force. Congress has established affirmatively that the elimination of all forms of discrimination in employment is a matter of high national concern,¹²³ and judicial agreement readily has followed.¹²⁴

Although characterized by less clarity, the second and third considerations, concerning legally permissible and socially appropriate remedies, also have been addressed. These inherently intertwined considerations undoubtedly have influenced courts that have employed the selective use of numerical quotas. While the ultimate question of the legal permissibility awaits Supreme Court resolution, lower courts have not balked when this method appeared the appropriate remedy. Even when confronted with the facially restrictive language of section 703(j), courts adjudicating Title VII claims have not been impeded in the exercise of their remedial discretion. Similar employment standards have been imposed pursuant to the civil rights statutes and Executive Order 11,246.

The constitutional issues presented by relief premised upon a specific "color-consciousness" have not yet been examined adequately, however. Left open by *De Funis*, this particularly troublesome question has not been developed fully by the few lower courts that have confronted it.¹²⁵ In *Associated General Contractors of Massachusetts, Inc. v. Altshuler*,¹²⁶ the Court of Appeals for the First Circuit did examine the problem carefully, although the appearance of a satisfactory resolution may be illusory. The plaintiffs in *Altshuler*, representing a group of building trades contractors, challenged a provision in their contract that obligated them to hire minority group members as 20 percent of their work force for a particular project.¹²⁷ The court rejected the contention that this provision required classification of employees in violation of the racially "blind" equal protection clause, stating that numerical employment discrimination remedies are permissible when there is a com-

123. See note 7 *supra*.

124. The Supreme Court noted the importance of the civil rights effort in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968).

—125. Several courts have supported the constitutional permissibility of preferential treatment to remedy discrimination. See, e.g., *Southern Ill. Builder's Ass'n v. Ogilvie*, 471 F.2d 680 (7th Cir. 1972); *Contractors Ass'n v. Secretary of Labor*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971); *Officers for Justice v. Civil Serv. Comm'n*, 371 F. Supp. 1328 (N.D. Cal. 1973).

126. 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 94 S. Ct. 1971 (1974).

127. *Id.* at 11 (contract provision mandated by state law).

pling need to remedy serious racial imbalance if the means employed are reasonably related to the desired end.¹²⁸ Nevertheless, *Altshuler* cannot be viewed as an ultimate resolution of the constitutional question. The Supreme Court has allowed racial employment classifications only during wartime emergency,¹²⁹ and, of course, final constitutional sanction can come only from the high court.

At the heart of the constitutional issue is a conflict between two social interests, the desire to end discrimination and the effort to establish a "color-blind" society. Because use of numerical quotas inherently evokes this imbroglio, they are highly suspect, especially when milder remedies are available. Numerical relief, therefore, should be used only when no other effective methods are available. Recent judicial cognizance of this frailty of numerical relief is apparent from the disinclination to resort to that remedy until after repeatedly unsuccessful milder efforts.¹³⁰ Direct coercion may be appropriate when anything less would delay unduly the needed corrective action¹³¹ or when an employer's widely perceived discriminatory reputation otherwise might discourage minority applicants.¹³² Nevertheless, this questionable form of relief should be used sparingly, and it should not be employed merely because of its ease of application or monitoring; to do so can only foster antagonism that will hinder unnecessarily the drive for equal employment opportunity.

128. *Id.* at 18-19.

129. See *Korematsu v. United States*, 323 U.S. 214 (1944).

130. See, e.g., *United States v. Wood, Wire, & Metal Lathers Local 46*, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973) (numerical relief ordered after union turned in a "trivial and superficial" affirmative action plan); *NAACP v. Allen*, 340 F. Supp. 703 (M.D. Ala. 1972) (racial discrimination had so "permeated" the department that supplemental relief held to be mandatory).

131. See, e.g., *Officers for Justice v. Civil Serv. Comm'n*, 371 F. Supp. 1328 (N.D. Cal. 1973); *Shield Club v. City of Cleveland*, 370 F. Supp. 251 (N.D. Ohio 1973).

132. See, e.g., *Carter v. Gallagher*, 452 F.2d 315 (8th Cir.), *cert. denied*, 406 U.S. 950 (1972).