COLOR-CONSCIOUS QUOTA RELIEF: A CONSTITUTIONAL REMEDY FOR RACIAL EMPLOYMENT DISCRIMINATION

Racially discriminatory hiring practices are especially pernicious because of their effect on a person's ability to provide for his family in the job of his choice.[1] The problems faced in attempting to ameliorate continuing racial discrimination in employment are particularly complex and incapable of resolution by simple judicial reprimand. While court-ordered quotas may provide a cure for the past harms of such discrimination, the remedy may fail to survive constitutional scrutiny, since the guarantee of equal protection of the law applies to both minority and white employment applicants.[2]

In *NAACP v. Allen*[3] a class action was brought to desegregate the all-white Alabama State Police.[4] Plaintiffs[5] based their claim on the equal protection clause of the fourteenth amendment and Title VII of the Civil Rights Act of 1964.[6] Finding evidence of racial discrimination,[7] the

1. *See* Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970).

2. U.S. CONST. amend. XIV, § 1; *see* Carter v. Gallagher, 452 F.2d 315, 325 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

3. 493 F.2d 614 (5th Cir. 1974).

4. The NAACP was able to establish a convincing prima facie case of discrimination at the trial level. It was shown that, in the 37 year history of the Alabama State Police, there had never been a black state trooper. The Alabama Department of Public Safety (DPS) employed 650 state troopers, 26 trooper cadets and 279 support personnel. The State Police also maintained a force of 500 unpaid, volunteer, reserve state troopers, who were selected by the DPS. The Department of Personnel conducts the Alabama Merit System and, in conjunction with the DPS, hired all but five of the DPS employees. These five nonmerit employees, who worked as laborers, were the only blacks employed by the DPS. *Id.* at 616.

5. The NAACP represented the class composed of its members and all similarly situated blacks in the State of Alabama. Phillip Paradise, Jr., a black state police applicant, intervened individually and on behalf of the class represented by the NAACP. The United States was ordered by the district court to participate as a party and amicus curiae. *Id.*

6. 42 U.S.C. §§ 2000e to e-17 (1970), *as amended*, (Supp. II, 1972). The Act provides: "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race . . . ." *Id.* § 2000e-2(a)(1) (1970). The Equal Employment Opportunity Act of 1972 § 2, 42 U.S.C. § 2000e (Supp. II, 1972), was enacted on March 24, 1972, subsequent to the district court decision, NAACP v. Allen, 340 F. Supp. 703 (M.D. Ala. 1972), and prior to the court of appeals decision, NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974). For the first time, state agencies and political subdivisions were brought under the restrictions of Title VII. This expansion was accomplished by including within the definition of "person," which is a part of the statutory definition of "employer," the following: "governments, governmental agencies, [and] political subdivisions . . . ." 42 U.S.C. § 2000e(a) (Supp. II, 1972).

7. One of the most common methods of proving such discrimination is to create a

district court issued a decree ordering the Alabama Department of Public Safety to hire one qualified black trooper for each qualified white trooper hired until blacks composed approximately twenty-five percent of the force.[8] On appeal, the State of Alabama contended that eligible white applicants would be subjected to reverse discrimination in violation of the equal protection clause.[9] The Court of Appeals for the Fifth Circuit, however, rejected the State's position and affirmed the district court decree.[10]

When discrimination is shown to exist and there is no exception justifying its existence,[11] Title VII provides for an active judicial role.[12]

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statistical presumption. A prima facie case of discrimination will be established by the presentation of statistical evidence showing a wide disparity between the percentage of blacks working for the employer in question and the percentage of blacks in the total population of the locality. *See, e.g.*, Morrow v. Crisler, 491 F.2d 1053, 1056 (5th Cir. 1974), *cert. denied*, 419 U.S. 895 (1974); United States v. Carpenters Local 169, 457 F.2d 210, 214 (7th Cir.), *cert. denied*, 409 U.S. 851 (1972). The employer then has the burden of either disproving the statistical presumption or proving the existence of a statutorily or constitutionally valid reason for the disparity. *See* Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 223 (5th Cir. 1974); United States v. Carpenters Local 169, *supra* at 214. Plaintiffs in *Allen* created the statistical presumption, and defendants failed to carry their burden in rebuttal. 340 F. Supp. at 705, *aff'd*, 493 F.2d 614 (5th Cir. 1974).

8. 340 F. Supp. at 706-07. Chief Judge Johnson's injunctive decree, ordering a hiring ratio, also applied to police cadets, auxiliary state troopers, and support personnel. The decree ordered the defendants to take specific affirmative action to advertise and recruit qualified black applicants.

9. 493 F.2d at 617.

10. *Id.* at 622.

11. An exception to Title VII's ban on racial discrimination exists if there is an "overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business . . . ." Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. denied*, 404 U.S. 1006 (1971). Business purpose is defined as having three criteria. First, it must be sufficiently compelling to override any racial impact. Secondly, no other available alternative having a less discriminatory impact can exist. Finally, the business practice must accomplish its stated purpose. This strict limitation of the business purpose exception conforms to the demands of the compelling governmental interest test applied in these situations. *See* notes 29-30 *infra*. One instance when the exception has been allowed was presented in Spurlock v. United Airlines, Inc., 475 F.2d 216 (10th Cir. 1972). In *Spurlock* the Tenth Circuit acquiesced in United Airlines' racially discriminatory hiring procedure for flight officers in light of the overriding need for safety in that part of the airline industry. *Id.* at 219.

12. 42 U.S.C. § 2000e-5(g) (1970); *see* Carter v. Gallagher, 452 F.2d 315, 330 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); United States v. Ironworkers Local 86, 443 F.2d 544, 553 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); Irvin v. Mohawk Rubber Co., 308 F. Supp. 152, 160 (E.D. Ark. 1970).

To rebut a charge of discrimination, the employer may prove that his employment practices are fair on their face and that he has no intent to discriminate. It is, however, the "consequences" of the employer's acts that the court will examine. *See* Griggs v. Duke

The court has not only the power, but the duty, to order a decree sufficient to prohibit racial discrimination.[13] Title VII authorizes the use of affirmative relief as a remedy for intentional discrimination.[14] "Intentional," in the context of the statute, simply means that the employer's acts were not accidentally performed.[15] Affirmative judicial relief for Title VII violations has included color-conscious hiring ratios.[16] While on its face Title VII appears to ban remedies that

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Power Co., 401 U.S. 424, 430 (1971); Gregory v. Litton Sys., Inc., 316 F. Supp. 401, 403 (C.D. Cal. 1970), *modified*, 472 F.2d 631 (9th Cir. 1972). If the employer has discriminated in the past, and the employer's present neutral policies have done nothing to alleviate the effects of past discrimination, a violation of Title VII is still established. Rowe v. General Motors Corp., 457 F.2d 348, 355 (5th Cir. 1972); *see* United States v. St. Louis-S.F. Ry., 464 F.2d 301, 307 (8th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973); Papermakers Local 189 v. United States, 416 F.2d 980, 991 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); United States v. Central Motor Lines, Inc., 338 F. Supp. 532, 557 (W.D.N.C. 1971). Good faith or present neutral employment practices do not create an exception to the restrictions of Title VII. *See* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971); Walston v. County School Bd., 492 F.2d 919, 924 (5th Cir. 1974). For a general discussion of the "effect" theory and its application see Gautreaux v. City of Chicago, 480 F.2d 210 (7th Cir. 1973), *cert. denied*, 414 U.S. 1144 (1974); 8 URBAN L. ANN. 265 (1974).

13. *See, e.g.*, United States v. Carpenters Local 169, 457 F.2d 210, 216 (7th Cir.), *cert. denied*, 409 U.S. 851 (1972) (employment); United States v. Jacksonville Terminal Co., 451 F.2d 418, 458 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972) (employment); Hutchings v. United States Indus., Inc., 428 F.2d 303, 310 (5th Cir. 1970) (employment); Papermakers Local 189 v. United States, 416 F.2d 980, 990 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970) (employment & union); Insulators Local 53 v. Vogler, 407 F.2d 1047, 1052 (5th Cir. 1969) (employment & union). *See generally* Louisiana v. United States, 380 U.S. 145, 154 (1965) (voting).

14. 42 U.S.C. § 2000e-5(g) (1970), provides: "[i]f the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . . the court may . . . order such affirmative action as may be appropriate . . . ." The courts have held that "this grant of authority should be broadly read and applied so as to effectively terminate the [discriminatory] practice and make its victims whole." Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 721 (7th Cir. 1969). *See also* United States v. Ironworkers Local 86, 443 F.2d 544, 553 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); Irvin v. Mohawk Rubber Co., 308 F. Supp. 152, 160 (E.D. Ark. 1970).

15. United States v. Central Motor Lines, Inc., 338 F. Supp. 532, 559 (W.D.N.C. 1971). This interpretation of the statutory requirement of "intent" must be viewed in reference to the court's primary concentration on the consequences or effect of the employer's acts. Therefore, the resolution of the issue of the consequences of the employer's discriminatory practices will lead to the determination of the necessity for affirmative relief. *See* note 12 *supra*.

16. *See, e.g.*, Morrow v. Crisler, 491 F.2d 1053, 1056 (5th Cir.), *cert. denied*, 419 U.S. 895 (1971); United States v. N.L. Indus., Inc., 479 F.2d 354, 377 (8th Cir. 1973); United States v. Lathers Local 46, 471 F.2d 408, 412 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); United States v. Carpenters Local 169, 457 F.2d 210, 211 (7th Cir.), *cert. denied*, 409 U.S. 851 (1972); Carter v. Gallagher, 452 F.2d 315, 330 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); United States v. Ironworkers Local 86, 443 F.2d 544, 553 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); NAACP v. Beecher, 371 F. Supp. 507, 520-23 (D. Mass.), *aff'd*, 504 F.2d 1017 (1st Cir. 1974).

incorporate preferential treatment based on race,[17] the Act does not prevent the use of racial quotas for the purpose of eliminating past discrimination. The anti-preferential treatment clause has been construed only to prohibit the use of racial quotas implemented for the *sole* purpose of insuring racial balance.[18]

Racial discrimination in certain employment situations[19] can also be attacked on a constitutional basis by utilizing the fourteenth amendment's equal protection clause.[20] Once a violation of the fourteenth amendment has been proven,[21] a court, exercising its equity powers, may order affirmative action to remedy the situation.[22]

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17. 42 U.S.C. § 2000e-2(j) (1970).

18. "[W]hile quotas merely to attain racial balance are forbidden, quotas to correct past discriminatory practices are not." United States v. Lathers Local 46, 471 F.2d 408, 413 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); *see, e.g.*, United States v. Electrical Workers Local 38, 428 F.2d 144, 149 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970); United States v. Pipefitters Local 638, 347 F. Supp. 169, 181 (S.D.N.Y. 1972); *Developments in the Law — Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1242 (1971).

19. The fourteenth amendment equal protection clause is applicable only when state action exists. The state action in *Allen* is the operation of the state police. *See* Evans v. Newton, 382 U.S. 296 (1966); Shelley v. Kraemer, 334 U.S. 1 (1948).

20. *See, e.g.*, Evans v. Newton, 382 U.S. 296 (1966) (park); Anderson v. Martin, 375 U.S. 399 (1964) (voting); Goss v. Board of Educ., 373 U.S. 683 (1963) (education); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (restaurant); Brown v. Board of Educ., 347 U.S. 483 (1954) (education); Reynolds v. Board of Pub. Instruction, 148 F.2d 754 (5th Cir.), *cert. denied*, 326 U.S. 746 (1954) (employment); Everett v. Riverside Hose Co. No. 4, Inc., 261 F. Supp. 463 (S.D.N.Y. 1966) (employment). It must be remembered that the Constitution does not guarantee a right to public employment, Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886, 896 (1961), or a right to proportional representation of minorities in any particular program, North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 46 (1971). The Constitution only guarantees equal employment opportunity through the equal protection clause. NAACP v. Allen, 493 F.2d 614, 621 (5th Cir. 1974); *see* Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971). Even though there is no guaranteed right to proportional representation of minorities, this fact does not prevent the court from utilizing the percentages of blacks to whites in the total population of the local community as an approximate standard to judge when the past effects of discrimination in a program have been eliminated. NAACP v. Allen, 340 F. Supp. 703, 706 (M.D. Ala. 1972), *aff'd*, 493 F.2d 614 (1974); *see* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 25 (1971).

21. The discussion of effect versus purpose set out in the discussion of Title VII is applicable to the equal protection clause. *See* note 12 *supra*.

22. Wright, *Public School Desegregation: Legal Remedies for De Facto Segregation*, 16 W. RES. L. REV. 478, 489 (1965); *see* United States v. Loew's, Inc., 371 U.S. 38 (1962); Clemons v. Board of Educ., 228 F.2d 863, 857 (6th Cir.), *cert. denied*, 350 U.S. 1006 (1956). The broad powers of equity are sufficiently flexible to remedy continuing discrimination. Dowell v. Board of Educ. 338 F. Supp. 1256, 1272 (W.D. Okla.), *aff'd*, 465 F.2d 1012 (10th Cir.), *cert. denied*, 409 U.S. 1041 (1972); *see, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of

Depending upon the extent of the racial discrimination and pursuant to the equal protection clause, the courts have ordered race-conscious remedies that include definite ratios and percentages of blacks to whites.[23] The scope of the remedy is determined by the extent of the violation,[24] and the standard for reviewing a district court's exercise of its equity jurisdiction is whether or not the judge abused his discretion.[25]

When racial classifications are incorporated in judicial remedies, the classifications have been attacked by whites alleging reverse discrimination.[26] The equal protection clause not only acts as the basis for the application of racial hiring percentages, but it also is a restriction on the

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Educ., 402 U.S. 1, 15-16 (1971); Mitchell v. Robert DeMario Jewelry Inc., 361 U.S. 288, 291 (1960); Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F .2d 1333, 1340 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975); Carter v Gallagher, 452 F.2d 315, 324 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

The general principles applicable to the framing of an equity decree do not vary according to the subject matter of the case before the court. "[A] school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct by a balancing of the individual and collective interests, the condition that offends the Constitution." Swann v. Charlotte-Mecklenburg Bd. of Educ., *supra.* at 15-16 (1971).

23. In the area of education the courts have freely utilized color-conscious remedies that incorporate racial ratios and percentages to stop discrimination. *See, e.g.*, Davis v. Board of School Comm'rs, 402 U.S. 33, 35 (1971); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 22-25 (1971); Kelly v. Guinn, 456 F.2d 100, 110 (9th Cir. 1972), *cert. denied*, 413 U.S. 919 (1973); United States v. Hinds County School Bd., 433 F.2d 619, 620-21 (5th Cir. 1970); Singleton v. Jackson Municipal Separate School Dist., 419 F.2d 1211, 1218 (5th Cir.), *cert. denied*, 396 U.S. 1032 (1970). "The Constitution is both color blind and color conscious . . . . [T]he Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination." United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 876 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967). The courts have upheld requirements, promulgated by executive order, that certain recipients of federal contracts institute affirmative action programs. These programs include racial hiring ratios and percentages. Southern Ill. Builders Ass'n v. Ogilvie, 470 F.2d 680, 684 (7th Cir. 1972); Contractors Ass'n of E. Pa. v. Secretary of Labor, 442 F.2d 159, 175 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971). Color-conscious hiring ratios have also been ordered under the equal protection clause and Title VII. *See, e.g.*, Vulcan Soc'y, Inc. v. Civil Serv. Comm'n, 490 F.2d 387, 399 (2d Cir. 1973); Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1340 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975); Baker v. Columbus Municipal Separate School Dist., 462 F.2d 1112, 1115 (5th Cir. 1972); Carter v. Gallagher, 452 F.2d 315, 330 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

24. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971).

25. United States v. Crescent Amusement Co., 323 U.S. 173, 185 (1944); United States v. Dillon Supply Co., 429 F.2d 800, 804 (4th Cir. 1970).

26. Carter v. Gallagher, 452 F.2d 315, 324 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); *see* notes 35-36 *infra.*

use of the quota.[27] Although not unconstitutional per se,[28] racial classifications are subject to strict scrutiny by the courts.[29] A judicial remedy incorporating a quota may be upheld for a compelling interest,[30] and courts have not been reluctant to find a compelling interest justifying the racial remedy in employment discrimination cases.[31] The

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27. *See* note 29 *infra*. Federal classifications based on race would be subject to the fifth amendment due process clause. The concept of equal protection of the law has been held to be a part of the fifth amendment due process clause because "discrimination may be so unjustifiable as to be violative of due process." Bolling v. Sharpe, 347 U.S. 497, 499 (1954); *see, e.g.*, Richardson v. Belcher, 404 U.S. 78, 81 (1971); Shapiro v. Thompson, 394 U.S. 618, 641-42 (1969); Schneider v. Rusk, 377 U.S. 163, 168 (1964).

28. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967); Korematsu v. United States, 323 U.S. 214, 216 (1944); *Developments in the Law — Equal Protection*, 82 HARV. L. REV. 1065, 1103 (1969) [hereinafter cited as *Developments in the Law*]; 56 MINN. L. REV. 842, 866 (1972). It has been argued by some members of the Supreme Court that racial classifications of any kind are unconstitutional per se. *See* DeFunis v. Odegaard, 416 U.S. 312, 343-44 (1974) (Douglas, J., dissenting); Loving v. Virginia, 388 U.S. 1, 13 (1967) (Stewart, J., concurring). This rule, however, has never been accepted by a majority of the Supreme Court.

29. *See, e.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973); Loving v. Virginia, 388 U.S. 1, 11 (1967); Korematsu v. United States, 323 U.S. 214, 216 (1944); Gunther, *The Supreme Court, 1971 Term — Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 24 (1972); *Developments in the Law, supra* note 28, at 1088; 56 MINN. L. REV. 842, 866 (1972); 34 U. PITT. L. REV. 130, 137 (1972).

It has been suggested that benign racial quotas, racial quotas used for the purpose of prohibiting discrimination, should be subject to a less stringent equal protection test. *See* Fiss, *Racial Imbalance in the Public School: The Constitutional Concepts*, 78 HARV. L. REV. 564, 579-80 (1965); *Developments in the Law, supra* note 28, at 1107-11. The continued utilization of the compelling interest test, however, will prevent, by its stringent limitations, every population group from demanding this severe form of relief in circumstances which do not warrant its use.

A question exists whether a different standard should be used in analyzing a voluntarily imposed racial quota as opposed to a judicially ordered quota. The reverse discrimination that plaintiff alleges he is subject to is the same whether a court or a private party institutes the quota. Therefore, the equal protection test that is used should not vary based on the factor of voluntariness. In fact, courts reviewing voluntary quotas have used the same equal protection test that other courts have utilized in considering racial classifications. *See* Porcelli v. Titus, 431 F.2d 1254, 1257 (3d Cir. 1970), *cert. denied*, 402 U.S. 944 (1971); DeFunis v. Odegaard, 82 Wash. 2d 11, 32, 507 P.2d 1169, 1182 (1973), *vacated per curiam as moot*, 416 U.S. 312 (1974); 8 URBAN L. ANN. 311 (1974).

30. Compelling interest means that the racial classification's "objective could not be attained by a measure which did not draw racial distinctions, but also that the public interest involved outweighs the detriments that will be incurred by the affected private parties." *Developments in the Law, supra* note 28, at 1103. In calculating the "public interest," the court should look to "the benefits accruing to society and the degree of risk which will be incurred if a measure of that nature is not permitted." *Id.* The actual "detriments" should be discovered "by examining both the importance of the individual or group rights infringed and the extent to which the measure will have long-term adverse effects on those interests." *Id.*

31. There are numerous examples of racial classifications that have been properly

use of quotas, however, has not been accepted as a general judicial prescription.[32] Illustrative of this position is *Carter v. Gallagher*[33] in which the Eighth Circuit held the district court's racial hiring remedy unconstitutional.[34] In *Carter* the Minneapolis Fire Department was ordered by the district court to give an *absolute* hiring preference to the next twenty qualified minority applicants. The Eighth Circuit decided that this specific remedy constituted reverse discrimination in violation of the equal protection clause.[35] The Supreme Court, however, has not definitively ruled on this issue.[36]

In *Allen* the existence of racial discrimination was not seriously at issue in the court of appeals.[37] The only real issue decided by the Fifth Circuit was the constitutionality of the racial quota ordered by the

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applied. *See, e.g.*, Porcelli v. Titus, 431 F.2d 1254 (3d Cir. 1970), *cert. denied*, 402 U.S. 944 (1971) (employment); Baker v. City of St. Petersburg, 400 F.2d 294 (5th Cir. 1968) (employment); Offerman v. Nitkowski, 378 F.2d 22 (2d Cir. 1967) (education); NAACP v. Beecher, 371 F. Supp. 507 (D. Mass.), *aff'd*, 504 F.2d 1017 (1st Cir. 1974) (employment).

32. As a result, courts issue restricted racial quotas. *See* note 27 *supra*.

33. 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

34. *Id.* at 325. In *Carter* a class action on behalf of certain minority groups, based on the fourteenth amendment equal protection clause and Title VII, sought injunctive relief against discriminatory hiring practices by the Minneapolis Fire Department.

35. *Id.* The court in *Carter* then went on to hold that a one-to-two, qualified black to qualified white, hiring ratio, which will remain in effect until 20 qualified minority members are hired, is constitutional. According to the *Carter* court, the one-to-two ratio remedy is not a "quota" and is constitutional, where as the remedy of only hiring blacks for the next 20 positions is unconstitutional, because:

> [A]s soon as the trial court's order is fully implemented, all hirings will be on a racially nondiscriminatory basis, and it could well be that many more minority persons or less, as compared to the population at large, over a long period of time would apply and qualify for the positions.

Id. at 330-31. This distinction is invalid, since as soon as the 20 qualified minority members are hired, pursuant to the district court's plan in *Carter*, the hiring would also be on a racially neutral basis. Therefore, the fact that the hiring procedure will eventually be racially neutral does not distinguish between these two remedies.

The claim of reverse discrimination stated by the Eighth Circuit is highly improper. Whether the remedy which calls for the absolute preference for 20 qualified blacks or the remedy which calls for the one-to-two, qualified black to qualified white, hiring ratio, until 20 blacks are hired, is instituted, some qualified whites are going to be passed over in favor of a qualified black. Faced with this fact, there is either a compelling government interest and it is valid to use a racial quota and pass over a qualified white, or there is no compelling interest and it is unconstitutional to pass over a qualified white. The court in *Allen* frames the compelling interest in a way that would make both tests in *Carter* constitutional. *See* text at note 40 *infra*.

36. *See* DeFunis v. Odegaard, 416 U.S. 312 (1974) (the court avoided an opportunity to rule on reverse discrimination by dismissing the case as moot).

37. 493 F.2d at 617; *see* note 4 *supra*. Confronted with an overwhelming numerical presumption of discrimination, the only defenses the court could have accepted would

district court. Concentrating on the factual basis for the racial quota, the court concluded that the scope of the remedy was neither disproportionate to the extent of the violation[38] nor inconsistent with the response of other courts faced with similar employment discrimination situations.[39] Focusing on the constitutional basis for the remedy, the court found a compelling governmental interest justifying the imposition of a racial hiring quota. It declared that, "It is the collective interest, governmental as well as social, in effectively ending unconstitutional racial discrimination, that justifies temporary, carefully circumscribed resort to racial criteria."[40] The significance of this remedy lies in the Fifth Circuit's clear definition of the limits that would govern the application of racial quotas as a judicial remedy for racial discrimination in employment. In *Allen* the court listed four valid restrictions on the utilization of racial hiring quotas.[41] First, their application should be limited by the traditional views of comity and judicial restraint.[42] Secondly, racial hiring quotas should be used only as

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have been proof of a valid business purpose or a compelling state interest. The State of Alabama concentrated, however, on demonstrating other facts in an attempt to prove good faith and neutral employment practices. Brief for Defendants at 4, NAACP v. Allen, 340 F. Supp. 703 (M.D. Ala. 1972). The State also argued that under the district court's order less qualified blacks would be hired over more qualified whites. The court of appeals dismissed this contention as illogical because the state trooper selection process had not been shown to be nondiscriminatory or job-related. Therefore, the present standing of any applicant on the police force's job eligibility lists cannot be used as a basis for a constitutional argument. 493 F.2d at 618; *see* note 44 *infra*. The State also attempted to demonstrate graphically that the federal government was more guilty of racial discrimination in employment than was Alabama. Brief for Defendants, *supra*, at 3. Since Alabama was unable to prove either a valid business purpose or a compelling government interest, the State was found to be in violation of both Title VII and the equal protection clause. 493 F.2d at 616-17.

38. 493 F.2d at 620-21. There was irrebuttable proof of a long history of intentional racial discrimination. The State of Alabama's efforts at desegregation were considered insignificant by the two reviewing federal courts.

39. *See* Morrow v. Crisler, 491 F.2d 1053 (5th Cir. 1974), *cert. denied*, 419 U.S. 895 (1975); Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

40. 493 F.2d at 619. The state agency involved is a police force. This fact must not be overlooked in the equal protection balancing process. "This is a police department and the visibility of the Black patrolman in the community is a decided advantage for all segments of the public at a time when racial divisiveness is plaguing law enforcement." Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1341 (2d Cir. 1973).

41. 493 F.2d at 621.

42. *Id. See generally* note 31-32 *supra*. Inherent in this limitation is the concept that "[j]udicial authority enters only when local authority defaults." Swann v. Charlotte-

a temporary remedy.[43] Thirdly, only minority members who are qualified for the position should be hired.[44] Finally, the racial remedy should be reserved for those circumstances in which no other alternative is available.[45]

The racial remedy fashioned by the district court in *Allen* complies with the preceding standards established by the Fifth Circuit. Since the scope of the remedy is related to the extent of the violation, the district court judge did not abuse his discretion by ordering the quota.[46] When the Alabama State Police force is approximately twenty-five percent black, the temporary hiring ratios will be replaced by a racially neutral hiring procedure.[47] Before being hired as a state trooper, the minority applicant must successfully complete the entrance examinations and the training courses.[48] The district court therefore concluded, on the basis of

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Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971). Even when this "default" occurs, the court is limited to fashioning a remedy equal to the nature of the violation. *Id.* The court cannot step beyond this traditional limitation.

43. "It is a temporary remedy that seeks to spend itself as promptly as it can by creating a climate in which objective, neutral employment criteria can successfully operate . . . ." 493 F.2d at 621. *See, e.g.*, Baker v. City of St. Petersburg, 400 F.2d 294, 301 n.10 (5th Cir. 1968); *Developments in the Law, supra* note 28, at 1104; *cf.* Korematsu v. United States, 323 U.S. 214, 219 (1944).

Since the court will determine the duration of the quota standard, the burden of proof will be on the employer to show that the discrimination has been eliminated if he wants the quota standard to be dropped before the time period set by the court ends. Morrow v. Crisler, 491 F.2d 1053, 1056 (5th Cir. 1974).

44. "[I]t is not the purpose of quota relief to require that anyone who lacks job-related qualifications be employed." 493 F.2d at 618. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971); United States v. Chesapeake & O. Ry., 471 F.2d 582, 593 (4th Cir. 1972).

The standard defense of an employer charged with racial employment discrimination is that there are no qualified minority members available to fill the employer's needs. This defense has rarely been accepted by the court. *See, e.g.*, Morrow v. Crisler, 491 F.2d 1053, 1055-56 (5th Cir. 1974), *cert. denied*, 419 U.S. 895 (1975); United States v. N.L. Indus., Inc., 479 F.2d 354, 371 (8th Cir. 1973); United States v. Hayes Int'l Corp., 456 F.2d 112, 120 (5th Cir. 1972). *But cf.* Spurlock v. United Airlines, Inc., 475 F.2d 216 (10th Cir. 1972). In *Allen* the court observed that since the issuance of the district court's injunctive order, 325 blacks had passed the qualifying examination for state troopers. 493 F.2d at 621.

45. "It is a form of relief which should be reserved for those situations in which less restrictive means have failed or in which the chancellor could reasonably foresee that they would fail." 493 F.2d at 621. *See, e.g.*, Harper v. Kloster, 486 F.2d 1134, 1136-37 (4th Cir. 1973); Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1340 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975); United States v. Lathers Local 46, 471 F.2d 408, 414 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973).

46. 493 F.2d at 620-21. *See generally* notes 32-33 *supra.*

47. 493 F.2d at 621.

48. *Id.*

the pervasiveness of the discrimination[49] and the lack of response to an earlier court order banning state police support personnel hiring practices,[50] that the only practical judicial remedy is one incorporating a racial quota.[51]

Allen stands for the principle that, when confronted with continuing racial discrimination in employment, a court has the duty to fashion a remedy sufficient to eliminate the discrimination. The remedy may take the form of an affirmative hiring procedure that utilized color-conscious ratios and percentages. Consistent with the prevailing judicial interpretation, the use of racial classifications in fashioning a remedy to overcome racial employment discrimination was held in *Allen* to be within the discretion of the court. *Allen* is significant not only for reaffirming the constitutionality of color-conscious quota relief, but also for clearly presenting the restrictions on the utilization of the racial remedy. Those restrictions by definition will prevent misuse of this drastic judicial remedy and will guide courts dealing with the problem of racial discrimination in employment in the future[52] It is hoped that the restrictions on the racial remedy's application, as articulated in *Allen*, will allay the fear and distrust of quotas. A backlash[53] against this type of remedy could destroy a practical answer to the problem of racial discrimination in employment and frustrate effective implementation of true equal employment opportunity.[54]

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49. *See* note 4 *supra*.

50. United States v. Frazer, 317 F. Supp. 1079 (M.D. Ala. 1970). The Alabama Department of Personnel was permanently enjoined from racial discrimination in its hiring practices.

51. 493 F.2d at 621.

52. Since the court of appeals in *Allen* stated that its decision is limited to the particular facts of *Allen*, the specific effect of this decision in areas other than racial discrimination in employment is uncertain. 493 F.2d at 418.

53. Racial quotas have not been limited to employment discrimination. They have been widely utilized in the desegregation of schools. *See* note 23 *supra*. In the area of housing, the concept of limited racial quotas has also been upheld. *See* Otero v. New York City Housing Authority, 484 F.2d 1122 (2d Cir. 1973); Banks v. Perk, 341 F. Supp. 1175 (N.D. Ohio 1972), *modified*, 473 F.2d 910 (6th Cir. 1973).

54. On July 18, 1974, Mr. Justice Powell, at the request of the State of Alabama, entered an order extending the time for filing a petition for writ of certiorari in *NAACP v. Allen* to and including September 16, 1974. The NAACP's attorney indicated that the Alabama Attorney General has decided not to file a petition for writ of certiorari to the Supreme Court. Letter from Joseph J. Levin, Jr. to Ronald R. Urbach, Oct. 7, 1974, on file with *Urban Law Annual*.