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Compensating for Race or National Origin in Employment Testing

MICHAEL A. REITER*

INTRODUCTION

In 1971 the United States Supreme Court rendered its now famous decision interpreting Title VII of the Civil Rights Act of 1964,1 Griggs v. Duke Power Co.2 Although that decision stands for more than one proposition,3 it is most often quoted for the following rule of law:

The Act [Title VII] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation . . . . If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.4

As a result of Griggs, courts have interpreted Title VII to permit a challenge to any employment practice which, although neutral on its face, has a disparate impact5 upon protected persons affected by

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   It shall be an unlawful employment practice for an employer—
   (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
   (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or to otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
3. The Court held that the thrust of Title VII goes to the consequences of employment practices, and not merely the motivation; that the guidelines of the EEOC are entitled to great deference; and that under Title VII, practices, tests, or procedures neutral on their face or in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory practices. Id. at 430-34.
4. Id. at 431.
5. The term "disparate impact" as used in this article, and as reflected in the cases cited herein, means having a disproportionate effect, and should not be confused with the definition of "disparate treatment" found in 29 C.F.R. § 1607.11 (1976). That section states:

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the particular employment practice. When challenging an employment practice on these grounds, a plaintiff must establish a prima facie case by showing that the questioned employment practice has a disparate impact upon the particular minority group to which the plaintiff belongs. Once the plaintiff demonstrates the disparate impact, the burden shifts to the defendant to justify the use of the questioned employment practice; for instance, by proving that its use is a business necessity.

The principle of disparate or unequal treatment must be distinguished from the concepts of test validation. A test or other employee selection standard— Even though validated against job performance in accordance with the guidelines in this part— cannot be imposed upon any individual or class protected by title VII where other employees, applicants or members have not been subjected to that standard. Disparate treatment, for example, occurs where members of a minority or sex group have been denied the same employment, promotion, transfer or membership opportunities as have been made available to other employees or applicants. Those employees or applicants who have been denied equal treatment because of prior discriminatory practices or policies, must at least be afforded the same opportunities as had existed for other employees or applicants during the period of discrimination. Thus, no new test or other employee selection standard can be imposed upon a class of individuals protected by title VII who, but for prior discrimination, would have been granted the opportunity to qualify under less stringent selection standards previously in force.


7. There are basically three other ways of proving employment discrimination: (1) by showing direct, deliberate, willful discrimination by the defendant, e.g., by showing that he has used racial epithets. See, e.g., Murry v. Am. Standard, Inc. 373 F. Supp. 716 (E.D. La.), aff'd, 488 F.2d 529 (5th Cir. 1973); (2) by inferring discrimination through a showing that the defendant has a disproportionately low number of minority employees given the size of the locale from which the defendant draws its work force. See, e.g., Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970); (3) by showing "(i) that [a person] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).


9. See, e.g., Green v. Mo. Pac. R.R. Co., 523 F.2d 1290 (8th Cir. 1975); Palmer v. Gen. Mills, Inc., 513 F.2d 1040 (6th Cir. 1975); Wallace v. Debron Corp., 494 F.2d 674 (8th Cir. 1974); United States v. St. Louis-San Francisco Ry. Co., 464 F.2d 301 (8th Cir. 1972), cert. denied, 409 U.S. 1116 (1973). In Palmer, the court stated that the test is whether an overriding legitimate business purpose exists, making the practice necessary to the safe and efficient operation of the business:

The specific elements of the standard are as follows: the business purpose must be sufficiently compelling to override any discriminatory impact; the practice must effectively carry out the business purpose it is alleged to serve; and there must be available no alternative policies or practices which would better accomplish the business purpose or accomplish it equally well but with a lesser discriminatory impact.

513 F.2d at 1044.
Moreover, courts have made it abundantly clear that this approach is not limited to cases involving racial discrimination, nor does it apply only to those cases where a particular employment practice perpetuates past discrimination by the defendant. Based upon the above principles, courts have held an employer’s use of garnishments, arrest records, conviction records, educational attainment, length of time on a particular job, “walk-in” or “word of mouth recruitment,” height requirements, hair length, and employment tests to be neutral employment criteria which, upon a showing of disproportionate impact upon a protected class, are proscribed by Title VII. As a result, their use has been enjoined.


11. Although Griggs v. Duke Power Co., 401 U.S. 424 (1971), dealt with a neutral criterion which perpetuated past discrimination, courts since Griggs have held that, absent a statutory defense, Title VII proscribes the use of all neutral employment criteria which have a disparate impact upon a group protected by Title VII, whether or not the criteria perpetuate past discrimination of that employer. See, e.g., Wallace v. Debron Corp., 494 F.2d 674 (8th Cir. 1974); Gregory v. Litton Sys., Inc., 472 F.2d 631 (9th Cir. 1972).

12. See, e.g., Wallace v. Debron Corp., 494 F.2d 674 (8th Cir. 1974); Johnson v. Pike Corp. of Am., 332 F. Supp. 490 (C.D. Cal. 1971); cf. Robinson v. City of Dallas, 514 F.2d 1271 (5th Cir. 1975), holding that the plaintiff failed to establish a prima facie case for racial discrimination, where he challenged a city personnel rule authorizing the disciplining of employees who fail to pay their “just debts.”


22. See, e.g., Gregory v. Litton Sys., Inc., 472 F.2d 631 (9th Cir. 1972); Wallace v. Debron Corp., 494 F.2d 674 (8th Cir. 1974). Of course, one may question whether the law should prohibit an employer from utilizing an employment criterion that perpetuates previous dis-
The purpose of this article is to examine testing as a neutral employment criterion. In so doing, it will focus on the various methods used to establish that an employment test is job related. These methods are generally referred to as test validation. Because validating a test—that is, showing that the test is an adequate predictor of performance on a particular job—is both expensive and time-consuming, suggestions have been made that artificial "handicaps" be given to minority employees and applicants for employment in order to avoid the need to engage in employment test validation. These suggestions are appealing to employers who wish to continue the use of employment tests, since it is considerably less expensive to grant preferences to persons of minority group background than it is to validate a particular employment test. However, problems of "reverse discrimination" may arise as white victims of the preference challenge its use. This article will examine alternative methods to employment testing validation to determine whether any of such methods will withstand the "reverse discrimination" challenge.

**EMPLOYMENT TESTING AS A NEUTRAL CRITERION**

*General Principles of the Law of Employment Testing*

The most frequently encountered barrier to equal employment opportunity is the use of written tests. The EEOC guidelines provide: An examination of charges of discrimination filed with the Commission and an evaluation of the results of the Commission's compliance activities has revealed a decided increase in total test usage and a marked increase in doubtful testing practices which, based on our experience, tend to have discriminatory effects. In many cases, persons have come to rely almost exclusively on tests as the basis for making the decision to hire, transfer, promote, grant membership, train, refer or retain, with the result that candidates are selected or rejected on the basis of a single test score. Where tests are so used, minority candidates frequently experience disproportionately high rates of rejection by failing to attain score levels that have been established as minimum standards for qualification.

It has also become clear that in many instances persons are using tests as the basis for employment decisions without evidence that they are valid predictors of discrimination by society in general but does not in any way perpetuate past discrimination of the employer. Compelling arguments can be made that an employer who has discriminated on the basis of race prior to the enactment of Title VII should not now be permitted to utilize neutral criteria which perpetuate his past discrimination. Contra, International Bhd. of Teamsters v. United States, 45 U.S.L.W. 4506 (U.S. 1977). But if society has discriminated against blacks by subjecting them to arrests in far greater proportion than their numbers, why should this employer be prohibited from using arrests as a criterion for employment when he was in no way responsible for the past discrimination? For a position similar to this, see Meany, Chicago Trib., Aug. 31, 1975, at 1, col. 1. The Supreme Court answered this argument in Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971): "The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."

23. 1973 Legal Services Manual for Title VII Litigation 41-42 [hereinafter cited as Litigation Manual]. The EEOC guidelines provide:

An examination of charges of discrimination filed with the Commission and an evaluation of the results of the Commission's compliance activities has revealed a decided increase in total test usage and a marked increase in doubtful testing practices which, based on our experience, tend to have discriminatory effects. In many cases, persons have come to rely almost exclusively on tests as the basis for making the decision to hire, transfer, promote, grant membership, train, refer or retain, with the result that candidates are selected or rejected on the basis of a single test score. Where tests are so used, minority candidates frequently experience disproportionately high rates of rejection by failing to attain score levels that have been established as minimum standards for qualification.

It has also become clear that in many instances persons are using tests as the basis for employment decisions without evidence that they are valid predictors of
have been the most frequently challenged neutral practice in employment litigation. In *Griggs v. Duke Power Co.*, the Supreme Court unanimously held that Title VII forbids the use of employ-

employee job performance. Where evidence in support of presumed relationships between test performance and job behavior is lacking, the possibility of discrimination in the application of test results must be recognized. A test lacking demonstrated validity (i.e., having no known significant relationship to job behavior) and yielding lower scores for classes protected by title VII may result in the rejection of many who have necessary qualifications for successful work performance.

29 C.F.R. § 1607.1(b) (1975).

It is known that the mean scores for blacks are lower than the mean scores for whites on most general ability, intelligence, aptitude, learning ability, or overall ability pencil and paper tests. 1970 PERSONNEL TESTING AND EMPLOYMENT OPPORTUNITY 3. See Bannister, Slater & Radzan, *The Use of Cognitive Tests in Nursing Candidate Selection*, 36 OCCUPATIONAL PSYCH. 75 (1962); Kirkwood, *Selection Techniques and the Law: To Test or Not to Test?*, 44 PERSONNEL 18 (Nov.-Dec. 1967); Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1998, 1639 (1969). In Cooper & Sobol, supra, the authors contend that there "is substantial evidence that blacks and other disadvantaged groups tend to perform worse on general aptitude tests than whites."


24. 29 C.F.R. § 1607.2 (1975) defines test as follows:

For the purpose of the guidelines in this part, the term "test" is defined as any paper-and-pencil or performance measure used as a basis for any employment decision. The guidelines in this part apply, for example, to ability tests which are designed to measure eligibility for hire, transfer, promotion, membership, training, referral or retention. This definition includes, but is not restricted to, measures of general intelligence, mental ability and learning ability; specific intellectual abilities; mechanical, clerical, and other aptitudes; dexterity and coordination; knowledge and proficiency; occupational and other interests; and attitudes, personality or temperament. The term "test" includes all formal, scored, quantified or standardized techniques of assessing job suitability including, in addition to the above, specific qualifying or disqualifying personal history or background requirements, specific educational or work history requirements, scored interviews, biographical information blanks, interviewers' rating scales, scored application forms, etc.

25. LITIGATION MANUAL, supra note 23, at 42; see cases cited in note 21 supra.

ment tests that are discriminatory in form unless the employer meets "the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question." 27 Most recently in Albemarle Paper Co. v. Moody, 28 the Court elaborated upon this principle:

This burden arises, of course, only after the complaining party or class has made out a prima facie case of discrimination, i.e., has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants. . . . If an employer does then meet the burden of proving that its tests are "job related," it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in "efficient and trustworthy workmanship." . . . Such a showing would be evidence that the employer was using its tests merely as a "pretext" for discrimination. 29

EEOC guidelines define discrimination in the testing context as

the use of any test which adversely affects hiring, promotion, transfer or any other employment or membership opportunity of classes protected by title VII . . . unless: (a) the test has been validated and evidences a high degree of utility as hereinafter described, and (b) the person giving or acting upon the results of the particular test can demonstrate that alternative suitable hiring, transfer, or promotion procedures are unavailable for his use. 30

Presently, if a complaining party shows that any performance measure used as a criterion for employment, promotion, transfer or any other employment opportunity has an adverse effect upon classes protected by Title VII, the burden shifts to the defendant to justify its use.

**Validating Occupational Tests**

To assist an employer in establishing that a particular test is job related, the EEOC has issued guidelines for such determinations

27. *Id.* at 432.
29. *Id.* at 425.
30. 29 C.F.R. § 1607.3 (1975). There is obviously a conflict between the guidelines and the Supreme Court's decision in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). Under the guidelines the burden is placed upon the person giving or acting upon the results of a particular test to demonstrate that alternative suitable hiring, promotion, or transfer procedures are unavailable for his use, while Albemarle places that burden upon the complaining party. See text accompanying note 29 supra.
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through professional validation studies. Although the EEOC guidelines are not administrative "regulations" formulated pursuant to procedures established by Congress, the Supreme Court has indicated that they are "entitled to great deference."32

Thus, when an employer wishes to utilize a particular test to select from among candidates for a position, the test should be validated, where technically feasible,33 "for each minority group with which it is used; that is, any differential rejection rates that may exist, based on a test, must be relevant to performance on the jobs in question."34

Under the guidelines, in order to validate a test—that is, to show that the test is an adequate predictor of performance on a particular job—an employer must have empirical evidence based upon studies employing generally accepted procedures for determining validity, such as those promulgated by the American Psychological Association.35 The guidelines suggest several methods for validating employment tests.36


33. 29 C.F.R. § 1607.4(b) (1975) provides:

   The term "technically feasible" as used in these guidelines means having or obtaining a sufficient number of minority individuals to achieve findings of statistical and practical significance, the opportunity to obtain unbiased job performance criteria, etc. It is the responsibility of the person claiming absence of technical feasibility to positively demonstrate evidence of this absence.

34. Id. § 1607.4(a).

35. Id. § 1607.8 provides:

   (a) Under no circumstances will the general reputation of a test, its author or its publisher or casual reports of test utility be accepted in lieu of evidence of validity. Specifically ruled out are: assumptions of validity based on test names or descriptive labels; all forms of promotional literature; data bearing on the frequency of a test's usage; testimonial statements of sellers, users or consultants; and other non-empirical or anecdotal amounts of testing practices or testing outcomes.

   (b) Although professional supervision of testing activities may help greatly to insure technically sound and nondiscriminatory test usage, such involvement alone shall not be regarded as constituting satisfactory evidence of test validity.

36. Id. § 1607.5 provides:

   (a) For the purpose of satisfying the requirements of this part, empirical evidence in support of a test's validity must be based on studies employing generally accepted procedures for determining criterion-related validity, such as those described in "Standards for Educational and Psychological Tests and Manuals" published by American Psychological Association, 1200 17th Street N.W., Washington, D.C. 20036. Evidence of content or construct validity, as defined in that publica-
tion, may also be appropriate where criterion-related validity is not feasible. However, evidence for content or construct validity should be accompanied by sufficient information from job analyses to demonstrate the relevance of the content (in the case of job knowledge or proficiency tests) or the construct (in the case of trait measures). Evidence of content validity alone may be acceptable for well-developed tests that consist of suitable samples of the essential knowledge, skills or behaviors composing the job in question. The types of knowledge, skills or behaviors contemplated here do not include those which can be acquired in a brief orientation to the job.

(b) Although any appropriate validation strategy may be used to develop such empirical evidence, the following minimum standards, as applicable, must be met in the research approached in the presentation of results which constitute evidence of validity:

1. Where a validity study is conducted in which tests are administered to applicants, with criterion data collected later, the sample of subjects must be representative of the normal or typical candidate group for the job or jobs in question. This further assumes that the applicant sample is representative of the minority population available for the job or jobs in question in the local labor market. Where a validity study is conducted in which tests are administered to present employees, the sample must be representative of the minority groups currently included in the applicant population. If it is not technically feasible to include minority employees in validation studies conducted on the present work force, the conduct of a validation study without minority candidates does not relieve any person of his subsequent obligation for validation when inclusion of minority candidates becomes technically feasible.

2. Tests must be administered and scored under controlled and standardized conditions, with proper safeguards to protect the security of test scores and to insure that scores do not enter into any judgments of employee adequacy that are to be used as criterion measures. Copies of test and test manuals, including instructions for administration, scoring, and interpretation of test results, that are privately developed and/or are not available through normal commercial channels must be included as a part of the validation evidence.

3. The work behaviors or other criteria of employee adequacy which the test is intended to predict or identify must be fully described; and, additionally, in the case of rating techniques, the appraisal form(s) and instructions to the rater(s) must be included as a part of the validation evidence. Such criteria may include measures other than actual work proficiency, such as training time, supervisory ratings, regularity of attendance and tenure. Whatever criteria are used they must represent major or critical work behaviors as revealed by careful job analyses.

4. In view of the possibility of bias inherent in subjective evaluations, supervisory rating techniques should be carefully developed, and the ratings should be closely examined for evidence of bias. In addition, minorities might obtain unfairly low performance criterion scores for reasons other than supervisor’s prejudice, as when, as new employees, they have had less opportunity to learn job skills. The general point is that all criteria need to be examined to insure freedom from factors which would unfairly depress the scores of minority groups.

5. Differential validity. Data must be generated and results separately reported for minority and nonminority groups wherever technically feasible. Where a minority group is sufficiently large to constitute an identifiable factor in the local labor market, but validation data have not been developed and presented separately for that group, evidence of satisfactory validity based on other groups will be regarded as only provisional compliance with these guidelines pending separate validation of the test for the minority group in question. (See § 1607.9). A test which is differentially valid may be used in groups for which it is valid but not for those in which it is not valid. In this regard, where a test is valid for two groups but one group characteristically obtains higher test scores than the other without a corre-
Criterion-related validity, the preferred method of validation under the guidelines,\(^{37}\) includes two types of validation: predictive validation and concurrent validation. Predictive validation consists of testing all applicants for a given job for a period of time and hiring some of those applicants, but not using the test results as a basis for selection. Criteria of job success are gathered from those hired after a reasonable period of time on the job. It is then determined whether there is a significant correlation\(^{38}\) between those who scored higher on the test and those who perform better on the job.\(^{39}\) If there

\textbf{37.} See id. § 1607.5(a) set out at note 36 supra.

\textbf{38.} Ascertaining whether there is a significant correlation between performance on a test and performance on a job is a technique of statistical analysis beyond the scope of this article. The matter is covered in the guidelines at id. § 1607.5(c); see note 36 supra.

\textbf{39.} Of course, frequently difficulties arise in determining what constitutes criteria of job success. One could use such criteria as turnover, absenteeism, or tardiness, but while these may be necessary elements of a “good employee” they certainly are not sufficient. Moreover, in low-level jobs it is possible that the more creative or better employees are likely to leave. However, predicting long tenure on a job is a sensible goal of a selection procedure.

Other criteria that can be used as criteria of job performance are salary progression, productivity, achievement on certain proficiency tests, or ratings by supervisors and co-workers. Of course, there is always the possibility of bias being built into ratings of job performance. One must be particularly sensitive to this problem when a group of predominantly black employees in a unit are rated by a white supervisor. This point is emphasized in 29 C.F.R. § 1607.5(b)(4) (1975); see note 36 supra.
is a significant correlation between the test scores and the performance level on a particular job, the test has been shown to have predictive validity for that job and it can be used without violating Title VII. If this method of validation is used, the sample of subjects must be representative of the typical candidate group for the jobs in question. In addition, the applicant sample must be representative of the minority population available for the jobs in the local labor market.\(^4\)

The method generally known as concurrent validation utilizes a similar approach. When using this method, both criteria of job success and performance levels are obtained from employees already on the job. It is then determined whether there is a significant correlation between those who have done well on the test and those who have done well on significant aspects of the job.\(^4\) When this method of validation is used, the sample of present employees must be representative of the minority group included in the applicant population.\(^4\) If it is not technically feasible to include minority employees in the validation studies conducted on the present work force, the studies must be re-evaluated when minority subjects are available.

Where either method of criterion-related validation is not feasible, evidence of content or construct validation may be used.\(^4\) Content validation is a process whereby a test is constructed which contains questions which are a representative sample of all of the tasks performed on the job,\(^4\) while construct validation consists of determining which attributes, characteristics, or trait measures are useful on a particular job, and then devising a test which measures those characteristics.\(^4\)

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40. 29 C.F.R. § 1607.5(b)(1) (1975); see note 36 supra.
41. See Vulcan Soc'y of the N.Y. City Fire Dep't, Inc. v. Civil Serv. Comm'n, 490 F.2d 387 (2d Cir. 1973).
42. See Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1975); see also League of United Latin Am. Citizens v. City of Santa Anna [current] 13 Empl. Prac. Dec. ¶ 11,308 (C.D. Cal. 1976) where the feasibility of one testing procedure over another appears to be more stringently applied to public sector employers.
43. 29 C.F.R. § 1607.5(b)(1) (1975); see note 36 supra.
44. Id. at § 1607.5(b); see note 36 supra. However, courts have rejected the use of content or construct validity in the absence of proof that a criterion-related validity study was not feasible. See Douglas v. Hampton, 512 F.2d 976, 987 (D.C. Cir. 1975); W. Addition Community Organization v. Alioto, 360 F. Supp. 733 (N.D. Cal. 1973); Bridgeport Guardians v. Members of Bridgeport Civil Serv. Comm'n., 354 F. Supp. 778 (D. Conn. 1973), modified on other grounds, 482 F.2d 1333 (2d Cir. 1973); Fowler v. Schwarzwalder, 351 F. Supp. 721 (D. Minn. 1972).
45. One court has said, "It is likely that such a showing of content validity could be made only in regard to simple, narrowly-defined jobs; perhaps the best example is steno-
A fundamental principle reflected in the guidelines is that a test may be avalid predictor of performance for one racial group but not for another. This principle, known as differential validity, can be explained by several factors. Tests generally have been developed with whites from middle-class homes as the model subject, and they often assume a common experiential background. Where blacks have neither the same cultural nor educational experiences as do whites, it is possible that a particular test has a different degree of validity for blacks than for whites. The guidelines accept the thesis of differential validity and require a person relying upon a particular test to generate data and to report results separately for minority and non-minority groups, wherever technically feasible. A test which is differentially valid may be used for groups for which it is valid, but not for those groups for which it is not valid.

Obviously, from what has been said, validating a test requires the assistance of an expert, and it can be time-consuming and expensive. However, if a particular test is shown to affect adversely members of a minority group and the evidence is not rebutted by proof of the test’s validity, the use of the test will most probably be found unlawful. But even when evidence of validation has been presented, courts frequently have held the evidence of validation insufficient, thus rendering the use of such tests impermissible.
In light of these decisions, some commentators have concluded that the language of the guidelines is too stringent. One psychologist has suggested that the guidelines are so rigorous that only one in twenty corporations could adequately validate a test for different races.

Many employers feel that the testing guidelines are so rigorous, expensive, and time-consuming that they have decided to return to the "seat-of-the-pants approach" to hiring and promotion. Thus, although an author in 1971 stated that "testing has rapidly increased in prominence," at least one writer has more recently concluded that "the use of testing is declining sharply in American business for reasons that have little to do with its accuracy. Testing's biggest stumbling block now is the Equal Employment Opportunities [sic] Commission (EEOC) and its guidelines on job placement." In fact, when "applied strictly, the testing requirements are impossible for many employers to follow."

To avoid the difficulties encountered in justifying the validity of employment tests, many defendants have concentrated their efforts on attempts to demonstrate that the use of a particular test does not adversely affect minority group members. However, such defenses have often met with little success. Other employers, fearing litiga-

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52. See Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1128-31 (1971) [hereinafter cited as Developments—Title VII].
55. Developments—Title VII, supra note 52, at 1121. The authors do note, however, that the growth of testing "may not have been so spectacular since the passage of Title VII. . . ." Id.
57. Developments—Title VII, supra note 52, at 1131. Of course, it is possible that employers have difficulty in validating tests because tests are poor predictors of job performance. See, e.g., E. Ghiselli, The Validity of Occupational Aptitude Tests 137 (1966); D. Super & J. Crites, Appraising Vocational Fitness 106 (rev. ed. 1962). Cooper & Sobol, supra note 23, at 1643: "But a paper and pencil test asking general questions does not necessarily measure the relevant mental capacity. It measures the capacity to answer the questions on the test. This may or may not be related to the capacity to perform well on particular jobs."
59. See note 58 supra. But cf. cases cited in note 60 infra.
Employment Testing

Recently, however, one of the largest publishers of personnel tests has suggested an inexpensive method of selecting employees for hire, promotion, or transfer whereby employers could continue employment testing, without validation, and without violating Title VII. This method, known as the "Percentile Within Normative Class Method of Selecting Employees" (Percentile Method), is intended to relieve employers of the burdens of validation and to diminish the likelihood of litigation. Since many employers would like to continue using personnel tests, they may ultimately wish to adopt this alternative to the expensive and time-consuming validation process set forth in the EEOC and OFCC guidelines. Adoption of the Percentile Method would undoubtedly affect employees throughout the United States.

The following section will explain the Percentile Method. The method then will be critically evaluated to determine its ability to withstand challenge under Title VII.

THE PERCENTILE METHOD

Background

Probably the most widely used of all intelligence tests is the Wonderlic Personnel Test. It consists of fifty questions, takes twelve minutes to complete and "can be administered by any well-trained clerk." Wonderlic himself describes the test as follows:

The Personnel Test is not "just a simple list of questions." It is a job sample about which we know many things. First of all, it was scientifically constructed following a very complicated formula. Many thousands of people were tested and retested before it was established. Many hundreds of hours of psychological research were necessary to make it simple and still effective.

As a result of this research, we know within reliable statistical variation that no matter how many times applicants take the test,

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60. Wall St. J., Sept. 3, 1975, at 19, col. 1. The EEOC believes that businesses are overreacting. Id. Support for the EEOC's position can be found in some cases which have upheld validation studies done by employers. See, e.g., Coopersmith v. Roudebush, 517 F.2d 818, 824 (D.C. Cir. 1975); Sims v. Local 65, Sheet Metal Workers, 489 F.2d 1023, 1025 (6th Cir. 1973); Shield Club v. City of Cleveland, 370 F. Supp. 251 (N.D. Ohio 1974).
61. E. WONDERLIC, WONDERLIC PERSONNEL TEST MANUAL (1975) [hereinafter cited as WONDERLIC].
62. Developments—Title VII, supra note 52, at 1121: "The Wonderlic Test is used by over 55% of all companies in the United States employing more than 1600 employees." Note, Legal Implications of the Use of Standardized Ability Tests in Employment and Education, 68 COLUM. L. REV. 691 (1968).
63. WONDERLIC, supra note 61, at 2.
it is unlikely that they would improve their comparative position on it. The Test does measure some very real and important human traits. The questions get progressively more difficult. As applicants go through the test, they meet with various types of problems: problems that expose their ability to (1) understand and think in terms of words, (2) understand and think in terms of numbers, (3) think in terms of symbols and (4) think in terms of ideas.

As applicants take the examination, they are compared with others on their ability to carefully follow detailed directions; to do arithmetic problems; and compared on their ability to analyze geometric figures. Other types of items presented to them include analogies, disarranged sentences, definitions, judgment, direction following items using clerical data, spatial relation items, etc. . . . Thus, a wide variety of questions commonly found in a mental ability test are presented to the applicant.\textsuperscript{64}

In discussing what can be learned from the test, Wonderlic asserts:

Not every job requires the same degree of problem solving, nor is every job as complex as some. What is needed, is to establish passing or so-called critical scores for various occupations. This should be done for each company since job titles are not completely descriptive. They are known to vary from plant to plant even within the same organization. Also, the critical score—the passing score—must be moved up or down, depending upon the available supply of applicants.\textsuperscript{65}

However, Wonderlic does provide minimum scores “established in many industries.”\textsuperscript{66}

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Administrator-Executive & 30 \\
Engineer & 29 \\
Accountant & 28 \\
Programmer & 28 \\
Manager-Supervisor & 27 \\
Salesman-Field Representative & 26 \\
Computer Operator & 25 \\
Secretary & 25 \\
Accounting Clerk & 25 \\
Writer, News, etc. & 25 \\
Sales & Service-Customer Service & 24 \\
Technician & 24 \\
Stenographer & 24 \\
Cashier & 24 \\
Foreman & 24 \\
Bookkeeper & 23 \\
Draftsman & 23 \\
Receptionist & 23 \\
Office, General & 23 \\
Student-Part Time Employee & 23 \\
Lineman, Utility & 22 \\
Teller & 22 \\
Typist & 21 \\
Clerk-Clerical & 20 \\
Key Punch Operator & 20 \\
Police-Patrolman & 20 \\
Skilled Labor & Trades & 20 \\
File Clerk & 19 \\
Maintenance & 18 \\
Telephone Operator & 18 \\
Unskilled Operator & 16 \\
Nurses Aide & 15 \\
Warehouseman & 15 \\
Custodian & 15
\end{tabular}
\end{center}

\textsuperscript{64} Id. at 4.
\textsuperscript{65} Id. at 4-5.
\textsuperscript{66} For example, Wonderlic recommends the following minimum raw scores for the positions listed:

\begin{itemize}
  \item \textbf{Administrator-Executive} \ldots 30
  \item \textbf{Draftsman} \ldots 23
  \item \textbf{Engineer} \ldots 29
  \item \textbf{Receptionist} \ldots 23
  \item \textbf{Accountant} \ldots 28
  \item \textbf{Office, General} \ldots 23
  \item \textbf{Programmer} \ldots 28
  \item \textbf{Student-Part Time Employee} \ldots 23
  \item \textbf{Manager-Supervisor} \ldots 27
  \item \textbf{Lineman, Utility} \ldots 22
  \item \textbf{Salesman-Field Representative} \ldots 26
  \item \textbf{Teller} \ldots 22
  \item \textbf{Computer Operator} \ldots 25
  \item \textbf{Typist} \ldots 21
  \item \textbf{Secretary} \ldots 25
  \item \textbf{Clerk-Clerical} \ldots 20
  \item \textbf{Accounting Clerk} \ldots 25
  \item \textbf{Key Punch Operator} \ldots 20
  \item \textbf{Writer, News, etc.} \ldots 25
  \item \textbf{Police-Patrolman} \ldots 20
  \item \textbf{Sales & Service-Customer Service} \ldots 24
  \item \textbf{Skilled Labor & Trades} \ldots 20
  \item \textbf{Technician} \ldots 24
  \item \textbf{File Clerk} \ldots 19
  \item \textbf{Stenographer} \ldots 24
  \item \textbf{Maintenance} \ldots 18
  \item \textbf{Cashier} \ldots 24
  \item \textbf{Telephone Operator} \ldots 18
  \item \textbf{Foreman} \ldots 24
  \item \textbf{Unskilled Labor} \ldots 16
  \item \textbf{Bookkeeper} \ldots 23
  \item \textbf{Nurses Aide} \ldots 15
  \item \textbf{Warehouseman} \ldots 15
  \item \textbf{Clerk-Clerical} \ldots 15
  \item \textbf{Custodian} \ldots 8
\end{itemize}
Perhaps because of its widespread use, the Wonderlic Personnel Test, as of 1969, was the test most frequently challenged on the ground that it was discriminatory. Moreover, challenges to its use have increased, and the number of decisions holding that its use did, in fact, have an adverse impact upon minority groups has been a special concern of employers.

Eliminating Adverse Impact as a Method of Avoiding Test Validation

In 1970, in response to the many administrative and judicial decisions invalidating the Wonderlic Test, research was conducted on a sample of 38,452 black job applicants taken from a total sample of 251,253 persons for the purpose of determining (a) whether, in fact, the Wonderlic Personnel Test did have an adverse impact upon Negroes, (b) whether any statistical patterns could be ascertained, and (c) if the test adversely affected Negroes, whether anything could be done to eliminate that adverse impact. The results of that research confirmed what courts have long held:

[A] very stable differential in raw scores achieved by Negro Applicant Populations exists. Where Education, Sex, Age, Region of Country, and/or Position Applied For are held constant, Negro-Caucasian Wonderlic personnel score differentials are consistently observed. These mean score differentials are, as other researchers have noted in the study of mental ability, about one standard deviation apart when comparisons of Caucasians and Negroes are studied.

Later research bolstered similar hypotheses with respect to the
Wonderlic Personnel Test scores for other minority groups. Thus, if an employer wished to hire persons for a particular position with the general mental ability level of the average high school graduate, as determined by the Wonderlic Personnel Test, use of a single raw score as a cut-off in determining a job applicant's acceptability would result in a substantially higher rejection rate of all minority candidates. To illustrate, a cut-off score of 21, the national average for high school graduates, would eliminate:

- 34.9% of all Caucasian applicants;
- 75.1% of all Negro applicants;
- 67.4% of all Spanish Surnamed American applicants;
- 48.2% of all American Indian applicants;
- 43.7% of all Oriental applicants;
- 54.4% of all other foreign native language applicants.

Without substantial evidence of validation, and without showing that alternative suitable employment procedures are unavailable, the use of the Wonderlic Test in this fashion would be violative of Title VII, since there is a substantially higher rejection rate of minority applicants.

To eliminate this adverse impact, Wonderlic has suggested replacing the use of a single raw score with the use of a multiple raw score based upon a single percentile standing. The result would be that the minimum raw score on the Wonderlic Test acceptable for employment decisions involving Caucasians would be higher than would be the minimum acceptable score for minority groups. To arrive at the minimum raw score necessary for the hire, promotion, or transfer of any particular individual, that person's raw score would be determined by reference to a table of norms for his or her racial, ethnic, or nationality class and by locating the raw score which corresponds to his or her percentile standing.

For example, if an employer wished to hire persons with the gen-

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72. Spanish Surnamed American, Oriental, American Indian and Other Foreign Native Language Norms 3 (1971) [hereinafter Minority Norms].
73. WONDERLIC, supra note 61, at 5.
76. Similar, although not so elaborate, suggestions have been made by others. See Developments—Title VII, supra note 53, at 1130 stating, “Because of the impracticality of the validation and alternative showing requirements, and the fact that the Commission will scrutinize closely higher rejection rates for minority candidates than non-minority candidates,” the easiest way for an employer to stay out of trouble and to avoid extensive validation techniques is to hire an acceptable proportion of blacks by applying a lower cutoff score to black applicants. See also Note, Legal Implications of the Use of Standardized Ability Tests in Employment and Education, 68 COLUM. L. REV. 691, 705 (1968).
eral mental ability of the average high school graduate, he would see that the raw score of twenty-one corresponds to forty-eight percent under the cumulative percentile standing for all job applicants regardless of race, national origin, or ethnic background.Using the Percentile Method, the employer would then turn to separate tables for that person's racial, ethnic, or nationality class and would find the following raw scores to approximate the forty-eighth percentile:

**48TH PERCENTILE MINIMUM TEST PERFORMANCE**

<table>
<thead>
<tr>
<th>Normative Class</th>
<th>Raw Score</th>
<th>Percent Eliminated</th>
</tr>
</thead>
<tbody>
<tr>
<td>Caucasian</td>
<td>23</td>
<td>50%</td>
</tr>
<tr>
<td>Negro</td>
<td>15</td>
<td>51%</td>
</tr>
<tr>
<td>Spanish Surnamed American</td>
<td>16</td>
<td>48%</td>
</tr>
<tr>
<td>American Indian</td>
<td>20</td>
<td>48%</td>
</tr>
<tr>
<td>Oriental</td>
<td>21</td>
<td>49%</td>
</tr>
</tbody>
</table>

Thus, instead of using a single raw score for all persons taking the test, a multiple raw score based upon a single percentile standing is used. In the above example, when hiring a Caucasian with the mental ability of a high school graduate as measured by the Wonderlic Test, an employer would require a raw score of twenty-three points out of fifty, but when hiring a Negro with the mental ability of a high school graduate, fifteen points would be required. In this way, the disparate effect of the test would be "compensated for through the use of percentile evaluation of normative groups or through the use of point conversions. . . ."79

Point conversions work in a similar fashion. As Wonderlic states:

> To generalize, point conversions to correct for disparate effect based upon total populations are as follows:

- Negro to Caucasian .................. 8 points
- Spanish Surnamed American to Caucasian .................. 6 points
- Oriental to Caucasian .................. 2 points
- Indian to Caucasian .................. 2 points
- Other Foreign Native Tongue to Caucasian .................. 4 points

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77. Wonderlic, supra note 61, at 16.
79. Id. at 3.
80. Id. at 16, 18, 20, 22, 24, 26.
Consider the following example. An employer wishes to hire three sales people. In the past he has always required people in sales to come from the upper two-thirds percentile as measured by the Wonderlic Test. The raw score of eighteen points most nearly corresponds to 33.33 percent under the cumulative percentile standing for all job applicants, regardless of race, national origin, or ethnic background. However, the employer wishes to eliminate the disparate impact of the Wonderlic Test. By using the above-mentioned point conversions, the employer would add eight points to all black applicants' scores and six points to the scores of all Spanish surnamed applicants. As a result, the minimum raw scores on the Wonderlic Test necessary for hire as a sales person are:

<table>
<thead>
<tr>
<th>Race</th>
<th>Minimum Score</th>
</tr>
</thead>
<tbody>
<tr>
<td>Negro</td>
<td>10 points</td>
</tr>
<tr>
<td>Spanish Surnamed American</td>
<td>12 points</td>
</tr>
<tr>
<td>Caucasian</td>
<td>18 points</td>
</tr>
</tbody>
</table>

Thus, if the Percentile Method is used, the rejection rate is essentially the same for all job applicants regardless of race, ethnic background or national origin. Moreover, the individuals passing the minimum test performance requirements of the employer have the general mental ability, as measured by the Wonderlic Test, associated with others of their respective normative groups. Wonderlic states:

The utilization of percentile scores of proper normative group classifications, in our professional opinion, will eliminate any disparate effect and therefore satisfies the Title VII requirements of the Civil Rights Act of 1964, the EEOC and OFCC Guidelines and the principles set forth in the Supreme Court Decision of Willie S. Griggs et al. vs. Duke Power Co.

However, although Wonderlic believes the previously discussed point conversions to be "valid generalizations," he recognizes that "smaller score conversions are indicated when the data is controlled for individual positions. The point conversion is based on score differentials between the total populations. This conversion will most often over-correct when applied to an applicant for a specific position." For this reason, the application of point conversions must

81. Wonderlic, supra note 61, at 16.
82. This can be seen in the earlier example whereby using a multiple raw score based upon the forty-eighth percentile on the test, the rejection rate was 50% for Caucasians, 51% for Negroes, 48% for Spanish Surnamed Americans, 48% for American Indians, and 49% for Orientals. See text accompanying note 78 supra.
83. Negro Norms, supra note 70, at 2; Minority Norms, supra note 72, at 2.
84. Minority Norms, supra note 72, at 4.
be tailored to the position for which an applicant has applied.\textsuperscript{85}

Assume again that an employer wishes to hire three sales persons yet avoid the disparate impact of the Wonderlic Test. Again, the raw score of eighteen points most nearly corresponds to 33.33 percent under the cumulative percentile standing for all job applicants, regardless of race, national origin, or ethnic background. By turning to the table entitled “Test Scores By Position Applied For”\textsuperscript{86} he will ascertain the “mean point conversion to Caucasian scores” for persons of different race, national origin, or ethnic background. By using that table the employer must add 7.90 points to all black applicants’ scores and 9.58 points to the scores of all Spanish surnamed applicants. As a result, the minimum scores necessary for hire as a sales person are:

<table>
<thead>
<tr>
<th>Race</th>
<th>Minimum Score</th>
</tr>
</thead>
<tbody>
<tr>
<td>Negro</td>
<td>10.10</td>
</tr>
<tr>
<td>Spanish Surnamed American</td>
<td>8.42</td>
</tr>
<tr>
<td>Caucasian</td>
<td>18.00</td>
</tr>
</tbody>
</table>

It is this method that Wonderlic maintains is the most reliable for assessing mental ability, while at the same time complying with the requirements of Title VII. Wonderlic has stated:

\textsuperscript{85} Wonderlic has analyzed test scores by job title broken down by race, national origin, and ethnic background. The results of this research are found in tables which indicate “Test Scores By Position Applied For.” Some information learned from these tables is as follows:

<table>
<thead>
<tr>
<th>Position Applied For</th>
<th>Arithmetic Average</th>
<th>Mean Point Conversion to Caucasian Scores</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sales</td>
<td>18.58</td>
<td>7.90</td>
</tr>
<tr>
<td>Sales</td>
<td>26.48</td>
<td>9.58</td>
</tr>
<tr>
<td>Sales</td>
<td>16.90</td>
<td>2.71</td>
</tr>
<tr>
<td>Sales</td>
<td>21.00</td>
<td>6.48</td>
</tr>
<tr>
<td>Sales</td>
<td>22.00</td>
<td>4.48</td>
</tr>
<tr>
<td>Mail Clerk</td>
<td>15.26</td>
<td>6.49</td>
</tr>
<tr>
<td>Mail Clerk</td>
<td>21.75</td>
<td>4.68</td>
</tr>
<tr>
<td>Mail Clerk</td>
<td>17.07</td>
<td>17.75</td>
</tr>
<tr>
<td>Mail Clerk</td>
<td>10.00</td>
<td>.75</td>
</tr>
<tr>
<td>Mail Clerk</td>
<td>21.00</td>
<td>4.68</td>
</tr>
</tbody>
</table>

Negro Norms, \textit{supra} note 70; Minority Norms, \textit{supra} note 73.

\textsuperscript{86} See table at note 85 \textit{supra}.
The Wonderlic Personnel Test has long been recognized as a reliable measure of mental ability. Extensive validation research and usage by personnel executives over many years has confirmed the value and accuracy of the measures. The Courts have acknowledged this. Their concern about the "Disparate Effect" on minority populations has been answered here.\(^7\)

**A Critical Evaluation**

The Percentile Method may, however, be subject to serious challenge on the basis of reverse discrimination. In order to evaluate the challenge consider the following example. An employer wishes to hire one employee for a sales position and he always requires employees in sales to come from the upper one-third percentile of all job applicants, as measured by the Wonderlic Test. The employer gives the test to six applicants and gets the following results:

(1) Caucasian 18  
(2) Caucasian 16  
(3) Caucasian 15  
(4) Negro 13  
(5) Caucasian 12  
(6) Negro 11

The employer looks to Wonderlic's table entitled "Test Scores By Position Applied For" and ascertains that he should add 7.90 points to the scores of all blacks applying for a sales position. By so doing, the black applicant who performed fourth best on the test, with a score of thirteen, is hired because his examination score is 20.90 after points are added in accordance with the Percentile Method. A suit is brought against the employer by a white applicant who scored eighteen on the Wonderlic Test, alleging that but for his race he would have been hired for the sales position.\(^8\)

**The Case Law**

The first reported case to consider the Percentile Method was *Young v. Edgcomb Steel Co.*,\(^9\) There, plaintiff, a forty-one year old black male who had completed three years at A & T Technical

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\(^7\) Minority Norms, *supra* note 72, at 4; Negro Norms, *supra* note 70, at 4.  
\(^8\) It must be emphasized that this article focuses on problems of employment testing and reverse discrimination under the civil rights statutes. The legal standards in those cases are different from those utilized where public employers are involved and constitutional tests are employed. See Washington v. Davis, 426 U.S. 229 (1976); Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975).  
Institute and who had worked for defendant for fourteen years as a shear operator was denied a transfer to a sales position because of his score on the Wonderlic Test. Defendant's use of the test had not been validated and was challenged by the plaintiff as being racially discriminatory. The court found defendant's use of the test to have a racially discriminatory effect which was not shown to be job-related and which did not comply with the Testing and Selecting Employee Guidelines of the EEOC. In enjoining the defendant's use of the test, the court stated:

The discriminatory impact of the Wonderlic Test has been widely noted particularly in the wake of the Supreme Court decision in Griggs v. Duke Power Co., . . . Moreover, from a study, in which 251,253 job applicants, including 38,452 blacks, took the Wonderlic Test, the creators of the test determined that it discriminated against blacks. . . . There is nothing in the evidence of this case which suggests that the defendant ever took account of the discriminatory impact of the test. . . .

Of course, Young did not raise the question of the effects of the Percentile Method upon white employees or applicants for employment. However, the underscored language seems to suggest that employers utilizing the Wonderlic Test are under a duty to account for the adverse impact of the Wonderlic Test, perhaps by utilizing the Percentile Method.

The next case to consider questions similar to those raised in the Young decision was Mele v. Department of Justice. In that case, plaintiff, a white applicant for an apprentice training position, brought suit under Title VII alleging that it was illegal for the defendant, in implementing affirmative action obligations under a consent decree with the Government, to utilize an unvalidated employment test with dual scoring. Under this system minority group examinations were separated from those of whites. The top scoring thirty minority persons and the five white persons scoring highest in their group were hired. Despite its finding that use of an unvalidated test constitutes discrimination per se, the court dismissed plaintiff's complaint, holding that plaintiff was not a member of the

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90. Plaintiff scored six on the test while the defendant considered 19-21 to be a passing score. Plaintiff took the test under conditions less favorable than those to which whites were subjected. 363 F. Supp. at 965, 967.
91. 29 C.F.R. § 1607 (1975).
94. Id. at 596. The court noted a split in lower court decisions on this question.
class protected by Title VII and, thus, was not able to invoke the protection of the EEOC guidelines. In so holding, the court said:

This Court is not unsympathetic to the plaintiff's plight and recognizes the seeming inequities imposed upon him by reason of affirmative action. However, such affirmative action programs have been held to constitute a valid exercise of executive power and this Court is duty bound to follow the Federal policy in favor of overcoming the effects of past discrimination by means of affirmative action.\(^5\)

Thus, it is not clear whether Mele rests upon the court's determination that Title VII is inapplicable to whites, its determination that "reverse discrimination" is a proper means of overcoming the effects of past discrimination where a consent decree is involved, or both.

Although other courts have approved preferential treatment of both minorities and women upon a finding of prior unlawful discrimination,\(^6\) pursuant to the dictates of a consent decree,\(^9\) or pursuant to affirmative action obligations under Executive Order 11,246,\(^9\) to the extent that Mele rests upon the notion that whites

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95. *Id.* at 597.

However, in Kirkland v. N.Y. State Dep't of Correctional Serv., 520 F.2d 420 (2d Cir.), *rehearing en banc* denied, 531 F.2d 5 (2d Cir. 1975), the court of appeals promulgated a twofold test for the imposition of temporary quotas. There must be a "clear-cut pattern of long-continued and egregious racial discrimination." Second, the effect of reverse discrimination must not be "identifiable," that is to say, concentrated upon a relatively small, ascertainable group of non-minority persons. 520 F.2d at 427. *See also* EEOC v. Local 638, Sheet Metal Workers, 532 F.2d 821 (2d Cir. 1976).


Employment Testing

are not protected by the civil rights statutes, that decision will be of limited value. Since that case was decided, the United States Supreme Court rendered its decision in *McDonald v. Santa Fe Trail Transportation Co.* In that case, two white employees brought suit alleging race discrimination because they were discharged for misappropriating cargo from company shipments while a black employee, also charged with the same offense, was retained. Reversing the Fifth Circuit, the Supreme Court held that both the Civil Rights Act of 1866 and Title VII prohibit racial discrimination in private employment against whites as well as nonwhites. Thus, decisional law has not provided a clear answer as to the permissibility of the Percentile Method.

**AFFIRMATIVE ACTION AND THE PERCENTILE METHOD**

*General Preferential Treatment of Minority Group Persons*

To the extent that the Percentile Method is regarded as simply another means of affording a preference to minority employees and applicants for employment, it is important briefly to examine the policy considerations of such preferences. In so doing, however, it is essential to consider how the courts have reacted to the policy considerations raised.

The obvious problem with all programs which grant preferences to persons of minority group background is the manifest unfairness of these programs to the white victims of the preference. This is

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11,246, "Employers who undertake voluntary affirmative action walk a thin line. . . ."

In 1965, President Lyndon B. Johnson proclaimed Executive Order No. 11,246, declaring as a matter of public policy that "affirmative action be taken to rectify discrimination against minorities" and providing that all federal contractors must agree not to discriminate against any employee or applicant for employment because of race, color, religion, or national origin. 30 Fed. Reg. 12,319 (1965). Executive Order 11,375, effective October 1968, supplemented the earlier order by forbidding discrimination by federal contractors on the basis of sex. 32 Fed. Reg. 14,303 (1967).

Pursuant to its rule-making authority, the Department of Labor on February 5, 1970, issued Order No. 4, which required each federal contractor to develop a written affirmative action program. Revised Order No. 4, 41 C.F.R. § 60-2 (1971), imposed additional and more specific compliance requirements.


especially true when laws have been passed to ensure that irrelevan-
cies such as race, color, religion, sex, or national origin will not be
used to deny anyone employment opportunities.\textsuperscript{101} To the extent
that preferential employment programs are implemented to aid per-
sons of minority group backgrounds, non-minority group persons
will be denied employment opportunities on the basis of their race,
and society will have departed from its avowed moral precept, “each
according to his merit.”

Certainly, the economic plight of blacks and other minorities in
this country due largely to deprivation and discrimination is now
legend.\textsuperscript{102} Under such circumstances, persuasive arguments can be
made that if we are ever going to have equal employment opportuni-

\begin{footnotesize}
\begin{enumerate}
\item Section 703 of Title VII provides in pertinent part:
\begin{enumerate}
\item It shall be an unlawful employment practice for an employer—
\begin{enumerate}
\item to fail or refuse to hire or to discharge any individual, or otherwise to
discriminate against any individual with respect to his compensation, terms,
conditions, or privileges of employment, because of such individual’s race,
color, religion, sex, or national origin; or
\item to limit, segregate, or classify his employees or applicants for employ-
ment in any way which would deprive or tend to deprive any individual of
employment opportunities or otherwise adversely affect his status as an em-
ployee, because of such individual’s race, color, religion, sex, or national
origin.
\end{enumerate}
\item It shall be an unlawful employment practice for an employment agency to
fail or refuse to refer for employment, or otherwise to discriminate against, any
individual because of his race, color, religion, sex, or national origin, or to classify
or refer for employment any individual on the basis of his race, color, religion, sex,
or national origin.
\item It shall be an unlawful employment practice for a labor organization—
\begin{enumerate}
\item to exclude or to expel from its membership, or otherwise to discrimi-
nate against, any individual because of his race, color, religion, sex, or na-
tional origin;
\item to limit, segregate, or classify its membership, or applicants for mem-
bership or to classify or fail or refuse to refer for employment any individual,
in any way which would deprive or tend to deprive any individual of em-
ployment opportunities, or would limit such employment opportunities or oth-
erwise adversely affect his status as an employee or as an applicant for employ-
ment, because of such individual’s race, color, religion, sex, or national ori-
gin; or
\item to cause or attempt to cause an employer to discriminate against an
individual in violation of this section.
\end{enumerate}
\item It shall be an unlawful employment practice for any employer, labor organi-
zation, or joint labor-management committee controlling apprenticeship or other
training or retraining, including on-the-job training programs to discriminate
against any individual because of his race, color, religion, sex, or national origin in
admission to, or employment in, any program established to provide apprenticeship
or other training.
\end{enumerate}
\end{enumerate}
\end{footnotesize}
Employment Testing

for persons of minority group background, it is not sufficient merely to start now with that premise in the form of anti-discrimination laws. Rather, according to these arguments, what must be done to assure equality of opportunity is to implement preferential programs so that persons of minority group backgrounds are able to compete favorably with non-minority group persons in obtaining jobs. That is, because of past discrimination, minority group persons frequently will be unable to compete for positions without preferential programs. Similarly, others have argued that in light of years of discrimination and oppression it is appropriate to pay compensation or reparations in the form of preferential programs to those victimized by discrimination. In short, so these arguments go, if preferential programs are not instituted, there may be no hope of narrowing the differences between minority and non-minority employment opportunities in the United States.

In response, others have challenged the wisdom of preferential employment programs for minority group members even as a remedy for past discrimination. Professor Ralph Winter, for example, has argued:

[Pref]erential programs are fundamentally counter-educative on the basic issue of racial discrimination itself. Instead of helping to eliminate race from politics, they inject it. Instead of teaching tolerance and helping those forces seeking accommodation, they divide on a racial basis. Such programs tend to legitimate the

103. Professor John Kaplan has articulated the argument as follows:

The treatment according to need argument often uses the analogy of a footrace in which one of the runners has been shackled for the entire time. We could not simply remove his chains and let the race continue. Not only would he then be far behind in the race, but also, from want of exercise and various other disabilities he would be much less able to continue. The thrust of this argument is that the only treatment consistent with equality is one which does not merely allow the footrace to proceed but which somehow propels the last place runner back into contention.


105. Support for this position is found in an analysis of employment statistics in the United States. For example, in the United States, the Negro unemployment rate has been substantially higher than that of the rest of the population and the gap in terms of dollars is widening. From 1951 to 1962, the annual income of Negro male workers increased $963.00 while that of white workers increased by $2,117. See Moynihan, Political Perspectives, in The Negro Challenge to the Business Community 76 (Ginzberg ed. 1964). See also N.Y. Times, Dec. 5, 1976, § 4, at 7, col. 1; Germain v. Kipp, 14 Empl. Prac. Dec. 4525, 4531 (W.D. Mo. 1977), stating: "whenever there is a limited pool of resources from which minorities have been disproportionately excluded, equalization of opportunity can only be accomplished by reallocation of those resources. In that process, detriment to non-minorities is inevitable."
back-lash by providing it with much of the philosophical and moral base from which the civil rights movement itself began.\textsuperscript{106}

Similarly, Professor John Kaplan has suggested that any attempt to secure preferential treatment for Negroes in the employment area will be extremely divisive since those most affected by job preference for Negroes will be second generation Americans and the poor whites who have most bitterly resented the march of the Negro toward equality.\textsuperscript{107}

In another but related context, the United States Supreme Court has answered this argument. In the recent case of \textit{Franks v. Bowman Transportation Co.},\textsuperscript{108} the Supreme Court faced a situation where identifiable black applicants for employment were denied positions because of their race. As a result, they sought seniority status retroactive to the dates of their employment applications. In opposition, the employer argued that an award of retroactive seniority to the class of discriminatees would conflict with the economic interests of other employees. Rejecting the employer's argument, the Court said:

\begin{quote}
[I]t is apparent that denial of seniority relief to identifiable victims of racial discrimination on the sole ground that such relief diminishes the expectations of other, arguably innocent, employees would if applied generally frustrate the central "make-whole" objective of Title VII. These conflicting interests of other employees will of course always be present in instances where some scarce employment benefit is distributed among employees on the basis of their status in the seniority hierarchy. But, as we have said, there is nothing in the language of Title VII, or in its legislative history, to show that Congress intended generally to bar this form of relief to victims of illegal discrimination, and the experience under its remedial model in the National Labor Relations Act points to the contrary. Accordingly, we find untenable the conclusion that this form of relief may be denied merely because the interests of other employees may thereby be affected. "If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed."\textsuperscript{109}
\end{quote}

\begin{tabular}{|l|}
\hline
\textsuperscript{107} Kaplan, \textit{supra} note 103, at 375. \hline
\textsuperscript{108} 424 U.S. 747 (1976). \hline
\end{tabular}
Of course, differences exist between granting retroactive seniority to a minority applicant for employment who was himself denied a position by an employer because of illegal discrimination and the granting of an artificial preference on an examination to a minority applicant for employment who was not illegally discriminated against by the employer giving the examination. However, it remains to be seen how far the Court is willing to extend the rationale of the Franks decision. The resolution of these issues ultimately will turn upon how the courts balance the interests of minority group persons in eradicating the effects of past discrimination with the legitimate concerns of non-minority group persons who may be denied positions solely because of their race, at least until such time that minority group persons are fairly represented in the workforce.\(^\text{10}\) This is especially true in light of the Supreme Court’s recognition that Title VII prohibits “[d]iscriminatory preference for any [racial] group, minority or majority.”\(^\text{11}\)

However, it is clear that the issues are complex and the equities are by no means all on one side. For this reason, courts have frequently been reluctant to enter this area\(^\text{12}\) and when they have done so, they have reached differing conclusions about how best to resolve the problems.\(^\text{13}\) At least one court, in balancing such interests, has held that temporary quotas should not be used unless there is a “clear-cut pattern of long-continued and egregious racial discrimination” and unless the effect of reverse discrimination is not concentrated upon a relatively small ascertainable group of non-minority persons.\(^\text{14}\) Obviously, use of the Percentile Method may indeed in-


\(^{112}\) See, e.g., DeFunis v. Odegaard, 416 U.S. 312 (1974), raising similar issues with respect to preferential law school admissions.


\(^{114}\) Kirkland v. N.Y. State Dep’t of Correctional Serv., 520 F.2d 821 (2d Cir. 1974), cert. denied, 417 U.S. 965 (1974).
volve reverse discrimination to a small, ascertainable group of non-
minority persons, namely to those specific white persons who were
not hired or promoted because points were added to the scores of
minority group persons. Other courts, to the extent that they wish
to lessen the effects of reverse discrimination, may follow the
*Kirkland* court. If they do, courts may be unwilling to sanction the
use of the Percentile Method.

*The Context of the Reverse Discrimination Challenge*

To a great extent, the likelihood of success of a reverse discrimina-
tion challenge to the Percentile Method may depend upon the con-
text in which the challenge is made. Since, as we have seen, courts
have permitted preferential treatment of persons of minority group
background and women pursuant to the dictates of a consent de-
cree,115 or pursuant to affirmative action obligations under Executive Order 11,246,116 to the extent that this method of selecting em-
ployees, or applicants for employment, is regarded as simply an-
other preference to be afforded to persons of minority group back-
ground, its use in such contexts probably will be upheld. Similarly,
federal courts, upon finding unlawful discrimination, may very well
be authorized to order an employer to adopt the Percentile Method,
since eight circuits have authorized district courts to establish goals
for the purpose of remediying the effects of past discrimination.117 In
so doing, courts have rejected the argument that section 703(j) of
Title VII118 prohibits such action.119

What is less clear, however, is whether employers may voluntarily

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115. *See note 97 supra.*
116. *See note 98 supra.*
117. *See note 96 supra.*
118. Section 703(j) of Title VII provides:

Nothing contained in this subchapter shall be interpreted to require any em-
ployer, employment agency, labor organization, or joint labor-management com-
mittee subject to this subchapter to grant preferential treatment to any individual
or to any group because of the race, color, religion, sex, or national origin of such
individual or group on account of an imbalance which may exist with respect to
the total number or percentage of persons of any race, color, religion, sex, or na-
tional origin employed by any employer, referred or classified by any labor organi-
zation, or admitted to, or employed in, any apprenticeship or other training pro-
gram, in comparison with the total number of 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.

by Judge Hays, 501 F.2d at 634-39.
decide to use the Percentile Method to alleviate what they regard to be the effects of past discrimination or to achieve a racially integrated workforce. It can be argued that since courts have broad discretion to order preferential treatment of persons of minority group background once unlawful discrimination has been found, and since employers may engage in affirmative action programs pursuant to a consent decree, no legitimate purpose is served by requiring an employer to go through the litigation process before the employer is permitted to utilize methods such as the Percentile Method. In short, in light of the fact that cooperation and voluntary compliance is "the preferred means" of effectuating Title VII, employers should be encouraged to adopt the Percentile Method as a voluntary corrective measure.

Some courts faced with similar arguments, although not involving the Percentile Method, have rejected the notion that employers may voluntarily adopt programs which afford preferential treatment to persons of minority group backgrounds. In Brunetti v. City of Berkeley, the Berkeley Fire Department administered a written non-discriminatory, valid, job-related examination to candidates seeking the promotional position of apparatus operator. From the test results, an eligibility test was compiled, ranking the candidates in numerical order to reflect their performance on the examination.

Ten of the eleven applicants on the list were white; the remaining applicant was black. The black applicant was appointed to the position of apparatus operator pursuant to the city's affirmative action program based solely upon his race. Plaintiffs, each of whom were ranked above the black applicant, filed suit alleging that the selection of the black applicant discriminated against the white candidates on the basis of race in violation of the equal protection clause of the fourteenth amendment. In an opinion that (1) completely ignored the different tests to be applied under the fourteenth amendment as opposed to Title VII, (2) relied almost completely upon Title VII cases, and (3) failed to articulate which standard it was applying, the court said:

122. The district court found that the City of Berkeley adopted the affirmative action program in recognition of a "history of discriminatory employment practices throughout all segments of American society," id. at 7365, but the program contained no legislative declaration of discriminatory conduct in the City of Berkeley itself. In fact the City during discovery denied engaging at any time in discriminatory employment practices.
In the present case, the record is totally devoid of any legislative declaration of past proven discriminatory practices by the City of Berkeley. Defendants have consistently maintained that the Affirmative Action Program was not launched to rectify prior discrimination in the municipal work force; and plaintiffs argue that the City of Berkeley has never been guilty of discriminatory practices. Thus, on the present record, this court must find that no historical justification exists for Berkeley's Affirmative Action Program, and that the program may not be sustained as a remedial measure. In absence of such a justification, the City of Berkeley may not afford preferential treatment to minority employees in violation of the rights of non-minority employees.\(^\text{124}\)

Thereafter, in Weber v. Kaiser Aluminum and Chemical Corp.,\(^\text{125}\) the issue of the voluntary adoption of preferential programs for minorities was raised in the context of a collective bargaining agreement which established a voluntary quota in craft training. Rejecting the idea that an employer may voluntarily adopt a quota system preferring black employees who had never been subject to prior discrimination by that employer, the court said:

At first blush, it might appear inconsistent that the Act on one hand makes unlawful the establishment by employers of affirmative action programs, while on the other hand permits, if not requires, the courts to fashion similar relief in certain cases. Upon reflection, however, substantial distinctions become apparent.

The most important and obvious distinction is the fact that Sections 703(a) and (d) of Title VII do not prohibit the courts from discriminating against individual employees by establishing quota systems where appropriate. The proscriptions of the statute are directed solely to employers.

There are other logical and compelling reasons for distinction between employer action and court action. First, because relief of this nature should be imposed with extreme caution and discretion, and only in those limited cases where necessary to cure the ill effects of past discrimination, the courts alone are in a position to afford due process to all concerned in determining the necessity for and in fashioning such relief. Further, the administration of such relief by the courts tends to assure that those remedial programs will be uniform in nature and will-exist only as long as necessary to effectuate the purposes of the Civil Rights Act.\(^\text{126}\)

Of course, it can be argued in response that affirmative action

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programs drafted in accordance with Executive Order 11,246 have been sanctioned by the courts, although such programs do not receive judicial supervision. However, these affirmative action programs are administered by various federal agencies and the courts have carefully scrutinized them to be certain that they are good faith attempts to comply with the affirmative action requirements of Executive Order 11,246 and that any affirmative relief taken is reasonably tailored to meet those requirements.

Unfortunately, the recent case of *Germann v. Kipp* does much to confuse the issue as to whether employers not subject to Executive Order 11,246 or to the dictates of a consent decree, may voluntarily adopt preferential programs for minorities such as the Percentile Method of selecting employees. In that case, the fire department of Kansas City, Missouri, in compliance with the city charter, and duly-enacted ordinances adopted in accordance with Executive Order 11,246 and Revised Order No. 4 of the Department of Labor, promulgated an affirmative action program. Pursuant thereto, the director of the fire department promoted five minority members to select positions although these persons ranked lower on the relevant certification lists than did other white candidates. Plaintiffs, persons who were passed over for promotion but who ranked higher on the certification lists than did those minority members who were promoted, brought suit alleging violation of the civil rights statutes and the fourteenth amendment. In denying plaintiffs' motion for an injunction on statutory as well as constitutional grounds, the court said:

Plaintiffs cite an unreported decision, *Brunetti v. City of Berkeley*, [citation omitted] as authority for the proposition that a voluntary affirmative action program which results in promotion of a minority municipal fire department employee over a higher-ranked white candidate is invalid where there is no showing that the city's job practices were discriminatory or that the program was needed to correct past racial discrimination. With due respect for the reasoning of the District Court for the Northern District of California from the cases cited within its unreported decision, this Court simply does not arrive at the same conclusion. The requirement of a finding of past discrimination before a court, in the exercise of its broad equitable power, may compel implementation of an affirmative action plan, including quota relief, does not necessarily mandate the conclusion that an employer may not voluntarily implement a reasonable, short-term affirmative action

127. See cases cited at note 98 supra.
129. *Id.*
130. See note 98 supra.
plan to remedy the effects of historical discrimination. That conclusion, which in effect would require employers to admit past discrimination or wait until they were sued by a minority individual and compelled to implement affirmative action, would fly in the very face of the conciliatory efforts intended to be made under Executive Order 11246, and would appear to this Court to contradict the spirit of the Fourteenth Amendment and its mandate to remove not only the incidence of discrimination but its effects as well.\(^3\)

However, the underscored language is of less assistance than one might think at first glance in resolving the issue of whether employers may voluntarily adopt preferential programs for minority group members. Since *Germann* arose in the context of a public employer having affirmative action obligations pursuant to an ordinance drafted in accordance with Executive Order 11,246, the underscored language is dicta. Moreover, it makes little sense to speak of an employer voluntarily implementing an affirmative action program if it has legal obligations under various executive orders.

Given the compelling arguments in *Weber*, and given the very delicate balancing of competing interests which necessarily must be considered,\(^2\) it is reasonable to conclude that courts probably will be hesitant to allow employers to adopt the Percentile Method on a voluntary basis.

**AN EXAMINATION OF THE PERCENTILE METHOD**

Apart from concerns in general about preferential programs for minority employees and applicants for employment, questions arise about the wisdom of utilizing the Percentile Method. Thus, in order to evaluate whether courts should order employers to test by the Percentile Method, the method itself must be evaluated.

The most serious flaw with this method of selecting employees is that no reason whatsoever is given for adding points to the scores of minority group members on the Wonderlic Test, except that such persons tend to do less well on that test than do whites that have taken the test. However, this in itself does not justify use of the Percentile Method. That is, in order to establish such a justification, it must be shown that although members of a minority group do less well on the Wonderlic Test than do whites, they perform equally well on the job.\(^3\) This, however, cannot be done without a

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132. See text accompanying notes 111-115 supra.
133. This is the justification for the use of differential validation.
validation study of a particular test for a particular job and, it will be remembered, it was precisely the interest in avoiding the burdens of validation that led to the recommended use of the Percentile Method. Thus, without relying upon the historical justifications for preferential programs, problems may exist with the Percentile Method.

Moreover, it can be argued that other problems exist with this as an employee selection device. If points are to be added to all "black scores" on the Wonderlic Test, how are "black scores" to be identified? If a person has a Negro father and a Caucasian mother, does he qualify for the addition of points to his score? If a German-American woman marries a Chicano, does she qualify as a Spanish surnamed individual for the purpose of deciding whether points are to be added to her score? In short, before the Percentile Method can work, the class of persons who will be afforded a preference must be defined. 134 Furthermore, if the purpose of adding points is to remedy the effects of past discrimination and cultural deprivation, so that all people are on a relatively even footing when applying for a job, then an attempt should be made to determine whether any particular person has suffered these particular deprivations before points are added to his score. That is, it cannot properly be assumed across the board that all blacks have been subjected to such deprivations and all whites have not. 135

Several replies can be given to these arguments. Of course, employers could define by race or national origin those persons who are to be afforded a preference, 136 or employers could implement such methods as visual identification or a questionnaire which requests information about what race or national origin each employee, or applicant for employment, considers himself. The former suggestion is repugnant and injects race too heavily into the employment process, while the latter suggestion is subject to error or deliberate misrepresentation.

134. This question is more than academic. Litigation has arisen as to the criteria to be applied in determining who is an Indian in the United States for the purpose of preferential hiring practices of the Bureau of Indian Affairs. See N.Y. Times, Oct. 10, 1976, § E, at 6, col. 4.


136. For example, employers desiring to give persons of minority background a preference could model rules after the statute adopted by the state legislature of Virginia when it outlawed interracial marriages. See VA. CODE ANN. §§ 1-14 (Repl. Vol. 1960). This statute was declared unconstitutional in Loving v. Virginia, 388 U.S. 1 (1967).
With respect to the argument that the Percentile Method is overbroad because it fails to consider the individual case, Professor John Kaplan has replied in another context:

Nor will it do to assert that this argument is fallacious in making a blanket assumption about Negroes, which applies to some, but not all. The ready reply is that our society often predicates special treatment upon judgments as to the needs of some but not all the members of a class, plus an unwillingness to draw distinctions exempting the relatively few who are not in need. Thus laws requiring shorter hours for women than for men are not based on the supposition that all women are frailer and less healthy than all men. The convenience of single lines is important also, and it has been therefore argued unless "looking at color" is used, "elaborate machinery" will have to be set up in many cases to determine "need and . . . social workism will be tremendously increased." 137

In the end, whether such replies are sufficient to survive a reverse discrimination challenge remains to be seen. 138

Moreover, as long as other alternatives remain open to employers, such as giving preferences to all persons subjected to economic deprivation or discrimination, regardless of race or national origin, courts may back away from the Percentile Method in favor of less drastic means of achieving equal employment opportunity. Furthermore, other alternatives exist. Because of the consequences to white victims of the Percentile Method, courts can refuse to allow employers to utilize this method and instead require validation of all job tests which have an adverse impact upon minority group members before points are added to their scores. Although this approach would be more expensive to employers, it would neither have the divisive effects that use of the Percentile Method would have nor would it subject members of minority groups to unwarranted employment tests.

CONCLUSION

In their desire to select qualified employees for positions, employers frequently have resorted to the use of employment tests as a selection device. In so doing, employers have during the past eleven years been subjected to litigation instituted by minority group members who have been adversely affected by such employment

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137. Kaplan, supra note 103, at 365.
tests. Because of the difficulties employers have encountered in complying with the EEOC guidelines, and because of the substantial expense involved in so doing, some have suggested that employers should merely add points to the scores of minority applicants for employment for the purpose of eliminating the adverse impact of particular employment tests and, thus, the need for test validation. One such method which has been suggested is the Percentile Within Normative Class Method of Selecting Employees.

Unquestionably such suggestions have benefits for employers desiring both to continue to use employment tests and to increase their minority work force while avoiding the hazards of litigation. However, as has been shown, employers adopting such methods may be confronted with lawsuits brought by whites challenging such methods as unlawful reverse discrimination.

Although problems may exist with the suggested methods, ultimately the success of litigation attacking them probably will depend upon the context in which such methods have been adopted. As we have seen, if these methods are adopted by court order, either upon a finding of discrimination or pursuant to a consent decree, they probably will be upheld. Similarly, if employers adopt such methods pursuant to an affirmative action program instituted under Executive Order 11,246, they most likely will survive claims of reverse discrimination. What is less certain, however, is whether employers, recognizing the need to integrate their work force, will be permitted voluntarily to give preference to minority employees and applicants for employment. Some lower courts, based upon compelling arguments, have prohibited such actions. In so doing, they have recognized the importance of court supervision in the delicate process of the granting of preference to minority employees and applicants for employment.

Finally, assuming that federal courts have the authority to order an employer to adopt methods such as the Percentile Method whereby minority employees, or applicants for employment, are given preferences on employment tests, the question still arises as to whether courts should order that such methods be adopted. In this regard, this article has suggested that certain problems exist with such methods which should cause courts concern. As a result, courts may find that the more expensive and time-consuming process of test validation is, in the end, still a preferable alternative to affording minority preferences in the testing area.