Doubling the Price of Past Discrimination: The Employer's Burden After *McDonald v. Santa Fe Trial Transportation Co.*

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Doubling the Price of Past Discrimination: The Employer's Burden After *McDonald v. Santa Fe Trail Transportation Co.*

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Affording employment opportunity in the private sector to minorities has come to be viewed as an important tool in achieving national social policies. Title VII and other legislative and administrative programs have been popularly viewed as vehicles to integrate the nation's work force. To some, these programs are seen as attempts to require employers to take preferential, "affirmative action" to promote positively the employment opportunities of minorities,¹ and so eradicate the vestiges of a past discriminatory system. To others, such positive action is really "reverse discrimination"² abridging the civil rights of non-minority persons. The recent Supreme Court decision in *McDonald v. Santa Fe Trail Transportation Co.*,³ gave recognition and credence to the position that non-minorities have the same civil rights as those persons traditionally the victims of unlawful discrimination. This decision, however, brings into focus the incompatibility of equal employment opportunity for all persons with any attempt to eliminate the present effects of past discrimination. This article will first explore the history of reverse discrimination, analyze the *McDonald* case, and then examine the dilemma of employers today faced with competing pressures to act without discrimination and yet take affirmative action on behalf of minorities.

**History of Reverse Discrimination Cases**

The integration of minorities and females into the work force has been generally considered a matter of national priority since the

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¹ As used in this article, the term "minorities" includes women as well as groups traditionally viewed as such. Sometimes for convenience "blacks" will be compared with "whites" but the analysis is not intended to be limited to the context of racial discrimination.

² "Reverse discrimination," as used herein, refers to discriminatory treatment of the traditional majority classes, *i.e.*, whites and males.

early 1960's. To effectuate this goal, the federal government,⁴ and some state and local governments,⁵ have encouraged employers to take "affirmative action" to promote utilization of minorities and females at all levels within their work force. As this concern over minority and female employment grew, however, a parallel concern was created in individual white workers about their relative employment status.

Realization by whites that the special emphasis placed on recruitment, hiring, and promotion of blacks and females would operate to their disadvantage was not sudden. Over the past decade, there have been scattered challenges by aggrieved white employees

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At least one statute, however, seeks to limit the affirmative action requirement:

Nothing contained in this chapter or in any rule or regulation issued by the commission shall be interpreted as requiring any employer, employment agency or labor organization to grant preferential treatment to any individual or to any group because of the race, color, religious creed, national origin, sex, age or ancestry of such individual or group because of imbalance which may exist between the total number of percentage of persons employed by any employer, referred or classified for employment by any employment agency or labor organization admitted to membership or classified by any labor organization or admitted to or employed in, any apprenticeship or other training program, and the total number of percentage of persons of such race, color, religious creed, national origin, sex, age or ancestry in the Commonwealth or in any community, section or other area therein, or in the available work force in the Commonwealth or in any of its political subdivisions.

to the integration efforts of their employers.\(^6\) Invoking federal civil rights legislation,\(^7\) few of these challenges have elicited either judicial sympathy or substantial relief.\(^8\) Since 1973, however, there has been an increasing awareness of the dilemma posed by affording remedial relief to minority workers and imposing priorities in their hiring at the expense of the white, male incumbent worker or applicant.\(^9\)

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\(^6\) See cases cited at note 8 infra.


\(^8\) See, e.g., Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1972), cert. denied, 405 U.S. 1040 (1972) (class action under § 1981 by fire department employees in which the Eighth Circuit remanded and sanctioned temporary hiring quota of one minority person for every two non-minority persons); Rios v. Steamfitters, Local 638, 501 F.2d 622 (2d Cir. 1974) (action under § 1981 and Title VII by union applicants in which the Second Circuit upheld a quota for union membership); Patterson v. Newspaper Deliverers' Union, 384 F. Supp. 585 (S.D.N.Y. 1974), aff'd, 514 F.2d 767 (2d Cir. 1975) (consolidated actions under Title VII by newspaper and publications delivery employees in which the Second Circuit approved a settlement which provided for aggressive affirmative action and a 25% minority employment goal); O'Burn v. Shapp, 70 F.R.D. 1029 (E.D. Pa. 1976) (private action under Title VII by police department applicants in which the district court refused to allow collateral attack on a consent decree which allegedly caused reverse discrimination). For collections of the cases which have addressed the appropriateness and scope of preferential relief, see 1974-75 Annual Survey of Labor Relations and Employment Discrimination Law, 16 B.C. Ind. & Com. L. Rev. 965, 1068-73 (1975); Comment, The Myth of Reverse Racial Discrimination: An Historical Perspective, 23 Clev. St. L. Rev. 319 (1974).

\(^9\) See, e.g., DeFunis v. Odegard, 82 Wash. 2d 11, 507 P.2d 1169 (1973), vacated per curiam as moot, 416 U.S. 312 (1974). DeFunis involved a white male whose application for admission to the University of Washington School of Law was rejected pursuant to an admissions procedure which, while not employing quotas, did consider the race and ethnic background of applicants who chose to indicate those characteristics on the application form. Mr. De Funis filed suit charging, inter alia, that his fourteenth amendment equal protection rights had been violated when the school accepted 36 minority applicants whose past scholastic performance indicated that they were less qualified than plaintiff. The Washington Supreme Court rejected the trial court's ruling that consideration of race by the school was per se unconstitutional. Instead, the court required the defendant to prove that consideration of the race of its applicants was "necessary to the accomplishment of a compelling state interest." 82 Wash. 2d 33, 507 P.2d at 1182.
Preferential relief was first challenged when courts imposed hiring and promotion quotas to remedy past discriminatory practices of a particular employer. Despite pleas on behalf of affected white incumbent employees, such quota relief has been approved by many federal courts. The imposition of such remedial measures was based on the rationale that only by such definitive quotas could clear-cut patterns of past discrimination be corrected. Finding themselves unable to fashion other forms of adequate relief, the courts relied upon the quota system as a remedy.

While the authority of a federal court to order preferential hiring has been widely accepted, there has been no unanimity as to when such a remedy is appropriate. In *Carter v. Gallagher*, the Eighth Circuit expressed its hesitation with respect to the imposition of absolute quotas, saying:

The absolute preference ordered by the trial court would operate as a present infringement on those non-minority group persons who are equally or superiorly qualified for the fire fighter's positions; and we hesitate to advocate implementation of one constitutional guarantee by the outright denial of another.

Similarly, the Third Circuit has expressed its concern over preferential treatment:

Opening the doors long shut to minorities is imperative, but in so doing, we must be careful not to close them on the face of others, lest we abandon the basic principle of non-discrimination that sparked efforts to pry open those doors in the first place.

Compelling interests were found in the state's desire to: (1) promote integration; (2) produce a racially balanced law school student body; and (3) correct the shortage of minority members admitted to the bar. The school's consideration of racial characteristics was found to be necessary since less restrictive alternatives such as improving primary and secondary education in the state would not be able to correct the problem of underrepresentation in the foreseeable future. However, by the time plaintiff's case was argued in the United States Supreme Court he had already been admitted to the law school pursuant to the trial court's order, and had, in fact, registered for his final semester. Accordingly, the suit was dismissed as moot by the Supreme Court. 416 U.S. at 317. *See also* cases cited at notes 12 and 14 *infra*.


11. Commonwealth v. O'Neil, 473 F.2d 1029 (3d Cir. 1973), is an excellent example of a court's uncertainty about the scope and use of quota relief. In evaluating district court quotas for police hiring and promotion, the Third Circuit first rejected quotas for hiring and promotion, 4 Fair Empl. Prac. Cas. 1286 (3d Cir. 1972). On rehearing, however, the same court again rejected promotional quotas, but affirmed the hiring procedures including the quota provisions because the court was "equally divided" with respect to those provisions. 473 F.2d at 1030.

12. 452 F.2d 315 (8th Cir. 1972).

13. *Id.* at 330.

Despite these reservations, these courts refused to declare use of quota systems impermissible. Finding no other means by which to remedy past discrimination, numerous courts have upheld quotas, though not always denominated as such. Furthermore, while the debate over the appropriateness of quotas continued, they were approved in the majority of cases where such relief was proposed.

The rationale supporting preferential treatment, however, has begun to receive ever closer scrutiny as employers seek to comply with government affirmative action regulations and court orders requiring increased employment opportunities for minorities. As the number of challenges to such action has increased, courts have shown greater concern about the effects of remedial employment efforts upon whites. The result has been a marked increase in the courts’ reluctance to approve preferential treatment of minorities or to impose quota remedies. This reluctance was clearly evidenced by a spate of decisions in 1975 and 1976 on the question of reverse discrimination. Several of these cases deserve closer scrutiny.

15. The *Carter* court eventually approved a hiring quota of one minority person for every two non-minority persons. 452 F.2d at 331. The *O'Neill* court, while voiding the hiring quota system presented because it was not “limited to requiring the Police Department to hire from a pool of applicants of demonstrated qualifications,” noted that their action “in no way suggests that imposing a quota system is unconstitutional as a judicial remedy for discrimination.” 4 Fair Empl. Prac. Cas. at 1289.


18. See, e.g., *Patterson v. American Tobacco Co.*, 535 F.2d 257 (4th Cir. 1976) (upholding non-preferential elements of the district court’s affirmative action order but reversing an order that the employer combine seniority rosters at his two plants and “bump” white workers); *Chance v. Board of Examiners*, 534 F.2d 993 (2d Cir. 1976) (reversing a district court ordered quota “excessing” plan for teachers because of its non-remedial, racially-based distortion of the seniority system); *Kirkland v. N.Y. State Dept. of Correctional Serv.*, 520 F.2d 420 (2d Cir. 1975) (rejecting the use of hiring and promotional quotas for civil service jobs); *Flanagan v. President & Board of Georgetown College*, 417 F. Supp. 377 (D.D.C. 1976) (invalidated university policy of granting financial aid based in racial quotas but refused to award damages to white plaintiff); *Weber v. Kaiser Aluminum & Chem. Corp.*, 415 F. Supp. 761 (E.D. La. 1976) (rejected quota requirements in a collective bargaining agreement on the grounds that only a court could sanction such measures and only upon a showing of past discrimination); *McAleer v. A.T. & T. Co.*, 416 F. Supp. 435 (D.D.C. 1976) (awarding dam-
One of the most notable decisions partially denying quota relief because of its effect upon white employees was Kirkland v. New York Department of Correctional Services. In Kirkland, two black correctional officers brought suit to enjoin promotions based upon an allegedly discriminatory promotional exam. The test was held to be racially discriminatory and unlawful, a finding affirmed by the court of appeals. The district court had, however, ordered the establishment of a rigid quota system for promotions.

The use of such quota relief, insofar as it established a permanent quota requirement, was struck down by the Second Circuit. While it recognized quotas to be an appropriate remedy in some instances, the court refused to permit their use when there had been no showing of clear-cut patterns of long-continued and egregious racial discrimination and where the proposed quota system would have an identifiable impact upon a small number of easily ascertained individuals. Yet the court sanctioned use of interim quotas as a justifiable remedy within the lower court’s discretion where the impact of such quotas on white workers would be limited.

Since the decision in Kirkland, a growing judicial reluctance to grant preferences to minorities at the expense of white, male workers has become more apparent. In California, an action brought by white firemen challenging the legality of the affirmative action plan of the City of Berkeley was successful. In another instance, a dis...
strict court’s order "bumping" incumbent white male employees as a remedy for previous race and sex discrimination was overturned. The appellate court refused to permit displacement of workers who "have done no wrong." 25

In a decision issued shortly before the Supreme Court decision in McDonald, a Virginia district court came to grips even more clearly with the problem of promoting minority and female employees at the cost of foreclosing qualified white males from these positions. Without ruling on the validity of all preferential relief, the court in Cramer v. Virginia Commonwealth University 26 considered whether an affirmative action plan can excuse "preferential" treatment or benign discrimination in employment decision-making. Virginia Commonwealth University had actively recruited women for faculty positions to compensate for alleged past deficiencies in hiring. The male plaintiff was denied either of two positions for which he was undisputedly at least as well or better qualified than the two female applicants hired. The male applicant claimed the practice of preferential hiring pursuant to the university's affirmative action program resulted in unlawful reverse discrimination. 27

In defense, the university asserted that its policy of considering qualified female candidates to the exclusion of qualified males was not in violation of the equal protection clause of the fourteenth amendment. It contended such a policy was rationally related to the school's obligation to conform to federal and state affirmative action requirements. Further, the university took the position that prohibitions against preferential hiring and quotas contained in Title VII were overridden by the implied obligation under Executive Order 11246 to afford preferences to minorities. 28

The court recognized the inherent conflict between implementation of an affirmative action plan and completely neutral hiring quota was upheld despite the fact that the written exam was validly job related. The test was the sole criterion for appointment to the municipal police department, and reliance on it had resulted in a pattern of racial and sexual imbalance. See also United States v. City of Chicago, 549 F.2d 415, 436-39 (7th Cir. 1977) where sex and racial quotas for policemen and women were upheld where past discrimination had been shown.

25. Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir. 1976). The challenged district court order had required the employer to combine seniority rosters at his two plants. White workers would have thereby been "bumped" by more senior minority workers from the other plant. The Fourth Circuit found that remedy to be broader than Title VII contemplated as it affected "innocent white workers and as monetary relief was adequate." Cf. Franks v. Bowman Transp. Co. 424 U.S. 747 (1976) (where the Supreme Court ordered similarly broad seniority relief despite the potential effect on displaced white workers).


27. Id. at 1399-1400.

28. Id. at 1400-03.
practices. Holding that Title VII prohibits such preferences and that Executive Order 11246 does not negate the prohibition against preferential treatment, the court argued against any use of race or sex as a criterion in hiring. Finding affirmative action practices which afford preferential treatment to minorities and females to be unlawful, the court insisted that the very same injustices to which affirmative action programs were addressed would be forever perpetuated if preferential treatment were given on the basis of race or sex.

This concern for the rights of the majority can be further demonstrated by court decisions refusing to permit an employer to voluntarily correct past discriminatory practices by seniority modification; refusing to allow a school to permit the layoff of school supervisory personnel on a basis other than seniority; and, refusing to permit voluntary quota hiring for a police department to correct the impact of a discriminatory entrance examination. On the other hand, the use of quota remedies continues, and it seems that remedial relief having a definite adverse impact on the competitive rights of whites is still within the authority of the courts. It is not clear, however, as elaborated below, that an employer who implements


[Whether or not affirmative action is a good policy, the Court holds it to be bad law insofar as it permits or requires sex discrimination in hiring. . . . There will never be sex or racial peace until the idea of sex or racial discrimination is dead and buried. The primary—the only—beneficiaries of affirmative action plans and their siblings are the thousands of persons engaged in the civil rights business, bureaucrats, lawyers, lobbyists and politicians. The persons who are suffering are the ostensible objects of the plans’ solicitude, and persons, such as plaintiff herein, who get flattened by the civil rights steamroller.

12 Fair Empl. Prac. Cas. at 1403-04.

30. Id. at 1404. “The only means of ridding the nation of invidious discrimination is to tear it out . . . ‘root and branch’. . . . Affirmative action only perpetuates it.”

31. Weber v. Kaiser Aluminum & Chem. Corp., 415 F. Supp. 761 (E.D. La. 1976). The employer and union had negotiated a collective bargaining agreement which provided that certain craft training openings be filled on a “one-white, one-black” basis. The purpose of the provision was to achieve a racial balance similar to that in the community. However, the district court held that such preferential practices were appropriate only if court-sanctioned and only upon a showing of past discrimination. See discussion accompanying notes 79-85 infra. Contra German v. Kipp, 14 Empl. Prac. Dec. 4525 (W.D. Mo. 1977).

32. Chance v. Board of Examiners, 534 F.2d 993 (2d Cir. 1976). The Second Circuit reversed a district court order which had provided for “excessing” of positions (removal by abolition of the positions) by a racial preferential formula. The court said the non-remedial distortion of the seniority system was the kind of reverse discrimination specifically proscribed by Congress. See Note, The Continuing Validity of Seniority Systems Under Title VII: Sharing the Burden of Discrimination, 8 Loy. Chi. L.J. 882 (1977).


35. See text accompanying notes 90-99 infra.
any such remedial program will have any defense to the claims of adversely affected incumbent employees and white applicants.

Although the history of employment cases addressing the rights of whites is inconclusive, analysis reveals a significant shift in emphasis. The individual concern of white workers over the adverse effects of preferential hiring and promotion practices is now given judicial recognition.\textsuperscript{36} In contrast to an earlier almost singleminded concern to integrate minorities and females into the work force, there is now a countervailing concern—at least in the courts, if not by federal and local administrative agencies—to ensure that such efforts do not discriminate against the majority.\textsuperscript{37} However, the ultimate resolution of who should bear the burden for the past history of segregated work forces has not yet been established.

Ultimately, the Supreme Court will have to resolve the issue of when, if ever, preferential treatment of minorities in employment may be proper. The Court has already expressed a willingness to address this question in the area of school admissions.\textsuperscript{38} It was in \textit{McDonald}, however, that the Supreme Court first focused its attention on the availability of Title VII and section 1981 relief to white plaintiffs.

\textbf{McDonald v. Santa Fe Trail Transportation Co.}

Prior to the Court's decision in \textit{McDonald}, Title VII and the civil rights acts of the last century had been receiving widespread utilization and steady judicial expansion.\textsuperscript{39} The Court in \textit{McDonald} took

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\textsuperscript{36} See, e.g., cases cited at notes 12, 14, 19, 24, 25, and 26, supra.

\textsuperscript{37} Id.

\textsuperscript{38} In early 1977, the Court granted a petition for certiorari in Bakke v. Regents of the University of California, 18 Cal. 3d 34, 132 Cal. Rptr. 680, 553 P.2d 1152 (1976), cert. granted, 97 S. Ct. 1098 (1977). Bakke involved a fourteenth amendment challenge by an unsuccessful white applicant to a medical school's special admissions program for disadvantaged racial minorities. The court ruled that the state is not relieved of its heavy burden of showing a "compelling interest" by the mere fact that the classification in question discriminates in favor of the minority. The California Supreme Court rejected assertions that the classification was justified by the state's desire to provide minority members with minority member professionals. In view of the fact that plaintiff was indeed more qualified than some of the minority admittees and because the school had not been shown to have discriminated against minorities in the past and had not shown that less drastic means could not achieve the same results, the \textit{Bakke} court affirmed the lower courts' invalidation of the special admission program and granted Bakke an injunction ordering that he be admitted. 18 Cal. 3d at 64, 132 Cal. Rptr. at 700, 553 P.2d at 1172. \textit{But see Alvey v. Downstate Medical Center}, 39 N.Y.2d 326, 348 N.E.2d 537 (1976).

the opportunity to express clearly that the antidiscrimination obligation of the federal civil rights laws protects whites and blacks alike.

The underlying facts in *McDonald* were simple. In September, 1970, a black truck driver for Santa Fe Trail Transportation Company was observed loading cases of antifreeze into his car and was apprehended. The driver claimed that he had purchased the antifreeze from another driver, McDonald, a white, and that it had been approved by the dock foreman, a white man. Santa Fe investigated the incident and discharged McDonald for dishonesty in the theft of freight from company equipment and violation of company rules. The dock foreman was discharged for failing to properly perform his duties, exercising poor judgment, and violating company rules. The driver originally apprehended, who appeared to Santa Fe to have been uninvolved with the misappropriation, was not discharged.

McDonald, a member of Teamsters Local 988, filed a grievance on the same day he was discharged. The discharge was upheld in arbitration. He then filed a charge of racial discrimination with the EEOC. McDonald and the dock foreman, following McDonald's receipt of a "right-to-sue" letter from the EEOC, filed suit in the Southern District of Texas invoking Title VII and 42 U.S.C. § 1981. Plaintiffs alleged that all three employees had been jointly and severally charged with misappropriation of company property and that Santa Fe imposed more severe discipline against them because of their Caucasian race. They also claimed the union acquiesced or

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40. *McDonald* was decided on a Motion to Dismiss under Fed. R. Civ. P. 12(b)(6). The Supreme Court accordingly took as true the well pleaded allegations of the complaint. 427 U.S. at 276. However, depositions have been taken of the major participants in this occurrence and the following recitation is derived from those depositions and from interrogatories answered by the parties. We do not represent this recitation to be the facts as may be ultimately proven in the district court on remand. Nor should this material be construed as a comment upon any of the testimony which may be forthcoming at that trial.

41. It should be noted that several underlying jurisdictional issues were left unresolved. It was never alleged that the dock foreman had filed a charge with the EEOC. The district court did deny McDonald's attempt to maintain his action as a class action, but nevertheless retained jurisdiction over the foreman's individual claim.

Additionally, since McDonald was discharged on October 2, 1969, and did not file his charge with the EEOC until April of 1971, it is evident that he did not file within 90 days of his discharge as required by Title VII. This situation raises yet unanswered questions as to whether the 90 day period was tolled pending resolution of the grievance and, since the arbitration process was completed by October 29, 1970, whether he had received notice of the result of that proceeding and when. The issue of tolling during pendency of grievance procedures had not been resolved at the time of trial. Subsequently, the Court in International Union of Elec. Workers v. Robbins & Myers, 97 S.Ct. 441 (1976) held that filing a grievance under a collective bargaining agreement does not toll the limitation period. This may dispose of *McDonald* on remand.
Remedies for Past Discrimination

joined in this discrimination and failed to protect the whites in violation of its duties of fair representation.

After three and one-half years of pretrial activity, the district court terminated the action. Judge Bue dismissed the section 1981 allegation for lack of jurisdiction, ruling that it was inapplicable to whites. The Title VII allegation was dismissed as against the union for lack of jurisdiction since the union was not named in the charge filed with the EEOC. As against Santa Fe, it was dismissed for failure of the plaintiff to allege that the charge of misappropriation was false.

The Fifth Circuit in a per curiam opinion affirmed, ruling that section 1981 confers no actionable rights upon white persons and that no Title VII claim was stated in the absence of an allegation that the employer's accusation of theft was false. It implicitly distinguished *McDonnell Douglas Corp. v. Green* by noting this was not a case of discipline for an offense not constituting a crime.

On certiorari, petitioners argued that they must be provided an opportunity to show that the charge of misappropriation was merely a pretext for discriminatory discipline. With respect to white persons' standing under section 1981, petitioners pointed out that the statute refers to "all persons" and cited legislative history and some lower court decisions supporting their position. They emphasized

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42. Pretrial activity included three complaints, an exchange of interrogatory answers and several depositions, as well as briefs by the two parties and two memorandum opinions.

43. "Upon full consideration of the pleadings and authorities cited, it is the opinion of the Court that the better reasoned authorities hold that § 1981 is inapplicable to white persons." 10 Fair Empl. Prac. Cas. 1162, 1163 (S.D. Tex. 1974).

44. Id. at 1164.

45. The court stated:

   The pleadings of the plaintiffs do not allege that they were falsely charged with misappropriating company property; the substance of the allegations is that plaintiffs take issue with the fact that they were discharged for such conduct while a similarly charged Negro employee was not discharged. Upon reconsideration, the Court concluded that the dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged Negro employee does not raise a claim upon which Title VII relief may be granted.

Id. at 1165.

46. 513 F.2d 90 (5th Cir. 1975).

47. 411 U.S. 792 (1973). The plaintiff in *McDonnell Douglas* was a black employee who had engaged in an organized "stall-in" and "lock-in" to protest his allegedly discriminatory layoff. The employer subsequently advertised for workers with plaintiff's qualifications, but rejected plaintiff's application for re-employment. The Supreme Court concluded that, although the employer was not compelled to rehire an employee who had engaged in such conduct, he was compelled to apply his standards alike to persons of all races. In addition, the employer could not use the employee's conduct as a pretext for discrimination.

48. This attempted distinction was rejected by the Supreme Court, which found *McDonnell Douglas* "indistinguishable." 427 U.S. at 281-82.
that a favorable decision would not imperil the appropriate application of affirmative action programs because there was no indication that Santa Fe's action in this case had any reference to an effort to remedy past discrimination.

Santa Fe's position was that white thieves are not protected by Title VII, and pointed to the *McDonnell Douglas* requirement for establishing a prima facie case of discrimination that the plaintiff be qualified for the position he was denied. Santa Fe also urged that strict racial neutrality, in any event, is not consistent with the policy of affirmative action and would undermine the purpose of the civil rights acts. The union contended that it could not properly perform its duty as an employee representative if it must seek to have all "guilty" employees fired, or none.

Both respondents urged that section 1981 conferred no standing to whites. The employer further asserted that petitioners did not state a claim upon which relief could be granted because white persons should be required to allege some pattern of class-type discrimination against whites. Without this additional requirement, it was reasoned, employers would be subjected to numerous frivolous lawsuits brought by disgruntled white employees.

The Supreme Court, in an opinion by Mr. Justice Marshall, ruled with respect to the Title VII issue that *McDonnell Douglas* controlled, and reversed the decision of the lower court. It held that an employer must apply discipline equally without regard to race, even to thieves, and addressed the union's concern by stating that a bargaining representative must not allow racial discrimination to enter into its otherwise legitimate compromise function. The Court also found that the language of section 1981 and the greater weight

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51. *Id.* at 15-21.
54. Santa Fe Brief, *supra* note 50, at 30-32. The Court also permitted filing of *amicus* briefs by the Department of Justice, the Anti-Defamation League of B'nai B'rith, the American Jewish Committee and the Chamber of Commerce of the United States. The thrust of these briefs was that whites should enjoy the same protection from racial discrimination as any minority group. The NAACP was also allowed to file a brief as *amicus* in which it contended that summary judgment was appropriate since there was no genuine factual issue that the discharges were pretexts for racial discrimination.
55. 427 U.S. at 281-282.
56. *Id.* at 285.
of its legislative history mandated a finding that white persons have standing to invoke that provision.\textsuperscript{57} It is important to remember, however, that the Court expressly refrained from commenting on whether whites could challenge employment decisions undertaken pursuant to an affirmative action obligation.\textsuperscript{58}

Although provoking popular discussion at the time, \textit{McDonald v. Santa Fe} is not a revolutionary case in the law of employment discrimination. It had been widely assumed that white, anglo-saxon, protestant males were protected by Title VII. Section 1981, in its practical effect, "expands" those rights only by allowing circumvention of the administrative procedures and time constraints imposed by Title VII.\textsuperscript{59} Rather, the importance of \textit{McDonald} is that it provides high Court recognition of the concept of "reverse discrimination." \textit{McDonald} merely demonstrates that individual members of the majority have the same right to nondiscrimination as minorities.

During the last decade, an important social policy to abolish the effects of past discrimination and integrate the nation's work force was recognized and energetically pursued. Executive Order 11246\textsuperscript{60} and various other regulations\textsuperscript{61} require recipients of federal funds to take affirmative action to enhance employment opportunities for minorities.\textsuperscript{62} At the same time, Congress passed Title VII,\textsuperscript{63} prohibiting discrimination in employment, and established the Equal Employment Opportunity Commission to enforce that obligation.\textsuperscript{64} That agency, as well as other federal, state, and local agen-

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\item \textsuperscript{57} Id. at 286-87, 295-96.
\item \textsuperscript{58} Id. at 281 n.8. Santa Fe disclaimed that the actions challenged were part of an affirmative action program. Sante Fe Brief, \textit{supra} note 50, at 19 n. 5, and we emphasize that we do not consider here the permissibility of such a program, whether judicially required or otherwise prompted. The Supreme Court also emphasized that it was not considering the permissibility of a similar affirmative action program, whether voluntary or judicially mandated. 427 U.S. at 281 n.8. For a discussion of how \textit{McDonald}, read in the light of the legislative and judicial history of Title VII, may affect employers' willingness to enter into affirmative action programs, see Note, \textit{The Employer's Dilemma: Quotas, Reverse Discrimination, and Voluntary Compliance}, \textit{8 Loy. Chi. L.J.} 369 (1976).
\item \textsuperscript{59} Section 706 of Title VII, 42 U.S.C. § 2000e-5 (Supp. II 1972), amending 42 U.S.C. § 2000e-5 (1970), in general establishes a 180 day statute of limitation for filing claims. Suit may not be filed until the completion of Commission handling or six months from the date of charge, and must be filed within 90 days of receipt of notice of right to sue. Suits under Section 1981 are not subject to such administrative constraints.
\item \textsuperscript{60} Exec. Order No. 11246 (1965), \textit{codified} in 3 C.F.R. § 169 (1974).
\item \textsuperscript{61} \textit{See}, e.g., 41 C.F.R. Parts 60-1 through 60-74 (1976).
\item \textsuperscript{62} \textit{See} text accompanying notes 64-69 \textit{infra} for a discussion of the interplay between Executive Order 11246 and the regulations of the Office of Federal Contract Compliance.
\item \textsuperscript{64} Id.
\end{itemize}
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cies, together with various citizens' groups and individuals, have brought constant pressure to bear on employers to improve their "minority profile." *McDonald* and other recent cases reflect a growing awareness that efforts to equalize the interests of minorities may operate at the expense of the majority.\(^{65}\)

This emerging concern for the rights of whites belatedly brings into focus the practical difficulties of implementing a national policy affirmatively to integrate minorities into the work force and yet simultaneously to assure equal employment opportunity to all. Perhaps the primary roadblock to rapid employment integration is the effect on incumbent employees of attempts to put minorities into their "rightful place." Ironically, during the same term it heard *McDonald*, the Supreme Court decided in *Franks v. Bowman Transportation Co.*,\(^{46}\) that victims of past racial discrimination were presumptively entitled to a retroactive seniority date despite the corresponding loss of "competitive-type" benefits by innocent incumbent employees. It is only a matter of time until a displaced incumbent employee presents the Court with his claim against the employer, citing *McDonald*.\(^{67}\)

In theory, it may be possible to achieve parity between relevant racial populations and job holders of every category, and to attain this goal without ever discriminating against anyone. The inescapable fact, however, is that an employer with disparate racial patterns, presumably the result of past discrimination cannot, without reverse discrimination, alleviate that condition quickly. Under the most ideal conditions—i.e., an unlimited pool of qualified minority labor willing and available to accept employment and a statistically perfect source of applications—if all employment decisions after 1964 were made without regard to race, it would take at least a full generation of the work force, twenty-five to forty years, before all present effects of past discrimination could be eliminated. Obviously, it requires a complete turnover in the existing, racially imbalanced work force to replace it with a force selected without discrimination.

Affirmative action is plainly designed to reduce this delay. Employers constantly face pressure—real pressure involving dollars

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65. See notes 12-35 and accompanying text.


67. To date, the only case in which a court has upheld an incumbent employee's right to damages for reverse discrimination in promotion is McAleer v. A.T. & T., 416 F. Supp. 435 (D.D.C. 1976). The decision was reached two weeks before *McDonald* was decided; however, the case was settled after judgment in September of 1976, rendering its precedential value minimal. For a more extensive treatment of *McAleer*, see text accompanying notes 93-109 infra.
and cents—from government agencies, private litigants, and the courts to reach population parity, now. Government contractors must annually submit affirmative action plans specifying their minority hiring "goals," and comparing past goals and actual performance. Poor performance may lead to a compliance review resulting in loss of the contract, or even back pay liability. So long as the employer has not reached parity, he knows that he faces a prima facie case of discrimination under the civil rights statutes and therefore the potential for a suit difficult to defend. Victims of this apparent discrimination are encouraged to bring class actions for back pay and recovery of attorneys' fees, thus wielding the club of heavy litigation costs. But to the extent that any employer expends greater effort to hire and promote minorities, he may be guilty of reverse discrimination.

McDonald and kindred cases are making it clear that the easy solution of reverse discrimination is not available to ease the burden of civil rights obligations; that employers must walk the tightrope of nondiscrimination without favoring any group. But the fact remains that many, if not most, employers still face a work force in which minorities are under-represented, especially with respect to management, skilled and professional positions. Consequently these employers face the continuing threat of litigation and loss of large federal contracts. Counsel for management will recognize the now familiar inquiry from exasperated personnel officers—what do I do now? What steps can an employer take to avoid liability for the present effects of past discrimination? Unfortunately, the answer is not satisfying. The trend in the case law indicates that he cannot safely take voluntary action and especially may not institute a

68. See OFCC Revised Order No. 4, C.F.R. Part 60-2.
71. It has recently been held that the federal government can recover in restitution back pay on behalf ofaggrieved employees pursuant to Exec. Order No. 11246. United States v. Duquesne Light Co., 13 Fair Empl. Prac. Cas. 1608 (W.D. Pa. 1976). It has also been reported that in addition to bringing suit under Title VII, employees of one company by suing the federal government for failure to enforce Exec. Order No. 11246 have assured government efforts to obtain back pay without awaiting the results of the Title VII action. FEP Summary of Developments, No. 308, December 9, 1976. See generally, Rose, Judicial Enforcement of Executive Order 11246 and Remedies Thereunder, in PROCEEDINGS OF THE SECOND ABA NATIONAL INSTITUTE ON EQUAL EMPLOYMENT OPPORTUNITY LAW 25 (1975).
73. For a discussion of the use and availability of class actions in Title VII cases, see Meyers, Title VII Class Actions: Promises and Pitfalls, 8 LOY. CHI. L.J. 767 (1977).
74. See text accompanying notes 90-99 infra.
quota hiring and advancement system. Apparently, the employer must wait until he is sued as the federal courts allow only themselves to discriminate. Even then, if the court and litigants reach some solution, voluntary or otherwise, the employer still faces an unquantifiable exposure to lawsuits by adversely affected whites. These results are unacceptable, for they nullify any incentive to act voluntarily and thrust upon the courts the entire burden of rectifying the effects of past discrimination in employment.

**Voluntary Measures Discouraged**

One aim of Title VII is to encourage private integration of minorities into the nation's work force. The Supreme Court emphasized this function when it observed in *Albermarle Paper Co. v. Moody* that:

> [T]he reasonably certain prospect of a back pay award provides the spur and catalyst for employers and unions to self-examine and self-evaluate their employment practices and eliminate so far as possible the last vestiges of an unfortunate and ignominious page in this country's history.

That Court has also described the voluntary modification by employers and unions of seniority systems to ameliorate the effects of past discrimination as a method useful to establish a balanced work force, "a national policy objective of the 'highest priority.'" However, the *McDonald* decision, along with several recent lower court opinions, has significantly undermined employers' desire to take such voluntary remedial efforts. Whether an employer and a union can agree, without exposing themselves to further litigation, to implement any plan which would benefit minorities more than white males is now open to speculation.

The recent case of *Weber v. Kaiser Aluminum & Chemical Corp.* clearly indicates the kind of trouble an employer and union can create by attempting to improve their minority profile. Kaiser and the United States Workers entered into a bargaining agreement containing a special provision designed to increase the number of

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75. See notes 77-89 infra and accompanying text.
77. 422 U.S. 405 (1975).
78. Id. at 417-18. The Supreme Court in *Albemarle* allowed back pay on a class basis despite a lack of employer bad faith. Citing the compensatory "make whole" purpose of Title VII, the Court set the stage for extensive back pay awards in later employment discrimination cases.
minority employees at a Louisiana plant. Although the plant had adhered to a policy of nondiscrimination since 1958 and, after 1969, had hired new employees on a "one white, one black" basis, in 1974 minorities still represented only fifteen percent of the plant employees and two to two and one-half percent of skilled craft employees while comprising approximately forty percent of the work force in that area. Kaiser first attempted without success to identify and recruit qualified black craftsmen. Kaiser and the steel workers then agreed to adjust the prior procedure for assigning apprenticeship and craft job openings from a simple question of seniority to the "one white, one black" basis, each new opening going to the person with highest racial seniority. The plaintiffs were passed over for craft openings in favor of less-senior blacks—blacks who had not been judicially determined to be victims of prior discrimination. The district court enjoined the employer and union from pursuing this agreement. The court was unimpressed by the defendants' motivation for the quota system, implying that a desire to comply with the Office of Federal Contract Compliance (OFCC) regulations and to avoid vexatious litigation is an unworthy predicate to reverse discrimination. The court also noted that Title VII prohibits all racial discrimination and ruled that section 703(j) not only bars quota requirements, but positively forbids voluntary quotas:

It is clear that the Congress was aware of the concept of affirmative action programs during its considerations, and that it did not choose to exempt what many consider the salutary or benign discrimination of such programs from its sweeping prohibitions against racial discrimination by an employer against any individual.

81. Id. at 764.
82. Id. at 770.
83. "There is no evidence that Kaiser, in incorporating this quota system in the 1974 Labor Agreement, did so with a view toward correcting the effects of prior discrimination at any of the fifteen plants to which the system had application. To the contrary, it appears that satisfying the requirements of OFCC, and avoiding vexatious litigation by minority employees, were its prime motivations." 415 F. Supp. at 765.
84. Id. at 766. Such a reading places little strain on the legislative history of § 703(j). The sponsor of an amendment which eventually became §703(j) stated that the amendment would clearly prohibit the imposition of any quota system under Title VII. 110 Cong. Rec. 9881, 9882 (1964) (remarks of Sen. Allot). Similarly, Senator Clark expressly declared this to be the case:

[An]y deliberate attempt to maintain a given [racial or ethnic] balance would almost certainly run afoul of Title VII because it would involve a failure or refusal to hire some individual because of his race, color, religion, sex, or national origin.
The court went on to reject the defendants' argument that their quota system had the same effect as court orders frequently approved in civil rights actions requiring percentage hiring of minorities. The court admitted there was an apparent inconsistency between the prohibition of employer-created affirmative action programs and court-fashioned affirmative relief. However, the court emphasized the substantial differences between the two approaches.

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.85

The court acknowledged it was invalidating a kind of affirmative effort urged by the OFCC and used by employers in the past, but maintained that Title VII required the result. Any change should come from Congress.86

86. In reaching its conclusion that the discriminatory provisions of Kaiser's affirmative action program violate specific proscriptions of Title VII of the 1964 Civil Rights Act, the Court is well aware that similar programs have been adopted, before and after enactment of the 1964 Act, by many employers in the private and public sector, often because of pressure from various agencies of the Executive Branch of the United States Government. Undoubtedly, the laudable objective of promoting job opportunities in our society for members of minority groups has been viewed as a justification for the discrimination against other individuals which almost certainly results from such programs. Prior to the effective date of the 1964 Civil Rights Act, employers may have been free, for whatever motivation, to engage in such discriminatory employment practices. Indeed, it well may be that employers should be permitted to discriminate in an otherwise illegal fashion in order to bring about a national social goal. This Court, however, is not sufficiently skilled in the art of sophistry to justify such discrimination by employers in light of the

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What Title VII seeks to accomplish, what the civil rights bill seeks to accomplish, is equal treatment for all.

The \textit{Weber} case casts a pall on any voluntary effort by unions and employers to achieve population parity and reduce their exposure to troublesome federal agency inquiry and private litigation. While the decision represents only one district judge's opinion, and an earlier decision in Tennessee is directly to the contrary,\textsuperscript{87} it is consistent with the growing trend of cases subjecting preferential policies to close scrutiny.\textsuperscript{88} The emerging concern for the rights of whites signaled in \textit{McDonald}, coupled with the \textit{Weber} decision and others that have upheld white actions for discriminatory employment policies\textsuperscript{89} has led counsel for employers to inject a large measure of caution into any discussion of employment policies designed to increase minority participation.

\textbf{Judicially Imposed Programs May Not Be Safe}

If voluntary compliance programs will not be honored by the courts, the employer with a statistical disparity in his work force must wait to be sued.\textsuperscript{90} Many employers who today pursue a totally nondiscriminatory hiring policy are acutely aware that their past practices resulted in racial disparity. For these employers, minority under-representation is a powder keg awaiting the match. Any action to ease the statistical imbalance may disadvantage majority employees or applicants. Consequently, federal compliance proceedings or litigation which would generally resolve the discrimination issue for an entire craft, is not always unwelcome. In many such cases, the employer and the EEOC have been able to agree on an appropriate accommodation of interests. As a result, a complaint

\begin{quote}
\begin{itemize}
\item Unequivocal prohibitions against racial discrimination against \textit{any individual} contained in Sections 703(a) and (d) of the 1964 Act.
\item Moreover, if such racial discrimination by employers against individuals is to be sanctioned as a benign exception to the prohibitions of Title VII of the Civil Rights Act, then it is the opinion of this Court that such exception should be enacted by the Congress, that branch of our government responsible for creation of the national policy reflected in the prohibitions of Title VII, and not by a life tenured member of the Federal Judiciary.
\end{itemize}
\end{quote}

415 F. Supp. at 769-70.

\textsuperscript{87} Barnett v. International Harvester, 12 Fair Empl. Prac. Cas. 786 (W.D. Tenn. 1976). The employer and union were granted summary judgment in a Title VII action directed at an apprenticeship program in which applicants were listed by aptitude on separate eligibility lists for whites and blacks. Positions were filled by alternately accepting the top applicant from each list. The court found such an arrangement, which resulted in blacks with lower aptitude test results being placed ahead of whites with higher results, did not violate Title VII or 42 U.S.C. §1981. It is interesting to note that the employer filed a cross-claim against the OFCC which had approved the program. Since the court found no discrimination, it did not have to face the novel question of the agency's liability for reverse discrimination.

\textsuperscript{88} See notes 12-35 \textit{supra} and accompanying text.


\textsuperscript{90} To our perhaps jaundiced view, the wait is not likely to be a long one.
and consent order are often filed simultaneously.\textsuperscript{91} Such a procedure, of course, comports with the preferred scheme of conference and conciliation established in Title VII.\textsuperscript{92}

This type of compromise, however, had been premised upon the assumption that whatever the outcome of the litigation the court's order would relieve the employer from further concern over possible exposure for past discrimination. Particularly, it was thought that if a court ordered preferential hiring, goals, quotas or other affirmative relief, incumbent employees would not be able to challenge the result. Recent decisional law, however, has cast serious doubt on that assumption.

A case causing considerable consternation among employers is \textit{McAleer v. American Telephone and Telegraph Co.}\textsuperscript{93} In that case Judge Gesell of the District Court for the District of Columbia approved an award of damages to a white male employee who had been passed over for a promotion. The plaintiff conceded was entitled to the promotion under the effective collective bargaining agreement but, pursuant to a prior consent decree, the position was instead given to a less qualified and less senior female solely because of her sex. The decree, negotiated between AT&T and the EEOC under the auspices of the district court of Philadelphia\textsuperscript{94} provided an "affirmative action override" to the bargaining agreement. The agreement had specified that if two applicants for a position have substantially equivalent qualifications, the position must be offered to the one with superior seniority. If stated employment goals were not met, however, the decree required that as between persons possessing basic qualifications, the employer must choose the minority or female person.\textsuperscript{95}

Judge Gesell interpreted the policy of Title VII to place the burden of past discrimination on the guilty employer (or union) and wherever possible to relieve the innocent incumbent employee.\textsuperscript{96} He

\textsuperscript{91} This method of resolving the dispute is generally applauded, and has been characterized as the congressionally "preferred means." Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974).


\textsuperscript{95} \textit{Fair Empl. Prac. Man.} (BNA) § 431:117.

\textsuperscript{96} Relying on the Supreme Court's opinion in \textit{Franks v. Bowman Transp. Co., Inc.}, 424 U.S. 747 (1976), and especially Chief Justice Burger's separate opinion in that case, \textit{Id.} at 777, Judge Gesell stated:

\begin{quote}
courts should attempt to protect innocent employees by placing this burden [that of eradicating the effects of past discrimination] on the wrongdoing employer
\end{quote}
rejected the traditional defense that AT&T's acts were required by court order reasoning that the order was necessitated by AT&T's own wrongful conduct and thus not protected.\footnote{7} Although the employer must continue to comply with the court order, he must also compensate those majority employees affected by the preferential plan. The \textit{McAleer} court recognized that competitive status job benefits such as promotion, transfer, and order of layoff and recall may be withheld from incumbent employees but required the employer to pay for the loss of those benefits. Thus, the employer is liable for back pay to minorities and front pay to incumbents.\footnote{8}

The \textit{McAleer} case has been settled out of court and in the absence of further appellate review its validity is subject to question.\footnote{9} In fact, another judge has considered and refused to follow \textit{McAleer}.\footnote{10} There is some authority indicating that employment decisions taken pursuant to a court order even in this context should be immune from collateral attacks.\footnote{11} Nonetheless, Judge Gesell relied upon the opinions in the recent Supreme Court decision in \textit{Franks v. Bowman Transportation Co.}\footnote{12} and his reasoning is not inconsistent with that decision.

In \textit{Franks}, black applicants for over-the-road positions brought an action against Bowman Transportation for Title VII violations. The district court found that their rejection had been based upon racial discrimination, but it refused to grant retroactive seniority to the whenever possible. . . . This Court, agreeing with these sentiments, sees no reason why in equitably distributing the burden among the concerned parties the onus should be shifted from the employer responsible for the discrimination to the blameless third-party employee any more than is, as a practical matter, unavoidable.

\footnote{416 F. Supp. at 439-40.}

\footnote{97. 416 F. Supp. at 440.}

\footnote{98. This effect was expressly presaged in \textit{Franks}. \textit{See} the opinion of the Court, 424 U.S. at 777 n.38, and the separate opinion of Chief Justice Burger, 427 U.S. at 780.}

\footnote{99. It is possible that the appeal pending from the district court decision in EEOC v. A.T. & T. Co., 13 Fair Empl. Prac. Cas. 392 (E.D. Pa. 1976) will shed some light on the appropriateness of the A.T. & T. consent decree. At the district court level, Judge Higgenbotham, who originally entered the consent decree, upheld it against challenges based on Title VII, the National Labor Relations Act, Executive Order 11246 and the Constitution.\footnote{100. Judge Higgenbotham remarks of the \textit{McAleer} decision:}

date of their application.\textsuperscript{103} The Supreme Court reversed that aspect of the case, ruling that an award of retroactive seniority, like back pay, is presumptively necessary to make whole the victims of past racial discrimination.\textsuperscript{104} Such seniority status serves to place these victims in their “rightful place.” In response to a dissent by Justices Powell and Rehnquist, the majority reasoned that any adverse affect upon innocent, incumbent employees simply must be tolerated to achieve racial justice.\textsuperscript{105} In support, the Court noted that regardless of this relief the discriminatee continues to bear some of the burden of past discrimination.\textsuperscript{106} The Court was careful to point out further possible remedial action: a “hold harmless” order respecting all affected employees in a layoff, front pay in favor of each employee, and union liability where it participated in the illegal conduct. However, the Court expressly refrained from ruling on these issues.\textsuperscript{107} The Chief Justice, concurring and dissenting in part, stressed that a more equitable remedy would be to provide front pay to the affected innocent employees and reiterated that such claims were not foreclosed by the Court’s opinion.\textsuperscript{108}

The \textit{Franks} opinion can fairly be read as an invitation to consider front pay liability to innocent incumbent employees. In \textit{McAleer}, the court accepted that invitation. Judge Gesell held that McAleer was entitled to the benefits of the seniority position he held immediately prior to remedial efforts. Consequently, after the remedy is invoked and the minority plaintiff is awarded the position, the employer is still required to provide the benefits of that position to the affected “innocent” majority employee. In sum, two different employees have valid claims to the benefits of the same position.\textsuperscript{109} The effect on the employer is apparent: having once discriminated in the past, he is potentially liable for two salaries for the same position until the incumbent retires.

\footnotesize
\begin{enumerate}
\item \textsuperscript{103} \textit{Id.} at 751.
\item \textsuperscript{104} \textit{Id.} at 766.
\item \textsuperscript{105} The majority concluded that nothing in Title VII barred the proposed relief, and that the conflicting interests at bar would be present among employees any time “scarce” employment benefits were contingent on seniority. In addition, the court found, on balance, that “[i]f 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 was directed.” 424 U.S. 774-75.
\item \textsuperscript{106} \textit{Id.} at 776.
\item \textsuperscript{107} \textit{Id.} at 777.
\item \textsuperscript{108} \textit{Id.} at 780-81.
\item \textsuperscript{109} The same dual liability results if the court prohibits displacement of incumbent employees and instead orders front and back pay to minorities, an unlikely remedy after \textit{Franks}. See Patterson v. Am. Tobacco Co., 12 Fair Empl. Prac. Cas. 314 (4th Cir. 1976).
\end{enumerate}
IMPLICATIONS

The lower court cases discussed above cannot be considered the final word in the fluid and still developing law of employment practices and they cannot be attributed to the Supreme Court decision in *McDonald*. They share with *McDonald*, however, the reflection of an increased awareness that white employees enjoy the same rights to nondiscrimination as those enjoyed by minorities. This awareness has, in turn, significantly affected the responses by employers and labor organizations to pressures for minority hiring and advancement.

The real significance of this development lies in its impact on efforts to take "affirmative action" to integrate minorities into the work force. Many employers are still confronted with disproportionate work force populations, especially in skilled, professional and management positions. The OFCC, EEOC and numerous civic groups—to say nothing of individual victims—are pressing for changes in that minority profile. Many employers want to achieve the same result. However, the courts are increasingly avoiding imposition of quotas and it now appears that voluntary efforts which make opportunities disproportionately available to minorities may constitute unlawful reverse discrimination.

If voluntary corrective action is unlawful, the courts will be the only forum to decide what efforts, if any, will be made to correct the minority work force of any given employer. But is the courtroom really the place to implement a "national policy objective of the highest priority?" Should the lingering vestiges of centuries of discrimination be resolved on a case-by-case basis? Exclusive judicial implementation of this policy would obviously take a very long time and defeat the congressional mandate encouraging voluntary solutions.

A further difficulty has been pointed out above: the judicial impromptuir may not settle the situation. It now seems possible that two employees can obtain the benefits of the same "rightful place." This establishes the measure of liability for a single unlawful employment decision as the wage and benefit expense for the incumbent for the rest of his working life. Such draconian sums are inappropriate and completely eliminate any motivation to rectify the effects of past employment practices.

110. See text accompanying notes 64-69 supra.
111. See cases cited at notes 12, 14, 19, 24, and 26 supra.
112. Id.
A final question which emerges from these cases is the continuing effect of Executive Order 11246.\textsuperscript{114} The policy of the Order's administrator has clearly been to encourage efforts of minority hiring and advancement.\textsuperscript{115} As late as several years ago, that policy won wide and enthusiastic support. Now, however, the inconsistency between strict racial neutrality and affirmative action—in its literal sense—has become apparent. Any program, even if mandated by the OFCC, which requires an employer to provide greater opportunity to one group or another is likely to be invalid under the federal civil rights statutes.

\textbf{CONCLUSION}

We have for some years recognized two national policies, one to increase minority representation in employment, the other to eliminate discrimination. \textit{McDonald} and other cases reflect an awareness that these goals are inconsistent. Until this conflict is resolved, employers are left without guidance, subject to competing demands which can carry extreme consequences. It is time to resolve the role of affirmative action in employment so employers and unions can voluntarily institute the practices necessary and proper without the constant burden of vexatious administrative lawsuits and without the constant oversight of the judiciary.

\textsuperscript{114} 3 C.F.R. § 169 (1974).
\textsuperscript{115} See 41 C.F.R. §§ 60-2.1 to 60-2.26 (1976).