Consent Decrees: Can They Withstand the Charge of Reverse Discrimination

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COMMENTS

CONSENT DECREES: CAN THEY WITHSTAND THE CHARGE OF REVERSE DISCRIMINATION?

Introduction

There has been substantial litigation under the equal employment opportunity provisions of Title VII of the Civil Rights Act of 1964. In spite of this activity, minorities and women are still disproportionately represented in the low-income strata of society. Recently, a new problem has been added to the complexities of Title VII litigation. Even as official reports reflect the dearth of progress under the Civil Rights Act of 1964, reverse discrimination lawsuits threaten a fundamental aspect of Title VII procedures: compliance through conciliation, as embodied in consent decrees.

Congress clearly directed the Equal Employment Opportunity Commission (EEOC), the federal administrative agency responsible for implementing much of Title VII, to conciliate charges brought before it. Conciliation and settlement may

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1. 1979 by Evet Abt.
4. See generally sources cited note 3 supra.
5. 42 U.S.C. § 2000(e)-5(b) (Supp. V 1975) provides in pertinent part that: "If the Commission determines . . . that there is reasonable cause to believe that the charge (of discrimination) is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." See also 110 Cong. Rec. 2566-67 (1964) (House debate on amendment to clarify the EEOC's duty to conciliate prior to resorting to the courts); H.R. Rep. No. 914, 88th Cong., 1st Sess. 150 (1963), reprinted in [1964] U.S. Code Cong. & Ad. News 2391, 2404 (stating the committee's belief that enforcement of employment discrimination cases through the courts rather than by administrative cease-and-desist orders would encourage settlement of complaints). See also Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974).
occur in several ways.

Aggrieved individuals bringing suit under Title VII may reach a settlement with the respondent employers prior to any judicial finding of discrimination. Similarly, class actions may be settled prior to litigation on the merits, subject to court approval of the agreement.

A settlement agreement will typically provide for court approval and formal issuance of a decree, containing provisions denying liability for past discriminatory practices, but assuming responsibility for implementing non-discriminatory practices in hiring and promotion. The settlements will often contain specific goals and timetables detailing the steps which the employer must take to include minorities and women in his workforce. The conciliation process is valuable because it reduces the cost of compliance,

6. See, e.g., EEOC v. McLean Trucking Co., 525 F.2d 1007 (6th Cir. 1975) (settlement between aggrieved party and employer did not bar later court action by EEOC); Magana v. Platzer Shipyard, Inc., 74 F.R.D. 61 (S.D. Tex. 1977) (plaintiff who alleged a class action but later settled individually with employer required to submit evidence to the court that the proposed compromise would not prejudice the rights of class members); Voutsis v. Union Carbide Corp., 6 Empl. Prac. Dec. ¶ 9003 (S.D.N.Y. 1973) (plaintiff and employer reached agreement prior to suit brought by EEOC covering same charges).


8. Very few conciliation agreements are successfully negotiated by the EEOC. Between July 1, 1972, and March 31, 1973, a total of 2,107 attempted conciliations resulted in only 533 settlements. CIVIL RIGHTS COMMISSION REPORT, supra note 3, at 525. The number of successful conciliations should be compared to the backlog of cases awaiting conciliation as of June 30, 1973 (6,162). Id. at 529. For a critique and an analysis of conciliation procedures, see Adams, Toward Fair Employment and the EEOC: A Study of Compliance Procedures Under Title VII of the Civil Rights Act of 1964 (Aug. 31, 1972) (EEOC Research Division study).


10. The goals and timetables generally outline an agreed-upon percentage of minorities and women to be hired in order to remedy past discrimination. Statistics are used to indicate the appropriate number of minorities and women to be recruited or promoted, considering factors such as vacancies in the work force and the nature of the available labor pool. See generally [1976] EMP. PRAC. GUIDE (CCH) ¶¶ 1301-1308. For a discussion of the provisions constituting a well-planned and effective consent decree, see Comment, Title VII Consent Decrees: Affirmative Inaction?, 18 SANTA CLARA L. REV. 517 (1978).
avoids protracted litigation, and hopefully induces change without confrontation.11

It is precisely the conciliation process which is threatened by recent developments in employment discrimination law. Title VII prohibits the preferential treatment of any group on the basis of race, color, religion, sex, or national origin.12 However, courts have approved preferential treatment as part of the remedy for proven discrimination.13 Some courts have struck down voluntary affirmative action programs on the rationale that no admission or judicial finding of past discrimination was made.14 Consent decrees, with standard denials of liability for past discrimination, may be subject to challenge as orders for preferential relief without a judicial finding of discrimination. The affirmative provisions of a decree may be regarded as reverse discrimination by incumbent employees or

11. Adams, supra note 8, at 130.

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee 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 . . . .


14. In the context of school hiring, promotion, or lay-offs, courts have rejected voluntary affirmative action programs in Chance v. Board of Examiners, 534 F.2d 993 (2d Cir. 1976); Cramer v. Virginia Commonwealth Univ., 415 F. Supp. 673 (E.D. Va. 1976); Anderson v. San Francisco Unified School Dist., 357 F. Supp. 248 (N.D. Cal. 1972). It is arguable that in these cases the plans operated in such a manner as to exclude virtually all white males from consideration for hiring, promotion, or retention in the jobs. B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 722 (1976). In the Cramer case, the plaintiff contended that he was denied the offer for a permanent position due to reverse discrimination on the basis of sex. The defendants had solicited his application for the position, but only interviewed female applicants in an attempt to conform hiring to federal and state guidelines. The court held for the plaintiff, reasoning that "where the only difference between two persons competing for the same job is a difference in sex, then the Equal Protection Clause requires that they not be treated differently on the account that one is male and the other is female." 415 F. Supp. at 678. The female candidate who was hired was admittedly qualified for the job. The question thus remains whether the court would have treated the program differently if the defendants had at least interviewed male applicants and still had chosen the female applicant who was equally as qualified as the plaintiff.

For cases in which reverse discrimination was claimed in the context of employment, see, e.g., Weber v. Kaiser Aluminum & Chemical Corp., 415 F. Supp. 761 (E.D. La. 1976); Brunetti v. City of Berkeley, 11 Empl. Prac. Dec. ¶ 10,804 (N.D. Cal. 1975). These cases reflect a reluctance to approve affirmative action plans which touch upon the expectations of other employees where a specific judicial finding of past discrimination has not been made.
non-minority job applicants. The issue thus raised is whether the employer may use the consent decree as a defense in a subsequent reverse discrimination action. The underlying dispute is, of course, the validity of affirmative action plans, whether court-ordered, negotiated, or voluntary. The purpose of this comment is to examine the traditional and precedential role of consent decrees in Title VII litigation in light of recent reverse discrimination cases. An initial discussion of the legal contexts in which negotiated settlements occur will illustrate the usefulness of consent decrees under Title VII. Although discussion will focus primarily upon consent decrees negotiated between the government and the employer, generally the issues raised in this comment affect negotiated settlements between private individuals and employers, and class actions as well.

An analysis of the competing legal concepts of prohibition of preferential treatment versus affirmative action will illuminate the difficulties confronting employers who enter into negotiated settlements embodied in consent decrees or voluntary affirmative action plans. Remedies to these problems surface from that analysis with primary focus on equitable treatment of all parties affected by a consent decree. In this way it is hoped that cooperation with the conciliation process will result.

**CONSENT DECREES: THEIR TRADITIONAL FUNCTION**

**Invoking the Conciliation Process**

Conciliation and settlement may occur at various points in time under the statutory scheme of Title VII. For an aggrieved party, the first step on the road to conciliation or litigation is the filing of a charge with the Equal Employment Opportunity Commission (EEOC). The EEOC is obligated to send notice to the employer of the charge of discrimination, and must also defer the charge to any state agency authorized to resolve it. The state agency may be able to conciliate the charge, or an employer may choose to settle before further action is taken by the EEOC and to submit the settlement for EEOC approval.

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15. See text accompanying notes 48-58 infra.
16. § 706(e), 42 U.S.C. § 2000e-5(e) (Supp. V 1975), provides that “notice of the charge... shall be served upon the person against whom such charge is made within ten days” after the charge of discrimination is made.
18. EEOC Regulations, 29 C.F.R. § 1601.19a (1977) provide:
   At any time subsequent to a preliminary investigation and prior to the issuance of a determination as to reasonable cause, the District Direc-
The EEOC assumes jurisdiction of the charge if no state redress is available, or if state authorities do not resolve the dispute within sixty days. If state agencies do not settle the dispute, the EEOC will investigate and determine reasonable cause. A finding of no reasonable cause will result in the issuance of a right to sue letter. If reasonable cause is found, the EEOC must attempt conciliation prior to issuing a suit letter or prior to initiating suit itself. If the EEOC cannot complete its investigation of the charge within 180 days, the aggrieved party may request a right to sue letter when that time period expires.

Finally, an EEOC Commissioner may also file charges with the Commission on behalf of aggrieved parties, or may

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20. § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1) (Supp. V 1975). Regardless of what findings state or federal authorities make, the charging party's final recourse is always in federal court. For cases in which it has been held that the absence of a finding of reasonable cause by the EEOC cannot bar suit on a charge of discrimination, see McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971).
initiate charges alleging a pattern or practice of discrimination. 24

This brief overview of pre-litigation procedural steps under Title VII reveals many opportunities for informal settlement of disputes. However, the opportunities for conciliation are reduced if employers do not receive protection from reverse discrimination suits arising from such informal settlement. Without some judicial protection of a consent decree, the employer would do better with a litigated judgment.

The Approved Settlement and The Courts' Concerns

Assume that the investigatory powers of the EEOC have been triggered by a charge either by an individual or by a member of the Commission. Reasonable cause is determined; settlement negotiations between the government and the employer result in agreement; and the parties apply to the court for approval of the settlement. Once the settlement is approved and a decree issued, how do the courts treat the decree in subsequent litigation?

In order to delineate court treatment of consent decrees in subsequent litigation, focus here is on agreements between the government and an employer. Consent decrees, like contracts, only bind those who are party to them. 25 Thus, consent decrees negotiated between the government and an employer are vulnerable to later challenge by the very discriminatees designated to receive relief under the settlement. 26

Challenges to a consent decree by the very individuals designated to receive relief under the settlement truly place courts in a quandary. 27 On the one hand, the adequacy of the...

24. § 707(e), 42 U.S.C. § 2000e-6(e) (Supp. V 1975). Pattern-or-practice suits allege systematic discrimination, and often are brought against entire industries. Section 707(e) states that all pattern-or-practice actions "shall be conducted in accordance with the procedures set forth in section 706 of this Act." Section 706 sets forth the procedure of filing of a charge, investigation and determination of reasonable cause, and conciliation.


26. See United States v. City of Jackson, Miss., 519 F.2d 1147 (5th Cir. 1975). See also text accompanying notes 30-39 infra. Technically, discriminatees are not parties to a consent decree negotiated between the government and an employer, even though relief is directed toward them under the settlement.

27. The place of the courts in public law litigation and their departure from traditional concepts of adjudication is assayed in Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976). Professor Chayes lists the diver-
relief is determined at the time the consent decree is entered for most discriminatees in a very real sense; few individuals can afford to pursue their individual claims further. On the other

gences between traditional concepts of adjudication and the new roles of courts in public law litigation as follows:

(1) The scope of the lawsuit is not exogenously given but is shaped primarily by the court and the parties.

(2) The party structure is not rigidly bilateral but sprawling and amorphous.

(3) The fact inquiry is not historical and adjudicative but predictive and legislative.

(4) Relief is not conceived as compensation for past wrong in a form logically derived from substantive liability and confined in its impact to the immediate parties; instead it is forward looking, fashioned ad hoc on flexible and broadly remedial lines, often having important consequences for many persons including absentees.

(5) The remedy is not imposed but negotiated.

(6) The decree does not terminate judicial involvement in the affair: its administration requires the continuing participation of the court.

(7) The judge is not passive, his function limited to analysis and statement of governing legal rules; he is active, with responsibility not only for credible fact evaluation but for organizing and shaping the litigation to ensure a just and viable outcome.

(8) The subject matter of the lawsuit is not a dispute between private individuals about private rights, but a grievance about the operation of public policy.

Id. at 1302.

Juggling the interests in public law litigation is conceptually a far more difficult enterprise than balancing the relative rights and wrongs under traditional equity adjudication, if only because the wrongs are not always easy to specify. The number of parties involved in public law litigation serves to complicate the balancing process enormously.

28. Section 706(k) of Title VII provides that the court at its discretion may award reasonable attorneys fees to the prevailing party. 42 U.S.C. § 2000e-5(k) (1970). Private attorneys are likely to take only those cases in which the charging party will almost certainly prevail, however, leaving the weak or difficult cases to the resolution of the Commission. See Civil Rights Commission Report, supra note 3, at 519-20. Additionally, where a single charging party is finally notified that he or she must engage a private attorney to file suit, considerable changes have occurred in that party's status. Considerable time has passed since the discrimination occurred, and witnesses and evidence may have long since disappeared, making private suit even more difficult. Moreover, the charging party has exposed himself or herself to the inevitable consequences, however subtle, of filing a charge against one's employers.

Id. at 542. William H. Brown III, chairman of the EEOC, indicated that only ten percent of the cases in which the EEOC had been unable to reach a conciliation were subsequently taken to court by the charging party. See Equal Employment Opportunities Enforcement Act: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 91st Cong., 1st Sess. 38, 40 (1969). The chairman also stated: Yet in order to realize the rights guaranteed him by Title VII, the disadvantaged individual is told that in the pinch he must become a litigant, which is an expensive proposition and traditionally the prerogative of the rich. Thus minorities are locked out of the proffered remedy by the very
hand, the policy of conciliation weighs heavily on the side of upholding the decrees as negotiated. The negotiation process would be discredited if all the hard work in reaching a settlement could later be undone by dissatisfied third parties, even if those parties were victims of the employer's discrimination. Courts are faced with challenges in the form of motions to intervene as well as subsequent suits.

*United States v. Allegheny-Ludlum Industries, Inc.* demonstrates the policy considerations inherent in a judicial decision regarding intervenors' challenges to a negotiated settlement. In *Allegheny-Ludlum*, the Fifth Circuit Court of Appeals examined the policy bases supporting the lower court's approval of consent decrees entered into by the government and nine steel companies. Several intervenors were permitted to challenge the consent decree's provisions for back pay, which they considered to be *a priori* insufficient. The court's definition of the main issue in the case created a substantial obstacle to the success of the intervenors' arguments.

In the court's analysis, the intervenors were challenging the authority of government agencies to "lawfully conciliate

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29. *See note 5 supra.* Additionally, Justice Powell's opinion for the Court in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), details the policy of conciliation underlying Title VII:

Cooperation and voluntary compliance were selected as the preferred means for achieving [the elimination of unlawful employment discrimination]. To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby existing state and local equal employment opportunity agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit.

30. 517 F.2d 826 (5th Cir. 1975).

31. *Id.* at 834. The EEOC, the Department of Labor, and the Department of Justice were all engaged in the negotiations.

32. Fed. R. Civ. P. 24 provides for intervention as of right and permissive intervention. The procedure for intervention and its possible uses in the context of reverse discrimination cases will be discussed more fully at notes 125-135 infra.

Additionally, the legality of the waivers required in order to receive the back pay award was challenged. *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 851 (5th Cir. 1971). The appellants also contended that the decree did not provide for adequate supervision by the courts or the governmental agencies involved. *Id.* at 864. These issues are not specifically addressed in the text as the same policy rationales upholding the back pay award suffice to support other provisions in the decree.

33. 517 F.2d at 862. The decree provided for a $500 back pay award for each eligible employee.
and settle by consent decree charges of discrimination cutting across an entire industry. . . .” Thus, public policy weighed heavily on the side of approval of the consent decree. In analyzing the intervenors' arguments against the decrees, the court balanced the affirmative action objectives of Title VII against the strong congressional policy favoring voluntary compliance.

Providing adequate relief for discriminatees is, of course, the goal of Title VII. Yet the court recognized that voluntary compliance “over an extended period of time will contribute significantly toward ultimate achievement of statutory goals.” Additionally, those individuals dissatisfied with the amount of the back pay award could sue for more if they refused the proffered relief. The decrees only bound the government, the nine steel companies, and those employees who accepted back pay awards pursuant to its terms. The court pointed out: “If the decrees were vacated, however . . . litigation-free back pay would be lost to those whose claims were factually weak and, though arguably entitled to some back pay, probably could not otherwise recover.”

The court refused to vacate approval of the consent decrees. The policy of voluntary compliance, the contractual nature of consent decrees, and national policy considerations outweighed the intervenors' concerns for the sufficiency of the relief under the decrees. Courts consistently uphold Title VII actions against employers who have entered consent decrees. The decrees do not

34. Id. at 850-51.
35. The standard of review in Allegheny-Ludlum was abuse of discretion, also a great burden on the intervenors. Id. at 850. In framing the issue as it did, however, the court increased the already heavy burden on the intervenors.
36. Id. (quoting Patterson v. Newspaper & Mail Deliverers' Union of N.Y. & Vic., 514 F.2d 767, 771 (2d Cir. 1975)).
37. 517 F.2d at 864.
38. Id.
39. Similar considerations are evident where members of the class in a private class action suit are themselves dissatisfied with the proposed settlement reached by the representatives of the class and the employer. See Cotton v. U.S. Pipe & Foundry Co., 14 Fair Empl. Prac. Cas. 326 (N.D. Ala. 1975). In this case, the court found that the agreement, which was negotiated under the supervision of the court, would be implemented as agreed. Even though the settlement bound all class members as to those provisions necessitating uniformity, such as the seniority provisions, class members could still "opt out" on other provisions and sue for additional relief (e.g. back pay).
40. The defendant's argument ignores the number of cases litigated as class actions which have held that a consent decree entered into by the government and an allegedly discriminatory company does not bind by collateral estoppel those persons who have not accepted compensation under the decree or signed a release. Rodriguez v. East Texas Motor
bar subsequent litigation involving the same charges of discrimination, so long as the discriminatees have not accepted relief pursuant to the settlement. Although the subsequent litigation will generally be allowed to continue, in point of fact much of the subject matter of the second suit is limited by the prior consent decree.

Additionally, courts will not permit the substance of a consent decree to be reviewed in another forum, both upon principles of comity and upon recognition of the impact such review would have on the negotiation process. Reviewing the provisions of a decree in another forum raises the possibility of subjecting one party to conflicting orders of court. Courts are so wary of collateral attacks upon the substance of decrees that dissatisfied third parties are advised to seek intervention rather than attacking the provisions at a later date. However, as


41. Id.

42. Compare the decision in a long chain of litigation in Rodgers v. United States Steel Corp., 69 F.R.D. 382 (W.D. Pa. 1975) (certification of class action), with the later decision regarding the scope of issues before the court, Rogers v. United States Steel Corp., 70 F.R.D. 639 (W.D. Pa. 1976). In certifying the class for proceeding against U.S. Steel, the court rejected defendant's arguments that injunctive relief provided in the steel industry consent decrees preempted the plaintiffs' suit as plaintiffs had made no showing of a need for relief beyond that provided in the consent decree. The court stated:

'These Decrees do not appear to provide "the most complete relief possible" under Title VII... it is clearly conceivable, as another court noted in certifying a (b)(2) class under quite similar circumstances that this court might ultimately "... issue an injunction differing from the one consented to in Allegheny-Ludlum in the specifics of its scope or implementation." (citation omitted).

69 F.R.D. at 387-88. When, in the subsequent proceeding, the plaintiffs asked the court to issue an injunction against the tender of back pay to affected employees of defendant's plant pursuant to the steel industry consent decree, however, the court clearly outlined those issues which were "litigated and decided in an appropriate forum," and therefore not before the court in the second proceeding. The adequacy of the back pay fund, the manner of distribution of the fund, and the adequacy of the injunctive relief provided by the consent decrees were all considered non-litigable in the second proceeding, 70 F.R.D. at 641. The decrees referred to in the decisions are the ones approved in United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826 (5th Cir. 1975), discussed at text accompanying notes 30-39 supra.


44. Construction Industry Combined Comm. v. International Union of Operating Engineers, Local 513, 67 F.R.D. 664 (E.D. Mo. 1975) (employers seeking to prohibit enforcement of consent decree entered into by union with EEOC must intervene in case before the judge who entered the decree).

Allegheny-Ludlum indicates, policy factors militate against intervention.

In brief, discriminatees dissatisfied with a settlement negotiated between the government and an employer encounter a judicial "Catch 22." They must seek intervention in order to challenge the decree, yet the policy of conciliation weighs heavily against intervention or a successful challenge. A decree is not determinative of the rights of those not party to it, yet it affects the interests of many employees who did not negotiate or sign it. An employer who implements a consent decree, and is subsequently charged with reverse discrimination, encounters an equally frustrating double bind.

COMPETING DEMANDS ON THE TITLE VII MANDATE

Reverse Discrimination

It is not surprising that a society which prizes the ethic of advancement through individual merit would encounter profound conceptual difficulties in its attempts to eliminate the effects of discrimination through promotion of disadvantaged groups. Also central to current American political philosophy is the concept of evenhanded treatment before the law. This theme, simply stated, is that the law should be neutral in its application, neither preferring nor disfavoring any group on the basis of race, national origin, religious beliefs, or sex. The traditional concepts of the competitive ethic and of equal treatment before the law engender conflict when special efforts are made to include disenfranchised groups in the economic mainstream.

The real conflict between "affirmative action" and "reverse discrimination" is the definition of equality. When certain groups in society have been severed from the principal social and economic institutions by either social or legal norms,

a preliminary injunction enjoining defendants from hiring according to provisions of consent decree, court denied the injunction on the basis that intervention was proper method of seeking relief rather than collateral attack upon the consent decree).

46. United States v. City of Jackson, Miss., 519 F.2d 1147 (5th Cir. 1975).
47. Id.
an essential question arises as to whether simply declaring an end to formal discrimination will suffice to end it. Even if discrimination against minorities and women is deemed unconstitutional, both groups are left where they were prior to the termination of legally sanctioned discrimination—at the bottom of the economic pile. The issue then becomes whether, with legal impediments to advancement removed, the status achieved by minorities and women is sufficiently "equal" to render inequitable any further manipulations of the legal and economic infrastructure of society on behalf of the disadvantaged groups.

This dispute becomes particularly volatile when the expectations of the majority are infringed upon in the course of advancing the interests of minorities and women. A compelling argument can and should be made that the issue of "reverse discrimination" is somewhat of a legal fiction; that in reality the advancement of minorities and women up the economic ladder is not a bestowal of privilege but a removal of unearned benefits from members of the majority. The argument, however convincing it may be conceptually, logically, or morally, will probably not dissuade those accustomed to the established modes of distributing benefits from insisting upon the maintenance of the status quo.

Many individuals who would never intentionally discriminate have relied on the individual merit ethic, namely, that

54. See note 3 and accompanying text supra.
55. The documentation of past discrimination against minorities also serves to document its counterpoint: unfair advantages to non-minorities. If minorities are under-represented in higher levels of education it is safe to assume that non-minorities are overrepresented. Stated simply, what society has been taking from its minorities, it has been giving to its non-minorities. The reverse discrimination aspect of affirmative action is, in reality, the removal of that benefit which American society has for so long bestowed, without question, upon its privileged classes. The question, viewed in this light, becomes: "Is the removal of a benefit, given for centuries to some at the expense of others, truly a discrimination against that long-favored class?"

benefits will be distributed on the basis of some "objective" standard. admitting. Admission to graduate school, for example, should be determined by test scores and grade point averages, and eligibility for transfer or promotion should be ascertained by test scores or seniority. Whether or not these expectations are realistic, whether or not an "objective" determination of an individual's merit can be made, the sudden defeat of these expectations will be met with resistance.

The recent case of Regents of the University of California v. Bakke epitomizes the resistance to affirmative action programs. Alan Bakke, a white male, was denied admission to the University of California Medical School at Davis on two separate occasions. The medical school operated a special admissions program which selected minority applicants for admission into the school. Mr. Bakke brought suit against the school, contending that he was "better qualified" to enter graduate school than the specially admitted minorities and was thus excluded on the basis of race. He contended that the Davis special admissions program violated his rights under the fourteenth amendment, the California Constitution, and Title VII of the Civil Rights Act of 1964.

The Supreme Court decision in this well-publicized case indicates the difficulties of balancing the competing interests of minority advancement and majority expectations. Justice Powell, joined by the Chief Justice and Justices Stewart,
Rehnquist, and Stevens in a separate opinion, found the special admissions program at Davis to be unlawful and ordered Mr. Bakke admitted. Justice Powell reached the fourteenth amendment question in his opinion, while the other Justices who found the program unlawful did so on statutory grounds alone. Justice Powell did not eliminate the consideration of race in affirmative action programs, however. Justices Brennan, White, Marshall, and Blackmun joined him on this aspect of the case, and dissented from the finding that the U.C. Davis special admissions program was impermissible.

The Bakke case will undoubtedly receive much scholarly treatment. It deserves some attention at this point for several reasons. The nine Justices were obviously divided on the affirmative action-reverse discrimination dichotomy. The question of how to implement a constitutionally permissible affirmative action program still remains. Affirmative action programs under Title VII will surely receive close judicial scrutiny as the meaning and parameters of the Bakke decision are delineated in subsequent cases. Social norms of integration on one side, and the competitive ethic on the other, may be exacerbated under Title VII precisely because Title VII affects a vital area in most people’s lives—employment.

Due to the important nature of the interests affected by Title VII, court decisions are not always consistent. The Fifth Circuit Court of Appeals recently invalidated a voluntary affirmative action plan implemented by an employer and a union. The program was challenged as constituting reverse discrimination, as minorities with less seniority than whites were selected for a special job-training program. The court of appeal held the program invalid because there was no judicial finding of past discrimination. Even a finding of discrimination may not save an affirmative action plan if the appellate court views the plan as having too great an impact on majority expectations. Court decisions which require a judicial finding

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62. Id. at 2739.
63. Id. at 2811 (concurring and dissenting opinion of Stevens, J.; joined by Burger, C.J.; Stewart & Rehnquist, J.J.).
64. Id. at 2767.
66. Id. at 222.
67. Id. at 227.
of discrimination hamper the conciliation process under Title VII. 69

Other courts have reasoned that affirmative action programs under Title VII, whether court-ordered or voluntary, are essential to accomplishing integration and must be upheld if reasonable. 70 The fact that the cases are not uniform in their

69. The dissent in Weber v. Kaiser Aluminum, 563 F.2d 216 (5th Cir. 1977), cert. granted, 47 U.S.L.W. 3401 (1978) (docket no. 78-435), vigorously objected to the majority opinion’s requirement of a judicial finding of discrimination. The dissent reasoned that such a requirement would effectively eliminate voluntary compliance with Title VII. 563 F.2d at 230.


The recent case of United Jewish Organizations of Williamsburgh v. Carey, 430 U.S. 144 (1977), also reflects the expectations of a white group regarding legislative reapportionment along racial lines. Under a redistricting plan to bring Kings County, New York, into compliance with the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1970), the Hasidic Jewish community of Williamsburgh was split into two districts in order to increase the proportion of nonwhite voters in the districts. Suit was brought charging that assignment to voting districts solely on the basis of race was a violation of the fourteenth and fifteenth amendments. 430 U.S. at 153. The Supreme Court rejected petitioners' claims that use of racial criteria in redistricting is never permissible, or usable only where a finding of prior discrimination has been made, and also defeated the claim that use of a "racial quota" is never acceptable in redistricting. Quite clearly in this case as well, two different but equally desirable social values clashed: the ultimate goal of considerations of race being irrelevant in the political process conflicted with the current necessity to advance participation in the political process along racial lines so that the ultimate goal could be reached a bit more rapidly.

This case has further analytical value for reverse discrimination issues in that the Court expresses a deferential attitude towards a congressional scheme that almost necessitates the use of racial criteria in order to be carried out. Drawing upon two prior cases for support, Beer v. United States, 425 U.S. 130 (1976), and City of Richmond v. United States, 422 U.S. 358 (1976), the Court stated:

Implicit in Beer and City of Richmond, then, is the proposition that the Constitution does not prevent a State subject to the Voting Rights Act from deliberately creating or preserving black majorities in particular districts in order to ensure that its reapportionment plan complies with § 5 . . . . Section 5, and its authorization for racial redistricting where appropriate to avoid abridging the right to vote on account of race or color, are constitutional. Contrary to petitioners' first argument, neither the Fourteenth nor the Fifteenth Amendment mandates any per se rule against using racial factors in districting and apportionment.

430 U.S. at 161.

The Court also emphasized the fact that "there was no fencing out the white population from participation in the political processes of the county, and the plan did not minimize or unfairly cancel out white voting strength." Id. at 165.

The question arises whether the Court would remain deferential to the congressional scheme and apply similar reasoning in a case involving the affirmative action-reverse discrimination dichotomy under Title VII. The argument in such a case would be that a carefully tailored program which did not disproportionately exclude white participation, which was made in accord with a constitutionally permissible, congressionally mandated program, would not violate the fourteenth amendment simply because it adversely impacted upon the expectations of whites. At least one district court
treatment of challenges to affirmative action indicates the difficulty of balancing the interests and expectations of the non-minority against the interests of minorities and women. The balancing process is equally tortuous in the United States Supreme Court. There are few clearly just solutions when the scales are so evenly weighted and the economic and social well-being of the litigants so critically affected by any decision.

The Delicate Balance: Minority Interests versus Majority Expectations in the Supreme Court

A recurring theme in Title VII litigation is the extreme difficulty of recompensing one group of employees without adversely affecting other employees. A trilogy of recent Supreme


For an insightful analysis of the complexities inherent in any discussion of "reverse discrimination," see Wasserstrom, Racism, Sexism, and Preferential Treatment: An Approach to the Topics, 24 U.C.L.A. L. Rev. 581 (1977). The author contends that much confusion is generated in discussion of preferential treatment from a failure to recognize three approaches to the topic. "The first of these perspectives concentrates on what in fact is true of the culture, on what can be called the social realities . . . . The second perspective is concerned with the way things ought to be . . . . The third perspective looks forward to the means by which the ideal may be achieved." Id. at 583. Given these three perspectives on the topic of preferential treatment:

[I]t can almost immediately be seen that the question of whether something is racist or sexist is not as straightforward or unambiguous as may appear at first. The question may be about social realities, about how the categories of race or sex in fact function in the culture and to what effect. Or the question may be about ideals, about what the good society would make of race or sex. Or the question may be about instrumentalities, about how, given the social realities as to race or sex, to achieve a closer approximation of the idea.

Id. The present discussion of the topic revolves around this third category, and takes a balancing approach between the competing demands on the Title VII mandate primarily because the courts seem to encounter much difficulty in resolving the issue of preferential treatment-reverse discrimination when one party before them has arguably not received the customary treatment solely due to his race or sex. See Defunis v. Odegaard, 416 U.S. 312 (1974); Regents of the Univ. of Cal. v. Bakke, 98 S. Ct. 2733 (1978); Cramer v. Virginia Commonwealth Univ., 415 F. Supp. 673 (E.D. Va. 1976); text accompanying note 57 supra.
Court decisions involving Title VII gives some clues to the Court's approach to balancing the competing expectations of majority employees with the interests of the minority.

*Franks v. Bowman Transportation Co.* was an expansive decision on remedies under Title VII. The issue confronted in *Franks* was whether non-employee minority job applicants who were discriminatorily denied employment as over-the-road truck drivers with the respondent company could properly be awarded retroactive seniority given the phrasing of section 703(h), which permits "bona fide" seniority systems to stand. Under section 703(h), it was unclear whether facially neutral, unintentionally discriminatory seniority systems could be altered or affected in order to provide relief for discriminees.

The Court determined that a grant of retroactive seniority was consistent with provisions of Title VII, with legislative history, and with the "make whole" objectives of Title VII.

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75. § 703(h), 42 U.S.C. § 2000e-2(h) (1970 & Supp. V 1975), provides that an employer may "apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . ."
76. Prior to *Franks*, several courts of appeal had held that a neutral seniority system could not be maintained where it perpetuated the effects of past discrimination; e.g., in departmental seniority systems. See, e.g., *Acha v. Beame*, 531 F.2d 648 (2d Cir. 1976); *Sabala v. Western Gillette*, Inc., 516 F.2d 1251 (5th Cir. 1975); *Rodriguez v. East Texas Motor Freight*, 505 F.2d 40 (5th Cir. 1974); *vacated and remanded*, 431 U.S. 396 (1977); *United States v. Roadway Express*, Inc., 457 F.2d 854 (6th Cir. 1972); *United States v. Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971); *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971).
77. The Court also dealt with the problem of whether retroactive seniority could be awarded consistent with § 706(g), which does not mention retroactive seniority as a specific remedy. 42 U.S.C. § 2000e-5(g) (1970) provides in relevant part:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.
78. 424 U.S. at 758.
79. Id. at 763-64.
The decision noted that benefits accruing from advanced seniority are as important to incumbent employees as they would be to non-employee discriminatees. The Court addressed the concern, raised by the company, that a retroactive award of seniority would impinge on the expectations of "innocent" employees, stating:

> It 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. . . . [W]e find untenable the conclusion that this form of relief may be denied merely because the interests of other employees may thereby be affected.

Thus the majority opinion recognized that expectations of non-minority individuals would be displaced by the decision.

The dissent emphasized that the grant of retroactive seniority to post-Act discriminatees would impact heavily on other innocent employees instead of the employer, who originally acted unlawfully. In response to the dissent's criticism that the creation of a presumption favoring the award of retroactive seniority would unnecessarily harm "perfectly innocent employees," the majority opinion stated that "the result [reached] today—which standing alone establishes that a sharing of the burden of the past discrimination is presump-

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80. Seniority standing in employment with respondent Bowman, computed from the departmental date of hire, determines the order of layoff and recall of employees. Further, job assignments for OTR (over-the-road) drivers are posted for competitive bidding, and seniority is used to determine the highest bidder. As OTR drivers are paid on a per-mile basis, earnings are therefore to some extent a function of seniority. Additionally, seniority computed from company date of hire determines the length of an employee's vacation and pension benefits. Obviously, merely to require Bowman to hire the class 3 victim of discrimination falls far short of a "make whole" remedy.

*Id.* at 767.

81. *Id.* at 774-75.

82. *Id.* at 788 (dissenting opinion of Powell, J.) (joined by Rehnquist, J.). Chief Justice Burger indicated a preference for awarding monetary damages rather than competitive seniority to discriminatees, reasoning that pursuing this remedy would tend to deter the employer from engaging in further discrimination while holding harmless other employees. *Id.* at 780.

83. *Id.* at 788.
tively necessary—is entirely consistent with any fair characterization of equity jurisdiction." In a footnote to that sentence, the majority opinion suggested the award of monetary damages to each incumbent employee and discriminatee as a possible remedy available to district courts. This suggestion was followed by a disavowal of any views regarding the use of such a remedy since the issue was not properly before the Court. That statement would have significant ramifications for employers who enter into consent decrees.

The *Franks v. Bowman Transportation Co.* decision demonstrated a greater concern for minority interests than other decisions preceding *Bakke*. After *Franks*, the decisions urge great caution in contemplating any expansion of remedies for discriminatees which impacts on the expectations of non-minority employees.

Although the *Bakke* case may eventually symbolize the concept of reverse discrimination, judicial recognition of the concept originated in another case, *McDonald v. Sante Fe Transportation Co.* In *McDonald*, two white males brought suit against their employer alleging that they were discriminatorily discharged in violation of Title VII and section 1981 of the Civil Rights Act of 1866. They, and one other employee, a black male, were charged with misappropriating the property

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84. Id. at 777.
85. Id. at 777 n.38. Chief Justice Burger apparently would apply the remedy of monetary damages exclusively as a replacement for the remedy of retroactive seniority for discriminatees. See note 82 supra. The majority opinion appears to suggest that monetary damages could be awarded to any employee, discriminatee or otherwise, whose status is adversely affected by sharing the burden of the employer's past discrimination. Compare 424 U.S. at 777 n.38 (majority opinion) with 424 U.S. at 780 (dissenting opinion of Burger, C.J.).
86. Regents of the University of California v. Bakke, 98 S. Ct. 2733 (1978); see discussion accompanying notes 59-67 supra.
87. Id.
89. 42 U.S.C. § 1981 (1970) provides:
   All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . .
of the respondent company. The white males were dismissed; the black employee was retained. The district court dismissed the complaint at the pleading stage, and the court of appeals affirmed. The issues presented by the case were (1) whether the white employee's (petitioner's) dismissal created a cause of action under Title VII; and (2) whether section 1981 applied to non-whites as well as to whites. The United States Supreme Court reversed the appellate decision, finding that a cause of action was stated under both statutes. The Court's decision on the Title VII cause of action is of interest not so much for its holding as for the vigor with which it was reached.

After examining legislative history, EEOC decisions, and prior judicial decisions, the Court refuted the argument that the commission of a criminal offense against the employer removed any protection which petitioners might have had under Title VII:

We... hold today that Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they Negroes and Jackson white.

... While Sante Fe may decide that participation in a theft of cargo may render an employee unqualified for employment this criterion must be "applied, alike to members of all races," and Title VII is violated if, as petitioners alleged, it was not.

... The Act prohibits all racial discrimination in employment, without exception for any group of particular employees, and while crime or other misconduct may be a

90. McDonald v. Sante Fe Transportation Co., 513 F.2d 90 (5th Cir. 1975).
91. 427 U.S. at 278.
92. Further discussion of the § 1981 claim is omitted, as that claim is peripheral to the analysis of this comment. The Court also examined legislative history to determine that § 1981 was intended to protect white as well as black citizens from discrimination based on race. See 427 U.S. at 285-96.
93. The Court relied upon its prior decision in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and found many factual similarities between that case and McDonald. In McDonnell a laid-off employee engaged in an illegal "stall-in" at the petitioner's plant, and was fined for obstructing traffic. When the respondent employee later applied for an open position with the petitioner, he was denied employment on the basis that he had participated in illegal activities. The respondent brought suit charging that he was denied the position on the basis of race. The Supreme Court held that the respondent should be permitted to prove his claim against the employer. "[I]t is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise." 411 U.S. at 801. The Court in McDonald found no difference between allowing the respondent in McDonnell to prove his case, and allowing the petitioners to prove theirs against Bowman Transportation Company.
legitimate basis for discharge, it is hardly one for racial discrimination.\textsuperscript{94} (emphasis in original).

Although the Court expressly noted that no consideration is given to the permissibility of an affirmative action program,\textsuperscript{95} the strong language employed in the decision proved difficult to ignore in ruling on the validity of such programs. \textit{McDonald} was cited several times in the \textit{Bakke} decision for the proposition that an absolute preference based on race is clearly unlawful.\textsuperscript{96} The case accentuates the narrow line which employers must tread to avoid charges of discrimination by majority or minority group members.

Finally, the High Court decision in \textit{International Brotherhood of Teamsters v. United States}\textsuperscript{97} merits brief discussion as a further clue to the concerns of the members of the Court in the area of employment discrimination. In a 7-2 decision,\textsuperscript{98} the Court held that retroactive seniority could not be extended to discriminatees "who suffered only pre-Act discrimination."\textsuperscript{99} Reliance upon legislative history provided the substantive rationale for its holding,\textsuperscript{100} but the dictum in the decision appears to be a more accurate indicator of the Court's concerns. In remanding the case to the district court, the Supreme Court noted that principles of equity apply when considering the "legitimate expectations of non-victim employees" and the interests of discriminatees.\textsuperscript{101} The Court indicated a strong desire that equitable principles apply where the "immediate imple-

\textsuperscript{94} 427 U.S. at 280-83.
\textsuperscript{95}  Id. at 281 n.8.
\textsuperscript{96} See Regents of the University of California v. Bakke, 98 S. Ct. 2733, 2750 (1978) (opinion of Powell, J.); \textit{id.} at 2811 (concurring and dissenting opinion of Stevens, J.; joined by Burger, C.J.; Stewart, J.; Rehnquist, J.).
\textsuperscript{97} 431 U.S. 324 (1977).
\textsuperscript{98} Stewart, J., wrote the opinion for the Court, in which Burger, C.J., and White, Blackmun, Powell, Rehnquist, and Stevens, J.J., joined. Marshall, J., filed a concurring and dissenting opinion in which Brennan, J., joined. It is interesting to compare the composition of the Justices supporting this decision with that of the decision in \textit{Franks}. See note 82 and accompanying text \textit{supra}. The dissenters in \textit{Franks} were able to flavor the decision in \textit{Teamsters} with the concern they displayed in the former decision for the expectations of non-minority group members.
\textsuperscript{99} 431 U.S. at 356.
\textsuperscript{100} The majority opinion found that the legislative history of § 703(h), 42 U.S.C. § 2000e-2(h) (1970 & Supp. V 1975) made it "clear that the routine application of a bona fide seniority system would not be unlawful under Title VII." 431 U.S. at 352. The dissent disputed the majority's interpretation of the legislative history: "Congress was concerned with seniority expectations that had developed prior to the enactment of Title VII, not with expectations arising thereafter to the extent that those expectations were dependent on whites benefiting from unlawful discrimination." \textit{Id.} at 384.
\textsuperscript{101} 431 U.S. at 375.
mentation of an equitable remedy threatens to impinge upon the expectations of innocent parties."

These concepts reflect much of the spirit of the Franks dissenters, namely, that the majority had not sufficiently considered the expectations of non-minority employees. The decision tipped "the delicate balance" once again, and the expectations of the majority gained some protection at the expense of the interests of victims of discrimination.

These cases—Franks, McDonald, and Teamsters—illustrate that the Court will contemplate some displacement of expectations for non-minority employees in order to accommodate discriminatees, but the balance is not easily struck. The Supreme Court itself walks a tightrope between the competing claims of discriminatees and non-victim employees. These conflicting interests originate as demands on employers, who must attempt to resolve the tension against a backdrop of varying liability for damages.

Reverse Discrimination and Damages to Incumbent Employees

The Supreme Court's decision in Franks was practically an invitation for district courts to award monetary damages to non-minority employees adversely affected by affirmative action plans implemented to remedy the employer's past discrimination. The invitation was accepted in McAleer v. American Telephone and Telegraph Co.

The McAleer decision unfolded against the background of a massive, industry-wide employment discrimination settlement entered into by the federal government and A.T.&T. Pursuant to the terms of a consent decree, A.T.&T. began to implement an affirmative action program containing goals, timetables, and an "affirmative action override." The "override" permitted A.T.&T. to disregard the collective bargaining agreement provisions for promotion based on seniority if it became necessary to comply with the goals and timetables of the decree. Plaintiff McAleer, a white male, was passed

102. Id.
105. See notes 82-85 and accompanying text supra.
107. See note 42 supra.
over for promotion after approval of the decree. He brought suit against A.T.&T. alleging that "he was entitled to promotion under the provisions of a collective bargaining agreement but the job was given to a less qualified, less senior female solely because of her sex."\textsuperscript{109}

District Court Judge Gesell denied the plaintiff's request for a promotion, on the ground that it would tend to prolong past discrimination in contravention of the consent decree.\textsuperscript{110} He granted plaintiff's request for damages, however, over the defendant's arguments that the consent decree operated as a defense. The court noted that ordinarily one acting "pursuant to a judicial order . . . is protected from liability arising from the act,"\textsuperscript{111} but refused to grant immunity to the defendant because the record clearly indicated that A.T.&T. had not been in compliance with federal law.\textsuperscript{112} The consent decree itself contained no admission of liability, nor was there a judicial finding of discrimination at the time the decree was entered.\textsuperscript{113} The court relied heavily on the footnote in the Franks decision suggesting monetary damages as a remedy.\textsuperscript{114}

The implications of the decision are rather startling. If the decision were followed generally, employers would be liable for "back pay to minorities and front pay to incumbents."\textsuperscript{115} Not only is the employer liable to discriminatees and incumbents, but the value of entering a negotiated settlement is reduced. An employer's liability to employees is not sufficiently clarified by consent decrees, as presently negotiated, to provide an impetus for reconciliation. The employer would be wiser to contest the charges of discrimination in the courts than to reach a settlement. It is not surprising that the result has met with a great deal of commentary\textsuperscript{116} and hostility.\textsuperscript{117}

\textsuperscript{109} Id. at 436.
\textsuperscript{110} Id. at 439.
\textsuperscript{111} Id. at 440.
\textsuperscript{112} Id. at 439.
\textsuperscript{113} Id. Obviously there was substantial evidence to support a governmental pattern-or-practice suit; otherwise it is doubtful that the federal government would have initiated the action or that A.T.&T. would have settled. The district court did ignore the express terms of the settlement that no admission or judicial finding of liability could be inferred from the settlement. See American Tel. & Telegraph Consent Order, [1978] 8 LAB. REL. REP. (BNA) 431:73.
\textsuperscript{114} See note 84 and accompanying text supra.
\textsuperscript{115} See Venick & Lane, supra note 88, at 809. See also Franks v. Bowman Transportation Co., 424 U.S. 747, 777 n.38. "Front pay" is defined in Franks as an "award of monetary damages . . . in favor of each employee . . . otherwise bearing some of the burden of past discrimination." Id.
\textsuperscript{116} See, e.g., Lopatka, A 1977 Primer on the Federal Regulation of Employment Discrimination, 1977 U. ILL. LAW F. 69, 137-44; Venick & Lane, supra note 88; Com-
The plaintiff, McAleer, and A.T.&T. eventually settled out of court for $7500, so it is impossible to state whether or not the decision will be followed generally. Subsequent to McAleer, the district court which originally entered the A.T.&T. decree rejected the McAleer "Catch-22" for employers. Instead, the court suggested that an employer who relied on a consent decree in good faith should receive some measure of immunity.

Nevertheless, the Supreme Court decisions in Teamsters and Bakke keep alive the concept of compensation to incumbents as the Court evidences concern for equitable treatment of discriminatees and non-victim employees alike. Majority expectations, minority rights, and the employers' interests are all converging in the courts and presenting such disparate claims that probably no single resolution will seem equitable to every group. Although perhaps there is no simple solution given the divergence of claims, there are various possibilities for successfully dispensing justice under Title VII.

117. One recent article citing the McAleer decision urges total resistance to the EEOC and the "reverse discrimination" of Title VII. Reminger & Ringler, Watch Out-EEO Agreements and Consent Decrees May Be Booby-Traps, 27 FED'N INS. COUNSELORS Q. 255 (1977).

118. See Employer's Dilemma, supra note 116, at 382.


Judge Higginbotham based his suggestion on § 713(b), 42 U.S.C. § 2000e-12(b) (1970), which provides in pertinent part:

In any action or proceeding based on any alleged employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission.

Pursuant to § 713(b), the EEOC has proposed regulations, to be issued at 29 C.F.R. § 1608, which purport to protect employers engaged in voluntary affirmative action plans from charges of "reverse discrimination." The proposed regulations specifically state that "the lawfulness of such remedial and/or affirmative action program is not dependent upon an admission, or a finding, or evidence sufficient to prove that the employer . . . has violated Title VII." The theory underlying the use of § 713(b) and the new regulations is that employers who rely on the proposed regulations will be protected from suits charging reverse discrimination.

120. See notes 97-104 and accompanying text supra.

121. See notes 59-67 and accompanying text supra.
Introduction

The suggestions for resolving the problems confronting employers are based on the following premises, most of which have been discussed above. First, the underlying theme of this author's approach is that affirmative action is a current necessity to remedy past and present discrimination against minorities and women.\(^{122}\) Second, recent cases in the Supreme Court emphasize that consideration must be given to the interests of non-minority employees as well as discriminatees when the expectations of the former may be adversely affected in remediating the effects of past discrimination upon the latter.\(^{123}\) Third, if an employer cannot rely upon the settlement as determinative of his liability, its value to him is reduced. Indeed, it may make the option of contesting the charge of discrimination more attractive. The conciliation process will be detrimentally affected if the employer is forced to compensate discriminatees and incumbent employees alike.\(^{124}\) Finally, if the conciliation process is to be safeguarded, then all parties whose interests will be affected by a settlement must be protected to the maximum extent possible given the divergent claims each brings into court. Therefore, all parties whose interests will be affected by the consent decree should be represented at some stage of the proceedings.

There are several procedural methods of insuring that currently unrepresented third parties whose interests will be affected by the settlement are protected. If the unrepresented third party is the incumbent, non-minority employee whose interests are affected by the advent of a Title VII settlement with his employer, there are at least three methods of safeguarding this employee's expectations. The current procedure of intervention in the proceedings could provide protection of the incumbent employee's interests. Alternatively, the incumbent's interests could be adequately represented throughout the settlement process if the EEOC issues guidelines adopting this procedure. Or, the courts could assume this responsibility by conducting hearings prior to approval of the consent decrees in which the incumbent's interests would be specially addressed. An examination of the advantages and disadvantages

\(^{122}\) See notes 51-55 and accompanying text supra.

\(^{123}\) See notes 100-103, 107-123 and accompanying text supra.

\(^{124}\) See notes 105-119 and accompanying text supra.
of each method is appropriate in determining the possibility of feasible solutions in this area.

**Maintenance of the Status Quo: Intervention**

The Federal Rules of Civil Procedure currently provide for intervention in a federal court proceeding either as a matter of right or as a matter of judicial discretion.\(^{125}\) Aside from the issue of meeting the proper statutory qualifications, the threshold barrier to intervention is timeliness.\(^{126}\) Once a judgment or decree is entered, intervention is very difficult.\(^{127}\) Even prior to entry of a decree in the case, intervention may be denied if to permit it would significantly disrupt the proceedings.\(^{128}\) Thus, for the purpose of bringing all parties affected by a settlement into the proceedings so that the employer may rely upon some measure of immunity from subsequent suit, intervention will only function as a remedy where all affected parties are sufficiently aware of the impact of the settlement on their rights so as to seek intervention. Even then, intervention may be discretionary with the court.

A second look at *United States v. Allegheny-Ludlum Industries Inc.*\(^{129}\) will provide an illustration of the problems inherent in the use of intervention as a method of participation for parties affected by a consent decree. Lengthy negotiations between the Justice Department, the Labor Department, and

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125. *Fed. R. Civ. P. 24* provides for intervention of right on anyone's timely application if a statute provides "an unconditional right to intervene" or the "applicant claims an interest relating to the property or transaction . . . and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest. . . ." *Fed. R. Civ. P. 24(a).* Permissive intervention is allowed if a timely application is made and "a statute of the United States confers a conditional right" or "an applicant's claim or defense and the main action have a question of law or fact in common." *Fed. R. Civ. P. 24(b).*

126. *Id.*

127. United States v. Allegheny-Ludlum Industries, Inc., 15 Fair Empl. Prac. Cas. 935 (5th Cir. 1977) (motion to intervene by employees claiming to be adversely affected by implementation of steel industry consent decrees was properly denied when seven and one-half months had passed since decree approved); Hefner v. New Orleans Pub. Serv., Inc., 14 Fair Empl. Prac. Cas. 826 (E.D. La. 1977) (employee who was aware of terms of consent decree three years ago may not now seek to challenge it as reverse discrimination); Nevilles v. EEOC, 511 F.2d 303 (8th Cir. 1975) (employee with status of "aggrieved party" must nevertheless seek timely intervention).

128. See, e.g., EEOC v. United Air Lines, 515 F.2d 946 (7th Cir. 1975) (minority group members not allowed permissive intervention where discovery closed, final pretrial conference held, and depositions completed); Gerstle v. Continental Air Lines, Inc., 466 F.2d 1374 (1972) (to allow intervention would unduly delay or prejudice the rights of the original parties).

CONSENT DECREES

the EEOC as plaintiffs, and nine steel companies and the United Steelworkers of America as defendants, resulted in an industry-wide settlement. The settlement was filed simultaneously with the suit, and was approved the same day.\(^\text{130}\) Shortly after entry of the decree, three organizations, four individuals, and six groups of plaintiffs sought intervention.\(^\text{131}\) Most of the individual plaintiffs and groups of plaintiffs were granted intervention as of right for the limited purpose of staying or vacating the decrees. The remaining organizations were denied the right to intervene.

The district court ruled on the intervenors' objections to the decrees in the same memorandum opinion in which the motions for intervention were decided. No further evidentiary hearings were ordered since the motion for intervention was accompanied by pleadings stating the claims or defenses.\(^\text{132}\) Several months after the consent decrees were entered, a group of incumbent employees sought to void the decrees, alleging that the decrees adversely affected them.\(^\text{133}\) Their motion was denied.

From beginning to end, the procedures employed in Allegheny-Ludlum appear to have been designed to frustrate participation in the settlement process by the very individuals, both discriminatees and incumbent employees, most affected by its implementation. Little advance notice was given to employees about the settlement; it was presented as a fait accompli. Indeed, the appellate court rejected the intervenors' arguments that interested private parties and counsel should have had notice and opportunity to participate in pre-decree negotiations, or at least notice for intervention purposes.\(^\text{134}\) The court emphasized that discriminatees could always refuse the awards provided in the settlement and sue for additional relief. And if McAleer is followed, incumbents may sue and receive compensation for the employer's "reverse discrimination."

The arguments in favor of the court's decision in the case are substantial. Factors of judicial economy, complexity of liti-

\(^{130}\) 63 F.R.D. at 3.
\(^{131}\) Intervention as of right was granted to those persons who met the statutory requirement of "person or persons aggrieved," i.e., those alleging discrimination by defendants against them in violation of Title VII. Fed. R. Civ. P. 24(a)(1); 63 F.R.D. at 4. Intervention was denied to the Ad Hoc Committee, the Rank and File Committee, and the National Organization for Women. Id.
\(^{134}\) 517 F.2d at 875.
gation if intervention is permitted, and concern for the integrity of the conciliation process itself militate against intervention for any but the most limited purposes. In an industry-wide settlement, it will not be possible to satisfy all those affected. For the purposes for which this settlement was negotiated, it may have been as fair as possible. Nevertheless, exclusion of employee input may jeopardize the employer and in turn the conciliation process itself. Those who participate in the negotiation process may be more prone to abide by its provisions once the terms are agreed upon.

The Allegheny-Ludlum case demonstrates that timeliness may be overcome as a barrier to intervention. However, with permissive intervention, other factors may enter into a court's decision on the merits. A court may deny intervention on the grounds that adequate consideration was given to the would-be intervenor's concerns. In addition, courts will not look with favor upon a party seeking intervention after refusing an invitation to participate in settlement negotiations. Where the purpose is to encourage participation in the settlement process so that optimal consideration can be given to the concerns of all affected parties, intervention may not be a better route to follow.

Participation in the Settlement Negotiations

Including representatives of all affected groups in pre-decree negotiations would be one method of bypassing the technical difficulties of intervention. In fact, this possibility has

135. Alaniz v. California Processors, Inc., 73 F.R.D. 289 (N.D. Cal. 1976) (proposed intervenors had adequate notice and were adequately represented by their union); cf. Mandujano v. Basic Vegetable Products, Inc., 541 F.2d 832 (9th Cir. 1976) (court should be well-informed of views of those who may be adversely affected by a settlement); United States v. Navajo Freight Lines, 525 F.2d 1318 (9th Cir. 1975) (non-class members' interests should be considered when approving settlement).

136. The A.T.&T. consent decree settlement and litigation is instructive on this point. The Communications Workers of America (CWA), a union, was asked to participate in the extensive pre-decree negotiations, but refused to participate. Shortly before the decree was signed, CWA sought to intervene generally, alleging that it would be adversely affected by the terms of the settlement. Judge Higginbotham denied the motion. EEOC v. American Tel. & Telegraph, 365 F. Supp. 1105 (E.D. Pa. 1973). The court of appeals agreed that CWA could not intervene generally as a party plaintiff. 506 F.2d 735 (3d Cir. 1974). The CWA's delay came back to haunt it when intervention was allowed, however, as its arguments claiming surprise as a means of vacating the decrees were not viewed as persuasive by the court in view of the fact that CWA was invited to participate in pre-decree negotiations. 419 F. Supp. 1022 (E.D. Pa. 1976), aff'd, 556 F.2d 167 (3d Cir. 1977).

137. For a comparison of intervention before courts with intervention before administrative agencies (although in a different context than EEOC negotiations), see
been raised by the Civil Rights Commission in the context of assuring input by minorities and women prior to entry of the consent decree. The concept of participation could merely be expanded to include incumbent employees.

Complicating the negotiation process, by additional participants may be detrimental to the conciliation process. The employer might feel more prone to "bargain tough" in the face of additional demands brought into the conciliation process by the employee representatives, thus defeating the purpose of conciliation itself. The goal of including employee representatives in the negotiation process, however, would be to reduce subsequent litigation by considering the concerns of all parties prior to entry of the decree.

Inclusion of all affected parties in the negotiation process would be the simplest method to initiate, procedurally, as it would require no enabling legislation. The EEOC could simply issue guidelines regarding third party representation in the process. Participation could be limited if the agency felt that extensive participation would be detrimental to conciliation. Third party representation has not yet been accepted as a means of reducing criticism of consent decree settlements by minorities and women. Therefore, some experimentation with this innovative procedure would be necessary in order to further evaluate its merits.

Pre-Entry Hearing on Impact of Consent Decree

Intervention may come too late to have any effect on the settlement process, and third party participation in the negotiation process may impede rather than facilitate conciliation. A court hearing on the consent decree's impact on third party expectations prior to approval of the settlement might avoid these procedural disadvantages. Both discriminatees and incumbent employees could be represented at the hearing and present objections to the settlement at that time. The court

Comment, Intervention by Third Parties in Federal Administrative Proceedings, 42 Notre Dame Law. 71 (1966) [hereinafter cited as Intervention by Third Parties].

140. See Intervention by Third Parties, supra note 137, at 74.
141. Zimmer & Sullivan, supra note 139, also suggests two other methods of insuring that public agencies consciously analyze the effects of their consent settlements on third parties. An agency could publicize the decree 30 days prior to entry as a comment period. Additionally, agencies could be required to issue an "impact state-
could consider the objections prior to entry of the decree.

An analogous procedure is followed under the Federal Rules of Civil Procedure for class actions. Court approval is required for any settlement or compromise that may be reached after a class action is brought. The courts are concerned that class actions not be settled simply for the benefit of the representative plaintiff, and that objections of class members be considered prior to the decree's approval. The purpose of court approval in the employment discrimination context would be somewhat more expansive. The court's purpose in the hearings would be to insure that the interests of all affected parties have been protected to the maximum extent possible, given the fact that some displacement of expectations is unavoidable where the concerns are not reconcilable.

Recent decisions in the federal appellate courts indicate that some consideration is being given to unrepresented third parties' interests within the existing framework of the Federal Rules. The Ninth Circuit recently held that objections to settlement of a Title VII class action by members of the class and the effect of the settlement on non-class members should be considered by the district court in approving the decree. The Fifth Circuit appraised the impact of a consent decree upon the seniority expectations of incumbent employees in considering an appeal to intervene in a class action by black employees against their employer. Thus the courts are aware of the difficulties inherent in approving settlements and will use current procedures where possible to avoid these problems.

Rule 23(e) may not be sufficient in some instances. In cases where negotiations are carried on between the EEOC and the employer, discriminatees and incumbents alike may have very little input into the settlement. Discriminatees may always choose to opt out of the settlement, although this option...
may be of little realistic value to them.\textsuperscript{147} Non-minority employees affected by the decree may have difficulty intervening, due to factors such as timeliness.\textsuperscript{148} Therefore, in instances where the settlement is reached without input from discriminatees or non-minority employees, and perhaps in those class actions where discriminatees have reached a settlement but its impact on incumbent employees has not been assessed, it may be feasible to hold a pre-entry hearing on the settlement's impact on the interests of all affected employees.

There are drawbacks to this approach. The Federal Rules of Civil Procedure would have to be revised to provide for this innovation. On a policy level, the purposes of embodying settlement agreements in consent decrees to save agency resources and promote judicial economy are not furthered by this approach. Given that precise legal rights cannot be determined within the context of a compromise settlement, parties may proceed to litigate their special claims in spite of the court's consideration of the fairness of the proposed settlement. At the minimum, innovations tend to increase litigation initially and at the maximum, an entirely new body of judicial distinctions and refinements could grow as a substitute for the current procedural limitations on participation in the settlement process.

Summary

There are no simple solutions, procedurally or otherwise, to the problem of insuring that all parties' interests are protected to the maximum extent possible when the claims of all discriminatees, non-minority employees, and employers are as difficult to reconcile as they are under Title VII. Current intervention procedures serve to eliminate some possible intervenors, thus maximizing judicial economy, but excluding employees with valid interests to protect. Inclusion of all parties in the negotiations may destroy the conciliation process itself. Requiring a court hearing on the fairness of the decree may reduce the benefits conferred by the consent decree process: judicial economy, agency resource-saving, and reduction of litigation.

The choices are difficult because employment is vital, and decisions distributing the benefits of employment can never be easy. Nevertheless, the McAleer case demonstrates that some

\textsuperscript{147} See notes 42-46 and accompanying text supra.
\textsuperscript{148} See notes 125-136 and accompanying text supra.
method of reconciling the divergent interests affected by a consent decree must be found in order to protect the conciliation process itself.

CONCLUSION

This comment has attempted to trace the convergence of two different themes in American legal thought, the competitive ethic and affirmative action, and to document the effects of the clash of these norms on a small but important procedure in Title VII. The issues are difficult to resolve in a legal context because they are difficult to resolve in social and economic contexts as well. Courts have the unpleasant task in this area of deciding not simply who was wronged, but also of distributing “scarce benefits” of vital importance to all working men or women.149

Consent decrees negotiated between the government and an employer theoretically are not determinative of a discriminatee’s rights. It is not surprising, therefore, that under current procedures an incumbent employee is not bound by the decree either. In McAleer, a consent decree did not withstand the charge of reverse discrimination. If consent decrees fall, conciliation will become immensely more difficult. Placing the entire burden for past discrimination on the employer may initially appear to be an attractive solution to the difficult problem of who must bear the burden of that discrimination. Employers may choose to fight in court rather than bear the entire burden, however, thus devastating the conciliation process. At the outset, a heightened awareness of the difficulties inherent in any decision in this area is necessary. Perhaps in this fashion more equitable solutions can be reached.

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