Voluntary Affirmative Action in the Private Sector--Are Seniority Overrides for Layoffs Permissible

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Despite the constitutional right to equal protection under the law\(^1\) and statutes prohibiting discrimination,\(^2\) racial discrimination persists in schools, workplaces, and other institutions.\(^3\) Recognizing that such laws alone are inadequate to achieve equality,\(^4\) courts have upheld race-conscious remedies\(^5\) as a legitimate and necessary means of counteracting discrimination in education\(^6\) and employment.\(^7\)

In the area of employment, courts have sanctioned the use of race-conscious remedies in two circumstances. First, under title VII of the 1964 Civil Rights Act,\(^8\) a court may order employers to institute affirm-

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1. U.S. CONST. amend. XIV (ratified July 9, 1868).
3. See generally RACIAL DISCRIMINATION IN THE UNITED STATES (T. Pettigrew ed. 1975). In 1978, Justice Brennan noted: "In 1968 and again in 1971, for example, we were forced to remind school boards of their obligation to eliminate racial discrimination root and branch." And a glance at our docket and at dockets of lower courts will show that even today officially sanctioned discrimination is not a thing of the past." Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 327 (1978) (footnotes omitted) (Brennan, J., joined by White, J., Marshall, J., Blackmun, J., concurring in part and dissenting in part).

Many obstacles to achieving equal employment opportunities remain. . . . The Nation's early perception in the school segregation cases taught us these obstacles are unlikely to be overcome merely by the prohibition of present and future discrimination. As Justice Blackmun observed in Bakke, "In order to get beyond racism, we must first take account of race. There is no other way."

5. A "race-conscious remedy" is a remedy that redresses past discrimination by taking race into account. Such a remedy attempts to counteract rather than merely halt discrimination. The use of race-conscious remedies began with judicial efforts to enforce the prohibition against state imposed segregation in the public schools. See infra cases cited in note 6.
7. See infra cases cited in note 10.
ative action hiring and promotion programs upon proof of discriminatory employment practices. Second, under United Steelworkers of America v. Weber, a private employer may voluntarily institute an affirmative action hiring or promotion program if it is designed to eliminate conspicuous racial imbalance in traditionally segregated job cate-

Title VII prohibits discrimination by public and private employers with fifteen or more employees. See 42 U.S.C. § 2000e(b) (1976). Specifically, section 703(a) of title VII states:

It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

Id. § 2000e-2(a). Section 703(d) of title VII states:

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

Id. § 2000e-2(d).

9. The term “affirmative action hiring or promotion program” is used in this Note to describe a race-conscious remedy that requires the employer to either fill a certain percentage of vacancies with qualified minority applicants until minority employees are fairly represented in the employer’s workforce, or to achieve a racially representative workforce within a specific time period. Section 706(g) of title VII provides for affirmative action remedies:

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.


Affirmative action hiring and promotion programs are intended to provide minority workers the opportunity to enter or advance into positions traditionally closed to them. However, minority employees hired under these programs generally have less seniority than white employees. Consequently, layoffs based solely on seniority are likely to disproportionately affect minorities and undermine the affirmative action hiring and promotion programs.

While the *Weber* Court held that title VII's prohibition of employment discrimination on the basis of race does not bar all voluntary affirmative action programs in the private sector, the Court declined to draw a clear line between "permissible" and "impermissible" programs. It found only that the specific training program at issue in *Weber* fell on the "permissible side of the line" based on certain features it embodied. Thus, the Court did not address whether an affirmative action plan designed to protect minority employees during layoffs from the disproportionate effects of the traditional "last hired, first fired" seniority system would be permissible. Nor did the Court indicate how section 703(h) of title VII, which specifically protects bona fide seniority systems as a lawful employment practice, would affect such an analysis.

An extension of private voluntary affirmative action to layoffs could affect a large percentage of the American workforce. The term "voluntary" does not apply only to employers who engage in affirmative action out of a sense of civic duty, but also includes any program not ordered by a court, even if it was adopted under government pres-
Thus, a program instituted to comply with affirmative action requirements for federal contractors is considered voluntary. Because the federal government contracts or subcontracts with numerous employers, resolution of this issue may affect a substantial number of workers.

This Note discusses whether private employers may voluntarily implement "seniority overrides" to preserve the gains realized by af-


19. The employers in United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979), and Tangren v. Wackenhut Servs. Inc., 658 F.2d 705 (9th Cir. 1981), cert. denied, 456 U.S. 916 (1982), contracted with the federal government and were under considerable pressure to implement affirmative action programs. Nevertheless, the programs were considered voluntary. Weber, 443 U.S. at 200; Tangren, 658 F.2d at 706-07. In Tangren, the district court reasoned:

The fact that [the union] did not readily assent to the affirmative action provision proposed by [the employer], even to the point of striking and of filing an unfair labor practice complaint with the NLRB, does not distinguish this case. Such difficulties and disagreements are an integral part of the collective bargaining process. When one side or the other finally concedes one point in return for some other benefit, including a resumption of work, the contract is no less "voluntary." To find otherwise would severely impair the entire system for resolving labor-management disputes.


20. In 1980, the federal government contracted with a total of 350,000 employers employing nearly 40 million workers. U.S. Dep't of Labor, Employment Standards Administration: The Office of Federal Contract Compliance Programs 3 (Jan. 1981). Not all of these employers are affected by Exec. Order No. 11,246, as the current threshold for triggering the Order's provisions is 50 or more employees and at least $50,000 in federal contracts. 41 C.F.R. § 60-1.40 (1983).

21. The term "seniority override" is used in this Note to describe a type of affirmative action plan in which layoffs of underrepresented minority employees are limited so that the percentage of minority employees on the job remains constant. The following is an example of a seniority override provision included in a collective bargaining agreement:

The parties agree to the following goals and objectives for the minimum employment of minority male employees and female employees in the bargaining unit:

July 1, 1978 to July 1, 1979 . . .
18% Minorities, 5% Female
Seniority overrides are prohibited by the special protection afforded seniority systems under section 703(h) of Title VII. The Note then considers

22. The Supreme Court is presently considering the validity of a court-approved consent decree ordering a public employer to use seniority overrides. Stotts v. Memphis Fire Dep't, 679 F.2d 541 (6th Cir. 1982), cert. granted, 103 S. Ct. 2076 (1983), vacated for consideration of mootness, 103 S. Ct. 2076 (1983), the parties had settled previous litigation by agreeing that the employer would institute affirmative action hiring and promotion programs. The district judges later modified the settlements, embodied in consent decrees, to provide for seniority overrides in light of unforeseen budget cuts that threatened to impede fulfillment of the terms of the consent decree. In all three cases the modification was upheld by the appellate court.

Although a consent decree reflects a voluntary settlement by the parties, these cases are not applicable to the area of voluntary affirmative action since a consent decree, entered and approved by the court, has the same force and effect as a court order entered after full litigation. See, e.g., Hadsfield v. Seafarers Int'l Union, 427 F. Supp. 264 (S.D. Ala. 1977); Clarke v. Volkswagen of Am., Inc., 419 F. Supp. 74 (S.D. Iowa 1976); A.D. Julliard & Co. v. Johnson, 166 F. Supp. 965 (lst. Cir. 1982), vacated for consideration of mootness, 103 S. Ct. 2076 (1983), the parties had settled previous litigation by agreeing that the employer would institute affirmative action hiring and promotion programs. The district judges later modified the settlements, embodied in consent decrees, to provide for seniority overrides in light of unforeseen budget cuts that threatened to impede fulfillment of the terms of the consent decree. In all three cases the modification was upheld by the appellate court.

23. See supra note 17 & accompanying text. Constitutional constraints do not apply because a program implemented solely by private parties does not involve state action. U.S. Const. amend. XIV, § 1. In Weber, the Court noted that the equal protection clause of the fourteenth amendment was not implicated because the plan did not involve state action. Weber, 443 U.S. at 200. However, the employer, a federal contractor, initiated the affirmative action program in response to pressure from the Office of Federal Contract Compliance (OFCC) to comply with its affirmative action requirements for federal contractors. Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 218 (5th Cir. 1977). One commentator has argued that OFCC's role constituted state action and that affirmative action programs created to comply with its regulations should be scrutinized in light of constitutional constraints. See Note, The Presence of State Action in United Steelworkers v. Weber, 1980 DUKE L.J. 1172. Even if constitutional constraints were applicable, courts have held that such constraints do not preclude all voluntary affirmative action plans. See Bratton v. City of Detroit, 704 F.2d 878, 883 (6th Cir. 1983); Valentine v. Smith, 654 F.2d 503, 507-08 (8th Cir. 1981); Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 691 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981). Cf. Fullilove v. Klutznick, 448 U.S. 448 (1980) (upholding a provision of the Public Works Employment Act of 1977 that required 10% of federal funds granted for
whether seniority overrides can withstand scrutiny under the *Weber* analysis of permissible voluntary affirmative action programs in the private sector. It concludes that private sector seniority overrides are both legal and essential to the success of affirmative action programs.

**Section 703(h) of Title VII**

The only provision in title VII concerning seniority is section 703(h).24 The pertinent part provides that “it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority system or merit system.”25 While this provision was clearly designed to protect seniority systems,26 it is unsettled whether it prohibits seniority overrides. The two appellate courts that have reviewed seniority overrides have held that they are permissible despite section 703(h),27 but the Supreme Court has yet to pass on the issue.

On its face, section 703(h) states only that, absent discriminatory intent, the operation of a bona fide seniority system does not violate title VII.28 The section does not state that a modification of such a system is unlawful. Thus, taken literally, the section does not prohibit seniority overrides. Both the legislative history and judicial interpretations of section 703(h) suggest that such an interpretation of the statute is appropriate.

**Legislative History**

Due to the absence of the customary legislative materials,29 the Supreme Court in *International Brotherhood of Teamsters v. United

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25. *Id.* *See supra* note 17.
States deduced the legislative intent underlying section 703(h) from three memoranda. These three documents were introduced into the Congressional Record by Senators Case and Clark during the Senate debate on title VII. The Court labeled these memoranda "authoritative indicators of [section 703(h)']s purpose."

The first memorandum is a Justice Department statement that reads in part:

Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by Title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. Any differences in treatment based on established seniority rights would not be based on race and would not be forbidden by the Title.

The second memorandum consists of written answers by Senator Clark to questions from Senator Dirksen.

Question... Normally, labor contracts call for "last hired, first fired." If the last hired are Negroes, is the employer discriminating if his contract requires that they be first fired and the remaining employees are white?

Answer. Seniority rights are in no way affected by the bill. If under a "last hired, first fired" agreement a Negro happens to be the "last hired" he can still be "first fired" as long as it is done because of his status as "last hired" and not because of his race.

These memoranda only state that a seniority system is not illegal under title VII even if minority employees are disproportionately affected by layoffs due to their lesser seniority. The documents simply explain what the provision literally sets forth; they do not suggest that section 703(h) should be construed as implicitly forbidding seniority overrides, and in fact have no apparent bearing on seniority overrides at all.

The third memorandum, prepared by Senators Clark and Case, is more problematic:

Title VII would have no effect on established seniority rights. . . . Thus, for example, if a business has been discriminating in the past

31. See infra notes 33–35. Senators Clark and Case were the "bipartisan captains" responsible for title VII during the Senate debate. Such captains, selected for each title by leading proponents of the Act from both parties, were charged with explaining and defending their title during the Senate debate. 110 CONG. REC. 6528 (1964). See Vaas, supra note 29, at 444-45.
33. 110 CONG. REC. 7207 (1964).
34. Id. at 7217.
and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier.  

This memorandum explicitly states that an employer would not be permitted to interfere with seniority expectations and thus suggests that seniority overrides are prohibited by section 703(h).

The authority of this third memorandum, however, is subject to question. First, in approving the use of affirmative action promotion programs and retroactive seniority remedies, courts have acknowledged, explicitly or implicitly, that some interference with the seniority expectations of white employees is permissible. Second, the memorandum states that employers would be prohibited from using any affirmative hiring remedies. Yet this has not deterred the courts from repeatedly approving affirmative action hiring and promotion programs. Such subsequent judicial action casts doubt on the authority of the document. It is also likely that this memorandum was designed to quell fears that the enactment of title VII would destroy the seniority system. Justice Brennan has suggested that the bill's proponents, in their eagerness to pass the bill, indulged in some exaggeration. Moreover, had Congress intended to provide broader immunity for seniority systems than that literally granted by section 703(h), it could

35. Id. at 7213 (emphasis added).

The fact that the former carloaders were adversely affected by the grant of retroactive seniority to the female employees does not constitute an act of discrimination towards them. In such a case, retroactive seniority is an appropriate remedy. Unfortunately, wherever one employee is given increased seniority rights, the acquisition of such rights often conflicts with the economic interests of other employees. This unfortunate consequence does not preclude conciliation agreements or consent decrees granting relief designed to correct the wrongs to which Title VII is directed.

37. 110 CONG. RAC. 7213 (1964).
38. See supra cases cited in notes 10-11.
39. Justice Brennan stated in American Tobacco Co. v. Patterson:

The defenders of Title VII responded in strong terms to the charge that "[T]itle VII would undermine the vested rights of seniority." According to the Act's proponents, this charge was a "cruel hoax ... generating[ing] unwarranted fear among those individuals who must rely upon their job or union membership to maintain their existence." Thus, with some exaggeration, the proponents of Title VII suggested that Title VII would not affect employees' expectations that arose from the operation of seniority systems.

have explicitly done so in the original bill or in the 1972 amendments. Instead, the 1972 amendments enlarged the remedial powers of the courts "to give [them] wide discretion in exercising their equitable powers to fashion the most complete relief possible."\(^{40}\)

In sum, with the exception of a single memorandum that has already been partially discounted by the courts, the legislative history of section 703(h) supports a literal interpretation of that section and does not appear to bar seniority overrides.

Judicial Interpretations

The Supreme Court’s interpretations of section 703(h) are consistent with a literal reading of the section. In *Franks v. Bowman Transportation Company*,\(^ {41}\) the Court held that section 703(h) did not bar the award of retroactive seniority to job applicants who had been refused employment because of their race.\(^ {42}\) Retroactive seniority was deemed appropriate even though it would negatively affect the seniority interests of current employees.\(^ {43}\) The Court labeled section 703(h) "definitional," noting that, "as with other provisions of § 703, subsection (h) delineates which employment practices are illegal and thereby prohibited and which are not."\(^ {44}\) Section 703(h), the Court added, "certainly does not expressly purport to qualify or proscribe relief otherwise appropriate under the remedial provisions of Title VII, § 706 (g), 42 U.S.C. § 2000e-5(g), in circumstances where an illegal discriminatory act or practice is found."\(^ {45}\) Moreover, the Court found "no indication in the legislative materials that § 703(h) was intended to modify or restrict relief otherwise appropriate once an illegal discriminatory practice occurring after the effective date of the Act is proved."\(^ {46}\) This interpretation of section 703(h) limits the section’s impact to its literal meaning.

The facts of *Franks* are distinguishable from those of a voluntary program. The plaintiff in *Franks* had proven illegal discrimination and had thus established a violation of title VII,\(^ {47}\) giving rise to a court-imposed remedy under section 706(g). In contrast, a voluntary affirmative action program, such as a seniority override, may be instituted ab-

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42. Id. at 762-69.
43. Id. at 757-62.
44. Id. at 758. The Court again referred to § 703(h) as "definitional" in *American Tobacco Co. v. Patterson*, 456 U.S. 63, 69 (1982).
46. Id. at 758.
47. Id. at 750.
sent proof of a title VII violation. However, the Court's narrow reading of section 703(h) in *Franks* did not depend on its finding of illegal discrimination. By characterizing section 703(h) as "definitional" the Court acknowledged that its only effect is to exclude certain employer conduct from the definition of unlawful employment practices, and therefore cannot serve to restrict the use of otherwise proper affirmative action remedies under section 706(g). Logically, the Court's reasoning could extend to *any* appropriate remedial measure, including one undertaken voluntarily. Under the interpretation of the *Franks* Court, then, section 703(h) should pose no barrier to the voluntary adoption of seniority overrides.

In *International Brotherhood of Teamsters v. United States*, decided by the Court one year after *Franks*, the government argued that the routine operation of a seniority system adopted before 1964 violated title VII. The United States alleged that minority employees who had been discriminatorily hired for lower paying positions were deterred from transferring into better paying jobs because the seniority system required forfeiture of accumulated seniority upon transfer. Hence, the operation of the seniority system had an adverse impact on minority employees by locking in the effects of prior discriminatory hiring practices.

The *Teamsters* Court conceded that the seniority system violated title VII since it "'operate[d] to "freeze" the status quo of prior discriminatory practices.'" The Court concluded, however, that section


49. *See supra* note 9 & accompanying text. The Court did state that there is no restriction on otherwise appropriate relief "once an illegal discriminatory practice . . . is proved." *Franks*, 424 U.S. at 761-62 (emphasis added). Thus before a *court* may order a remedy under title VII it must find illegal discrimination. This language does not suggest that such a finding is required for the institution of a voluntary seniority override program.

51. *Id.* at 328.
52. *Id.* at 329-30, 344.
53. *Id.* at 344.

54. *Id.* at 349-50 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971)). In *Griggs v. Duke Power Co.*, the Court held that facially neutral employment practices that have a discriminatory effect on minorities violate title VII. 401 U.S. 424, 430 (1971). In *Griggs*, black employees argued that the employer violated title VII by requiring applicants to pass an aptitude test or have a high school diploma. *Id.* at 425-26. The Court held that although the practice was fair in form, its effect was discriminatory because the practice favored white employees and there was no showing that the requirements were job related. *Id.* at 429-30. Thus, under the *Griggs* standard, racially neutral employment practices which are not job-related constitute illegal discrimination "if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Id.* at 430.
703(h) created an exception to this general rule by protecting the operation of a bona fide\textsuperscript{55} seniority system.\textsuperscript{56} Indeed, the "unmistakable purpose of § 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII."\textsuperscript{57} The Court thus reaffirmed the literal interpretation of section 703(h) and gave no indication that the provision has any broader meaning or would prohibit employers from voluntarily modifying a seniority plan for remedial purposes.\textsuperscript{58}

Neither Franks nor Teamsters broadened the scope of section 703(h) beyond its literal meaning, and such a judicial expansion would be inappropriate. In the one instance in which the Court departed from a literal reading of a title VII provision,\textsuperscript{59} it justified the departure on the ground that it was necessary to effect the purposes of the Act.\textsuperscript{60} In contrast, an interpretation of section 703(h) prohibiting seniority overrides could not be similarly justified because limiting voluntary remedial efforts would frustrate, rather than further, the goals of title VII.\textsuperscript{61}

Assuming that section 703(h) of title VII does not bar seniority

\textsuperscript{55} Based on the legislative history discussed supra notes 33-37 & accompanying text, the Court broadly construed "bona fide" to encompass any seniority system unless it was created with the intention to discriminate or had its genesis in racial discrimination. Teamsters, 431 U.S. at 353-54.

\textsuperscript{56} Id. at 354-55. "Accordingly, we hold that an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination." Id. at 353-54.

\textsuperscript{57} Id. at 352.

\textsuperscript{58} It has been argued that seniority overrides interfere with the operation of a seniority system and thus undermine the protective purpose of 703(h) as described by the Teamsters Court. See Schatzki, United Steelworkers of America v. Weber: An Exercise in Understandable Indecision, 56 WASH. L. REV. 51, 72 (1980). While seniority overrides may interfere with seniority expectations, § 703(h) only serves to protect bona fide seniority systems from a facial attack. No such attack is made by the use of a remedy affecting seniority expectations. See Fisher v. Proctor & Gamble Mfg. Co., 613 F.2d 527, 543 (5th Cir. 1980) ("post-Act discriminatees may receive complete retroactive seniority 'without attacking the legality of the seniority system as applied to them'") (quoting International Bhd. of Teamsters v. United States, 431 U.S. 324, 347 (1977) (emphasis added)). And as noted above, the Court has never suggested that 703(h) prevents employers from voluntarily establishing an alternative system that gives preference to minorities during layoffs. In Tangren v. Wackenhut Servs. Inc., 480 F. Supp. 539 (D. Nev. 1979), aff'd, 658 F.2d 705 (9th Cir. 1981), cert. denied, 456 U.S. 916 (1982), the district court held that section 703(h) should not constrain voluntary seniority overrides. Id. at 548. The court emphasized that because section 703(h) is an exception to the general Griggs doctrine it should be narrowly construed and "limited to the express language of the statute. It should not be read so as to preclude implementation of a program that goes beyond the requirements of Title VII." Id. See Tangren v. Wackenhut Servs. Inc., 658 F.2d 705, 707 n.2 (9th Cir. 1981).

\textsuperscript{59} See United Steelworkers of Am. v. Weber, 443 U.S. 193, 200-08 (1979); see also infra note 69.

\textsuperscript{60} Weber, 443 U.S. at 201-02.

\textsuperscript{61} See infra notes 121-31 & accompanying text.
overrides, the next question is whether a seniority override, as a form of affirmative action, can satisfy the guidelines outlined in Weber for determining whether a voluntary affirmative action program in the private sector is permissible.

The Weber Decision

In United Steelworkers of America v. Weber the Supreme Court upheld a voluntary affirmative action training and promotion program in the private sector. The employer, Kaiser Aluminum and Chemical Corporation (Kaiser), and the employees’ union agreed to institute an in-plant craft training program. Fifty percent of the openings in the program were to be allotted to black employees until the percentage of Kaiser’s black craftworkers reflected the percentage of blacks in the local labor force. At the time the program began, less than two percent of the skilled craftworkers at the plant were black although blacks represented approximately thirty-nine percent of the local workforce. Except for the fifty percent proviso, the program openings were filled strictly on the basis of seniority. When Brian Weber and other white employees were denied access to the training program despite their seniority over the black admittees, Weber filed a class action suit alleging that the program violated title VII’s prohibition of racial


63. Weber, 443 U.S. at 197-98. In Weber, the union had agreed to the affirmative action training program. Id. at 197. However, the Court did not specifically address whether the union’s consent was necessary to its holding or whether private employers could unilaterally implement an affirmative action plan. Other Supreme Court cases, however, have emphasized the important policy interest in collective bargaining. In American Tobacco Co. v. Patterson, 456 U.S. 63 (1982), the Court underscored the importance of the collective bargaining process and seniority provisions in particular. Id. at 76. See also Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 79 (1977); Southbridge Plastics Div. v. Local 759, 565 F.2d 918 (5th Cir. 1978) (union contract seniority provisions cannot be abrogated by the employer absent evidence of discriminatory intent in the union agreement); Boyd, Affirmative Action in Employment—The Weber Decision, 66 IOWA L. REV. 1, 38 (1980).

Nevertheless, the Eighth Circuit, in Sisco v. J.S. Alberici Constr. Co., 655 F.2d 146 (8th Cir. 1981), cert. denied, 455 U.S. 976 (1982), allowed an employer to unilaterally modify collectively bargained seniority provisions. The court held that the layoff of a white worker against established seniority rules was permissible so long as the employer’s affirmative action plan satisfied the Weber guidelines. Id. at 149.

65. Id.
66. Id. at 199.
discrimination.67

The Court responded that Congress enacted title VII to counteract longstanding employment discrimination against minorities and to open new job opportunities.68 To use title VII to prohibit all voluntary efforts to achieve this goal would be contrary to the Act's purpose.69 Although the Court declined to "detail the line of demarcation between permissible and impermissible plans,"70 it indicated that the Kaiser program was permissible because of two features: 1) the program mirrored the purposes of title VII, and 2) it did not "unnecessarily trammel" the interests of white employees.71

The Court found that the Kaiser program mirrored the purposes of title VII because it was designed to break down old patterns of racial segregation and open job opportunities in areas traditionally closed to blacks.72 At the time the Kaiser plan was created, only five out of the 273 skilled craftworkers at the plant were black.73 In addition, the Court judicially noticed the historical exclusion of blacks from craft professions.74 Thus the Kaiser program clearly opened job opportunities for minorities in a traditionally segregated field.

The Court found that the plan did not unnecessarily trammel the interests of white employees because it did not require the discharge of white workers and their replacement with new black hires.75 Also, it did not create an absolute bar to the advancement of white employees because fifty percent of the program's slots were allocated for whites.76 Moreover, the plan was temporary, ending as soon as the percentage of black skilled craftworkers at the plant approximated the percentage of blacks in the local labor force.77

The Weber Court did not state that any voluntary affirmative action hiring and promotion program must possess these two features in

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67. Id. at 199-200.
68. Id. at 202-04.
69. Id. at 201-07. The Court stated:
   In this context respondent's reliance upon a literal construction of §§ 703(a) and 
   (d) . . . is misplaced. . . . The prohibition against racial discrimination in 
   §§ 703(a) and (d) of Title VII must therefore be read against the background of the 
   legislative history of Title VII and the historical context from which the Act arose.
   Id. at 201 (citations omitted). The Court noted that "[i]t would be ironic indeed if a law 
   triggered by a Nation's concern over centuries of racial injustice . . . constituted the first 
   legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional 
   patterns of racial segregation and hierarchy." Id. at 204.
70. Id. at 208.
71. Id.
72. Id.
73. Id. at 198.
74. Id. at 198 n.1.
75. Id. at 208.
76. Id.
77. Id.
order to comply with title VII. Lower courts, however, have viewed these features as "safe-harbor" guidelines, and it is unlikely that a program possessing these features will be deemed to violate title VII's prohibition against discrimination. Thus it is important to determine whether seniority overrides fall within the Weber guidelines.

Application of the Weber Guidelines to Seniority Overrides

To the extent that the seniority expectations of white employees were adversely affected by the Kaiser plan, it appears that seniority interests were subordinated to the fulfillment of title VII objectives. The Weber Court, however, only evaluated the effect of an affirmative action training program on seniority expectations; it did not consider whether a program could extend affirmative action to layoffs. Nevertheless, the Court left open the possibility that the same guidelines could be used when evaluating other types of affirmative action programs.

The Court's analysis in Weber logically can be applied to seniority overrides. Although Weber involved new job opportunities rather than layoffs, this distinction is not significant. When the number of jobs decreases, the decision allocating the remaining positions can have the same impact on the proportion of minority employees as the decision allocating new positions in times of prosperity. Even assuming that the impact of a layoff on an employee is greater than the impact of a rejection on a job-seeker, the greater impact would simply be factored into the Weber test.

Two circuit courts of appeals have applied the Weber guidelines to seniority overrides and have upheld the overrides against title VII challenges. In Tangren v. Wackenhut Services, Inc., an employer (WSI) adopted a plan in order to comply with the affirmative action requirements for federal contractors. Because frequent layoffs rendered the program ineffective, WSI insisted on including a seniority override during the next union negotiations. The court upheld the override provision against a challenge by a white union member. The court rejected the claim that the provision unnecessarily trammeled the inter-

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79. The Court cautiously stated: "We need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans. It suffices to hold that the challenged Kaiser-USWA affirmative action plan falls on the permissible side of the line." Weber, 443 U.S. at 208.
80. See infra notes 111-12 & accompanying text.
82. See supra notes 18-19.
83. Tangren, 658 F.2d at 705-06.
ests of white workers, reasoning that the program was "carefully contoured to accomplish its limited objective. . . . As such it is an appropriate response to the problem inherent in a reverse seniority layoff system."84

In Sisco v. J.S. Alberici Construction Co.,85 the employer (Alberici) also adopted an affirmative action plan to comply with requirements for federal contractors.86 Unlike Tangren, however, a seniority override provision was never adopted by the union. When layoffs became necessary, Alberici laid off Sisco, a white shop steward, instead of a black ironworker.87 Although the black worker had more seniority than Sisco, Sisco was entitled to be laid off last under the union contract because his status as shop steward gave him "superseniority."88 Nonetheless, the court upheld Alberici's action after briefly noting that blacks had historically been excluded from the ironworker's trade in St. Louis, that Alberici's affirmative action program was temporary, and that Sisco was not replaced by a new black worker.89

Although on point, neither the Tangren nor the Sisco court provides an extensive analysis of Weber's application to seniority overrides. Thus, a fuller discussion of the application of the Weber guidelines to voluntary seniority overrides in the private sector is required.

The First Weber Guideline

The first Weber guideline is met if "[t]he purposes of the plan mirror those of the statute."90 The purposes of the statute are mirrored if the plan is designed to "break down old patterns of racial segregation and hierarchy"91 or to "'open opportunities for [minorities] in occupations which have been traditionally closed to them.'"92 Since the Kaiser plan in Weber trained blacks in the historically segregated craft field, it plainly mirrored the purposes of title VII.93

Once it is demonstrated that a traditionally segregated job cate-

84. Id. at 707. Although the circuit court did not address the first guideline, the district court found that the override provision mirrored the purposes of title VII because "it was adopted in order to break down a hierarchy that perpetuated the effects of past racial discrimination, here the absence of, or only a minimal participation in, the WSI workforce."

85. 655 F.2d 146 (8th Cir. 1981), cert. denied, 455 U.S. 976 (1982).
86. Id. at 149.
87. Id.
88. Id. at 147-48.
89. Id. at 149.
91. Id.
92. Id. (quoting 110 CONG. REC. 6548 (1964) (remarks of Sen. Humphrey)).
93. Id. at 198 n.1, 208.
gory exists, a voluntary seniority override clearly assists in achieving title VII purposes because it helps prevent erosion of gains made by minority employees in segregated fields. Thus, the employer's action in *Sisco* satisfied this guideline because blacks were historically excluded from the ironworkers trade in St. Louis.

In addition to promoting the integration of segregated fields, seniority overrides also help alleviate the relatively high unemployment rate among minorities. The legislative history suggests that title VII was addressed in part to this important concern. During the Senate debate, Senator Clark characterized the high rate of black unemployment as "a social malaise and a social situation which we should not tolerate." Because seniority overrides secure the gains of affirmative action hiring by alleviating the regressive effect of layoffs, and also mitigate the high rate of unemployment among minorities, they mirror the purposes of title VII and satisfy the first *Weber* guideline.

The Second *Weber* Guideline

The *Weber* Court's finding that the Kaiser plan did not "unnecessarily trammel the interests of white employees" rested on the consider-

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94. This can be established by showing a significant disparity between the percentage of minorities employed and the percentage of minorities in the local workforce. *See Weber*, 443 U.S. at 212 (Blackmun, J., concurring); Setser v. Novack Inv. Co., 657 F.2d 962 (8th Cir.) (en banc), *cert. denied*, 454 U.S. 1064 (1981). Courts have liberally interpreted the requirement of "traditionally segregated job categories." For example, in *Cohen v. Community College*, 484 F. Supp. 411 (E.D. Pa. 1980), the court found this requirement met by a "history of racial discrimination in the relevant occupation or profession at large" without a specific showing of minority underrepresentation in the employer's particular workforce. *Id.* at 434. Conversely, in *Tangren* the court held that it sufficed that minorities were traditionally excluded as security guards in the employer's workforce without further evidence that the security guard field was a traditionally segregated job category on a regional or national level. *Tangren*, 480 F. Supp. at 546. In *Sisco*, the court stated simply that "[t]here was a history of exclusion of black workers from the iron workers' trade in St. Louis," *Sisco*, 655 F.2d at 149. One commentator has concluded that the requirement is so "ill-defined, it is likely to cease having real importance." *Vaughn, Employment Quotas—Discrimination or Affirmative Action?*, 7 EMPLOYEE REL. L.J. 552, 560 (1982).

95. *Sisco*, 655 F.2d at 149. The district court in *Tangren* did not discuss whether the job category "guard" was traditionally segregated. Rather, it stated that since the percentage of minorities employed by WSI was small compared to the percentage of minorities in the local workforce, the seniority override served to break down a hierarchy that perpetuated the effects of past discrimination, and thus mirrored the purposes of title VII. *Tangren*, 480 F. Supp. at 546.

96. Members of minority groups suffer from a relatively high unemployment rate compared to that of the population as a whole. In 1965, the unemployment rate for all men and women was 4.0% and 5.5%, respectively. For minorities the figures were 7.4% for men and 9.2% for women. In June 1982, the unemployment rate for all men was 9.7% and 9.1% for women. For minorities the figures were 18.2% for men and 16.0% for women. *U.S. Bureau of the Census, Statistical Abstract of the U.S.: 1982-1983* at 376 (1983).

ation of three factors: 1) the Kaiser plan did not absolutely bar white advancement, 2) it did not require the discharge and replacement of whites with new black employees, and 3) it was temporary.  

First, the Court noted that under the Kaiser plan white employees would fill half of the training slots. Likewise, a seniority override would not necessarily bar advancement of all white employees because even though some white employees would be laid off, others would remain who could continue to work for and advance in the company.

Second, Kaiser's training plan did not require that any whites be discharged and replaced with new black employees. Similarly, seniority overrides do not require the replacement of discharged white workers with new black workers. Without the word "new," it might be difficult to distinguish between discharging a white employee and replacing him or her with a new black employee, and discharging a white employee in favor of keeping a less senior black employee. The Weber Court's specific reference to "new" employees suggests that the Court did not intend to bar retention of current minority employees. Therefore, this element of the guideline does not preclude seniority overrides.

The third factor considered by the Weber Court was that the program was temporary; it was not "intended to maintain racial balance but simply to eliminate a manifest racial imbalance." The plan would end when the percentage of skilled black craftworkers approximated the percentage of blacks in the local labor force.

Seniority overrides are also a temporary remedy if they are used only until the goal of a representative workforce is achieved. Seniority overrides are not generally used to maintain racial balance, in the sense of preserving an already racially balanced workforce, but rather are

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99. Id.
100. Neither the Tangren court nor the Sisco court addressed this particular factor. In the following hypothetical approximately 7.7% of the white workers would be affected by a seniority override: Assume Company X employs 100 workers, 10% (10) of whom are black and 90% (90) of whom are white. If Company X must lay off 30 employees, and in the last five years the Company has hired 10 black and 20 white workers, then on the basis of strict seniority, 100% of the black employees would be laid off and approximately 22% of the white employees would be laid off (10/10 and 20/90, respectively). With a seniority override, 33% of the blacks (3) and 33% of the whites (27) would be laid off, thus retaining a 10% (7) black workforce out of the remaining 70 employees. An additional 7 white workers (7/90 or 7.7%) are affected by the seniority override.
102. The Tangren district court disposed of this issue by stating that layoffs required consideration only of which employees are released, not the identity of the replacements. Tangren, 480 F. Supp. at 549. The Sisco court simply noted that Sisco was not replaced with a black employee. Tangren, 655 F.2d at 149.
104. Id. at 208-09.
used to protect whatever progress has been made in an ongoing effort to racially integrate the workforce. Thus, to the extent a seniority override policy serves only as a kind of stop-gap affirmative action policy until racial imbalance is eliminated, it is a temporary program in the Weber sense. The district court in Tangren took a different approach, finding that the seniority override contract provision was temporary because it was subject to renegotiation every three years.105

Balancing the Interests of White Workers with the Goals of Title VII

In addition to the three factors discussed above, the issue of whether the seniority override program unnecessarily trammels the interests of white workers inevitably calls for a general balancing of the interests of white workers with society's interest in achieving the goals of title VII.106

The Interests of White Workers

The courts have made it clear that white employees must share in the burden of alleviating discrimination,107 and that the public interest in affirmative action hiring and promotion plans generally outweighs the adverse effects on white workers.108 As one court observed, "if relief under title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed."109

It has been argued, however, that seniority overrides burden white employees more heavily than do hiring and promotion affirmative action programs.110 This argument suggests that the balance should shift

105. Tangren, 480 F. Supp. at 549.
106. In Weber the Court did not explicitly balance the competing interests involved. However, a balancing approach is implicit in the phrase "unnecessarily trammel," which suggests a concern that affirmative action does not cause more harm to white workers than necessary to achieve title VII objectives. It is not unusual for courts to use a balancing approach in evaluating the competing interests of affirmative action and white workers. See Stotts v. Memphis Fire Dep't, 679 F.2d 541, 560 (6th Cir. 1982), cert. granted, 103 S. Ct. 2451 (1983) ("A consent decree . . . is the preferred means of balancing societal and individual interests inherent in any employment discrimination action."); Vogler v. McCarty, Inc., 451 F.2d 1236, 1238 (5th Cir. 1972).
108. Although not always explicitly stated, this is the clear implication of cases ordering or upholding affirmative action remedies. See supra cases cited at notes 6, 10.
in favor of white employees. The burden of losing a secured job may be more severe than the burden of losing a job opportunity. Not only may the psychological impact be less at the hiring stage, when expectations are less "solidly grounded," but layoffs may bring with them all the attendant evils of unemployment, including loss of economic security and self esteem. Of course, similar hardships may result when an employment opportunity is denied or deferred due to use of affirmative action in hiring decisions. Yet to the extent that losing a job causes a greater psychological impact than losing a job opportunity, seniority overrides are a harsher remedy than an affirmative action hiring plan.

Yet the relative impact of the remedy is not by itself sufficient to determine its reasonableness under the Weber balancing test. An assessment of the reasonableness of the burdens created by seniority overrides depends largely upon how one views the role of white workers. If the white employee is viewed as being "innocently sacrificed" for the wrongs of the employer or society, then the consequences of losing a job seem that much harsher. However, if white employees are viewed as present beneficiaries of a job market artificially fixed to their advantage, then seniority overrides become a more moderate and equitable burden. Under the latter view, seniority overrides can be thought of as redistributing seniority rights to more accurately reflect what they would have been absent prior discrimination.

At least two courts have adopted this "unearned advantage" viewpoint. In Stotts v. Memphis Fire Department, the court rejected the argument that the seniority override would "unduly interfere" with

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112. This viewpoint is expressed in Fischer, Seniority is Healthy, 27 LAB. L.J. 497 (1976). "The notion that white workers should be victimized by destroying their bona fide seniority rights to continued employment because of past discriminatory hiring patterns imposed by management punishes the innocent, not the guilty." Id. at 502. The response to this argument is that it is inconsistent to consider it "unfair" for innocent whites to bear part of the burden for past discrimination when it comes to layoffs, but not for innocent minority workers to bear the entire burden of this discrimination. As Judge Wright has noted:

In a society where racial discrimination has been so pervasive, most white persons have both contributed to and benefited from discrimination to some degree. . . . To place the blame generally on social institutions relieves us all individually of responsibility. . . . [A] nonperpetrator who has been unjustly enriched in an ascertainable way by discrimination may have to contribute to remedying the injury from such discrimination.

Wright, supra note 3, at 240 n.92. It has also been suggested that the guilty employer, rather than either the white or black employee, should bear the burden. See Elkiss, Modifying Seniority Systems Which Perpetuate Past Discrimination, 31 LAB L.J. 37, 42-44 (1980); Wines, supra note 111, at 56.

113. 679 F.2d 541 (6th Cir. 1982), cert. granted, 103 S. Ct. 2451 (1983).
white employee expectations concerning promotions. It appeared to the court that "the expectation of non-minorities is based upon a pre-decree minority promotion ratio which presumptively would have been significantly higher had the City's employment practices been non-discriminatory." The court found that "[n]on-minorities benefited from, practiced, and acquiesced in those practices. The 1980 decree is a reasonable means to correct the adverse effects which minorities shouldered as a result of those [discriminatory] employment practices."

In *Baker v. City of Detroit*, the court found that white police officers had significantly benefited from prior discriminatory practices. When these officers alleged that an affirmative action promotion program interfered with their seniority expectations, the court upheld the plan, recognizing that "[i]t is true that affirmative action upsets the expectations of white workers, but such expectations are indeed tainted when they are based on a legacy of discrimination."

Thus, white employees may be "innocent" in the sense that they did not personally institute discriminatory practices, but the seniority they have accumulated may not be "innocent" of the benefits of discrimination. Courts do not weigh the seniority expectations of white workers as if they were accumulated in a neutral fashion, but rather recognize when they in part represent the benefits of historical discrimination gained at the expense of minority workers.

Finally, it should be noted that if a union has agreed to a seniority override provision, it would be more difficult for its members to argue that their interests have been unnecessarily trammeled. Because seniority rights are economic rather than vested rights, they can be bargained away. Thus a union-approved plan preserves the white employees’ bargaining rights.

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114. *Id.* at 556.
117. *Id.* at 940-58, 1002.
118. *Id.* at 1002. See also *Patterson v. Newspaper & Mail Delivery Union*, 514 F.2d 767, 775 (2d Cir. 1975) ("To the extent that the . . . [affirmative action program] may cause a temporary decline in . . . [a] white worker's rate of promotion . . . , it merely compensates for past discrimination by allowing a reasonable number of minority persons to be promoted to the 'rightful place' on the seniority ladder, which they would have occupied, but for industry-wide racial discrimination.").
120. The Supreme Court has alluded to the legitimacy of a security override provision in a collective bargaining agreement by noting that "the ability of the union and employer voluntarily to modify the seniority system to the end of ameliorating the effects of past discrimination [is a] national policy objective of the 'highest priority.'" *Franks v. Bowman*
The Goals of Title VII

On the other side of the scale from the interests of white workers lie the goals of title VII. For Congress, title VII symbolized the "vindication of a major public interest." Congress' intent was to close the earnings and employment gap between white and black workers and integrate blacks into the mainstream of society. Eradication of employment discrimination, however, requires more than mere legal prohibitions against discrimination; affirmative action is a necessary supplement. enactment of affirmative action remedial measures for title VII violations reflects this belief.

Voluntary seniority overrides in the private sector can play a critical role in achieving the goals embodied in title VII. If a hiring and promotion affirmative action program is already in place, the failure to extend affirmative action principles to layoffs will often eradicate any progress that has been achieved. Seniority overrides are particularly important in light of the regularity with which economic downturns occur. Since 1854, when the government first began compiling such records, there have been twenty-nine recessions, averaging one every four and one-half years. If with every downturn minority employment gains are largely undermined, integration of minorities into the


124. See supra note 3; see also United States v. Lee Way Motor Freight, Inc., 625 F.2d 918, 943-45 (10th Cir. 1979) (as a practical matter, "[w]hen a practice [of discrimination has] become a way of life for the company, there is little basis for assuming that the company is going to get religion, so to speak, overnight . . . [Adoption of an affirmative action plan] is a practical measure which would prevent possible repetition of [this] long and arduous lawsuit"); Associate Gen. Contractors, Inc. v. Altshuler, 490 F.2d 9, 16 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974) ("[t]he observation that the Constitution is colorblind represents a long-term goal, and it is by now understood that our society cannot be completely colorblind in the short term if we are to have a colorblind society in the long term"); Baker v. City of Detroit, 483 F. Supp. 930, 1001 (1979) ("until our society progresses further, affirmative action will remain a necessity").
126. See Stotts v. Memphis Fire Dep't, 679 F.2d 541, 561 (6th Cir. 1982), cert. granted, 103 S. Ct. 2451 (1983) ("It is uncontroversial that the application of the layoff policy . . . would have virtually destroyed the progress belatedly achieved through affirmative action."); Brown v. Neeb, 644 F.2d 551, 558 (6th Cir. 1981) (seniority based layoffs can make a "mockery of hiring goals").
economic mainstream will become that much more difficult.\textsuperscript{128} Indeed, without seniority overrides title VII will be effectively limited to its colorblind provisions. Considering the extent of discriminatory employment practices and the frequency of economic recessions, such a limitation may prove fatal to the goals of title VII.

Because the competing interests of white workers and employment equality cannot be quantified precisely, the balancing of these interests ultimately rests upon individual judicial judgments. Two courts have already made this difficult decision in favor of seniority overrides.\textsuperscript{129} In one of these cases, \textit{Tangren},\textsuperscript{130} the district court concluded that "the interests of non-minority employees are not ‘unnecessarily trammeled’ by the seniority overrides in favor of minority employees. The relatively minor infringement upon the seniority expectations of white employees is outweighed by the benefits to be achieved through affirmative action to insure minority representation in WSI’s workforce."\textsuperscript{131}

Although one might object to the description of the infringement as "minor," the congressional goal of eradicating employment discrimination requires that this burden be borne. The fortunes of individual employees are outweighed by the social value of achieving equality in the workplace.

\section*{Conclusion}

Seniority overrides should survive judicial scrutiny as a permissible form of affirmative action in the private sector. The legislative history and judicial interpretations of section 703(h) of title VII make

\textsuperscript{128} One statistical study showed that in recessionary periods minorities are generally laid off first and rehired last when economic recovery begins. J. Malveaux, \textit{Unemployment Differentials By Race and Occupation} (unpublished dissertation, Mass. Inst. Technology, 1980). For example, during the 1973-1975 recession, minorities lost their jobs 1.44 times faster than whites. During the 1975-1980 recovery period, however, minorities returned to work only .89 times as fast as whites. In the 1980-1981 recovery period, the recovery rate in the minority labor force was so sluggish that minorities were losing their jobs 1.4 times faster than whites were obtaining jobs. The only exception was the 1961-1969 recovery period. In the preceding recession (1960-1961) minorities left the work force at a rate of 1.88 times faster than whites. When the economy recovered, they returned to work 2.23 times faster than whites.


\textsuperscript{131} \textit{Id.}, at 550. \textit{See also} \textit{Stotts v. Memphis Fire Dep’t}, 679 F.2d 541, 560 (6th Cir. 1982), \textit{cert. granted}, 103 S. Ct. 2451 (1983) (“This realignment [resulting from the seniority override] vindicates a societal interest in remedying the effects of racial [discrimination] and more than justifies the displeasure some non-minorities may experience.”).
clear that the section only provides that bona fide seniority systems are legal under title VII. The section does not prohibit private sector employers from voluntarily modifying seniority systems to achieve title VII goals.

An analysis of *Weber* suggests that seniority overrides satisfy its guidelines for permissible voluntary affirmative action programs in the private sector. Like other types of affirmative action, seniority overrides mirror the purposes of title VII by breaking down traditionally segregated job categories, thus satisfying the first guideline. The second guideline, that the interests of white workers should not be "unnecessarily trammeled" presents the most difficult challenge. It ultimately requires a balancing of the competing interests of white workers in using their seniority to keep their jobs and the interests of society in achieving title VII goals.

A weighing of these interests shows the scale tipped in favor of seniority overrides. Because recessions and attendant layoffs are frequent, extension of affirmative action principles to layoffs is critical to maintaining the effectiveness of hiring and promotional programs, and therefore is essential to the achievement of a racially integrated workforce. Colorblind laws alone are not enough to make substantial inroads against such an intractable foe as employment discrimination.

It is during periods of economic recession that insecurities, disappointments, and self interest mount. Yet these concerns should not become an excuse for abandoning a national priority. America's commitment to title VII goals should not be just a fairweather friend, lauded in times of prosperity but shunned in more difficult times. Voluntary seniority overrides in the private sector are an equitable way for employers to continue to work, during adverse economic times, toward the fulfillment of title VII's goals.

*Karen G. Kramer*
### APPENDIX

#### MINORITY-NOMINORITY UNEMPLOYMENT DURING RECESSIONS AND RECOVERIES—1957-1982

<table>
<thead>
<tr>
<th>Recessions</th>
<th>Ending Unemployment</th>
<th>Incremental Ratio</th>
<th>Absolute Percentage Point Change</th>
</tr>
</thead>
<tbody>
<tr>
<td>1957 I—1958 II</td>
<td>7.4%</td>
<td>Min.</td>
<td>1.34%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>NonMin.</td>
<td>3.6%</td>
</tr>
<tr>
<td>1960 II—1961 III</td>
<td>9.9%</td>
<td>Min.</td>
<td>1.29%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>NonMin.</td>
<td>3.9%</td>
</tr>
<tr>
<td>1969 IV—1975 III</td>
<td>6.2%</td>
<td>Min.</td>
<td>3.3%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>NonMin.</td>
<td>5.9%</td>
</tr>
<tr>
<td>1973 IV—1975 III</td>
<td>4.3%</td>
<td>Min.</td>
<td>4.2%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>NonMin.</td>
<td>8.2%</td>
</tr>
<tr>
<td>1980 I—1981 IV</td>
<td>1.8%</td>
<td>Min.</td>
<td>1.2%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>NonMin.</td>
<td>2.2%</td>
</tr>
<tr>
<td>1981 II—1982 II</td>
<td>1.9%</td>
<td>Min.</td>
<td>1.2%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>NonMin.</td>
<td>2.2%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Recoveries</th>
<th>Ending Unemployment</th>
<th>Incremental Ratio</th>
<th>Absolute Percentage Point Change</th>
</tr>
</thead>
<tbody>
<tr>
<td>1958 II—1960 II</td>
<td>13.4%</td>
<td>Min.</td>
<td>3.5%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>NonMin.</td>
<td>9.1%</td>
</tr>
<tr>
<td>1961 II—1969 IV</td>
<td>12.9%</td>
<td>Min.</td>
<td>3.3%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>NonMin.</td>
<td>6.2%</td>
</tr>
<tr>
<td>1971 IV—1973 IV</td>
<td>10.1%</td>
<td>Min.</td>
<td>5.5%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>NonMin.</td>
<td>8.6%</td>
</tr>
<tr>
<td>1975 II—1980 I</td>
<td>8.2%</td>
<td>Min.</td>
<td>5.5%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>NonMin.</td>
<td>8.2%</td>
</tr>
<tr>
<td>1980 III—1981 II</td>
<td>13.9%</td>
<td>Min.</td>
<td>5.5%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>NonMin.</td>
<td>6.2%</td>
</tr>
</tbody>
</table>

Notes:
- Incremental ratio equals the absolute percentage point change for minorities divided by the absolute percentage point change for nonminorities.
- Result is the rate at which minorities leave/enter the workforce as compared to the rate for nonminorities.
- Since the unemployment rates of the two groups moved in opposite directions during this period, this incremental ratio means that minorities entered unemployment at 1.4 times the rate nonminorities left unemployment.