NOTES

CONSTITUTIONAL LAW—PREFERENTIAL QUOTA ON HIRING AND PROMOTION HELD TO BE AN UNCONSTITUTIONAL REMEDY FOR PAST DISCRIMINATORY EMPLOYMENT PRACTICES IN NEW JERSEY—*Lige v. Town of Montclair*, 72 N.J. 5, 367 A.2d 833 (1976).

Charles S. Lige, a black man, seeking a position with the Montclair, New Jersey Fire Department, took a written test, administered by that town on November 6, 1971, as the first phase in the process of selecting candidates for Montclair's fire-fighting force.[1] As Lige did not perform satisfactorily, his application was rejected.[2] He subsequently filed a complaint with the Division on Civil Rights of the New Jersey Department of Law and Public Safety (Division), alleging that the test and other selection procedures employed by the town " '[were] fair in form but discriminatory in operation,' " and that

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[1] Lige v. Town of Montclair, Recommended Findings of Fact and Conclusions of Law of Hearing Examiner Julius Wildstein, State of New Jersey Department of Law & Public Safety, Division on Civil Rights, Docket Nos. EG13RM-6282, -6833, at 4 (May 16, 1964) [hereinafter cited as Recommended Findings], *adopted by the Director of the Division on Civil Rights*; *see* Lige v. Town of Montclair, 72 N.J. 5, 13, 367 A.2d 833, 837 (1976). Lige and 57 other men aspiring to become members of the Montclair Police or Fire Departments were administered identical examinations. 72 N.J. at 7–8, 367 A.2d at 834. The hearing examiner found that the test was not professionally validated or otherwise indicative of those qualities necessary to perform the work of police officers or firefighters. Recommended Findings at 44.

For a discussion of the legal issues raised by challenges to employment testing, see Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598 (1969); Note, *Employment Testing: The Aftermath of* Griggs v. Duke Power Co., 72 COLUM. L. REV. 900 (1972).

[2] Recommended Findings, *supra* note 1, at 6.

If an applicant scored at least 17 points on the written exam and fell within the 75th percentile of applicants tested, he would be screened to determine police record, residency and health. *See id.* at 7–8. Lige's actual score on the written test was not disclosed in the Recommended Findings. It was found, however, that Lige, who had graduated from high school and had completed one year of college, did not meet the minimum requirements necessary to be considered for screening. *Id.* at 6. If successful in the testing and screening phases, the applicant would proceed to the next stage of the selection process, which involved an appearance before a five member examining board comprised of town residents of various professions, who possessed no particular expertise in municipal hiring. Lige v. Town of Montclair, 72 N.J. 5, 8, 367 A.2d 833, 834 (1976). The board, bound by no standard guidelines, would then make recommendations to the Montclair commissioner of public safety who was vested with "unrestricted discretion" in making the ultimate determination regarding hiring. *Id.*

the test "had an unlawful discriminatory effect on black applicants and was not properly designed to measure the traits necessary for successful performance" with respect to the positions sought to be filled.[3]

The Lige complaint was first heard at the administrative level, where the hearing examiner[4] determined that the town's selection

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[3] Lige v. Town of Montclair, 72 N.J. 5, 6–7, 367 A.2d 833, 833–34 (1976). The original complaint had been filed with the Division on December 27, 1971. Petition for Certification at 1, Lige v. Town of Montclair, 72 N.J. 5, 367 A.2d 833 (1976). That complaint charged that the town had violated the Law Against Discrimination, N.J. STAT. ANN. §§ 10:5-1 to -38 (West 1976). The complaint alleged specific violations of §§ 10:5-4 and -12(a). Recommended Findings, *supra* note 1, at 2–4. Section 10:5-4 provides in relevant part:

> All persons shall have the opportunity to obtain employment . . . without discrimination because of race, creed, color, national origin, ancestry, age, marital status or sex, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right.

Section 10:5-12 provides in relevant part:

> It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination:
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> (a) For an employer, because of the race, creed, color, national origin, ancestry, age, marital status or sex of any individual . . . to refuse to hire or employ or bar or discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment. . . .

In amendments to the original complaint, filed with the Division on August 10, and November 15, 1973, Lige, joined by the Director of the Division, charged that the police and fire department entrance exam "had a disparate effect on black applicants." Petition for Certification at 1, Lige v. Town of Montclair, 72 N.J. 5, 367 A.2d 833 (1976). It was further charged that the test "had an unlawful potential to discriminate" because the test was neither professionally validated nor job related. Lige v. Town of Montclair, 72 N.J. 5, 6–7, 367 A.2d 833, 834 (1976).

On June 14, 1972, the Director filed a separate complaint against Montclair, charging that the testing procedure used to select candidates for promotion within the police and fire departments was also discriminatory against blacks and other minorities. Recommended Findings, *supra* at 2, 4. The two complaints, as amended, were consolidated into one action for the administrative hearing. *Id.* at 2.

Montclair stated at the hearing that there were no acts of discrimination on the part of its department of public safety, which administered the tests and screening procedures, *id.* at 5, even though intent to discriminate was not charged. *Id.* In fact, the hearing examiner suggested that the Law Against Discrimination, N.J. STAT. ANN. §§ 10:5-1 to -38 (West 1976), does not require a showing of intent before an employer may be found guilty of an unlawful discriminatory employment practice. Recommended Findings, *supra* at 20–21. (relying upon Blair v. Mayor and Council, Borough of Freehold, 117 N.J. Super. 415, 417, 285 A.2d 46, 47–48 (App. Div. 1971)).

[4] Recommended Findings, *supra* note 1, at 1; *see* N.J. STAT. ANN. § 10:5-8(*l*) (West 1976).

The Law Against Discrimination, N.J. STAT. ANN. §§ 10:5-1 to -38 (West 1976), provides for the hearing of any complaint by the Division, if, in the opinion of the Attorney General (or his designate), "circumstances so warrant." *Id.* § 10:5-15. Section 10:5-16 requires that the controversy "be presented before the director," who acts as a delegate of the Attorney General pursuant to § 10:5-8(d). The Director, in turn, may

procedure for fire personnel discriminated against minority applicants and thus violated the New Jersey Law Against Discrimination (LAD).[5] Based on this finding, the Director of the Division (Director) issued an order which required, *inter alia*, that Montclair institute a hiring plan for police and fire personnel based on a racial quota system.[6] Specifically, the Director ordered that "[o]ne . . . qualified minority applicant shall be selected for every one . . . qualified white applicant until the total number of minority officers on the Fire Department equals at least fifteen . . . persons."[7]

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designate a hearing examiner from a pool of attorneys licensed to practice in New Jersey and selected for the express purpose of conducting hearings to "recommend findings of fact and conclusions of law." *Id.* § 10:5-8(*l*). The final determination, however, is made by the Director who may choose to accept or reject the hearing examiner's recommendations. *See id.* §§ 10:5-8(*l*), -17.

[5] Recommended Findings, *supra* note 1, at 43–46; *see* N.J. STAT. ANN. §§ 10:5-1 to -38 (West 1976).

Specifically, the hearing examiner recommended the following findings of fact: (1) The Town of Montclair was an employer as defined by the Law Against Discrimination and was required to comply with it; (2) Lige was not hired as a result of his performance on an unlawfully discriminatory employment test; (3) the test used for promotions was likewise unlawfully discriminatory; (4) the post-test hiring procedures violated the Law Against Discrimination in that the local examining board utilized no formal guidelines in evaluating applicants, and the appearance before that board bore no rational relationship to job performance; (5) the procedures involved in promotion were violative of the Law Against Discrimination for the same reasons applicable to post-test hiring procedures. Recommended Findings, *supra* at 44–46.

[6] Lige v. Town of Montclair, 72 N.J. 5, 13–14, 367 A.2d 833, 837 (1976).

The final order of the Director required the town to terminate all testing "until professionally validated and approved by the Division." *Id.* at 13, 367 A.2d at 837. The use of oral interviews in the third step of the selection process was also to be discontinued. *Id.* The Director further ordered the town to reevaluate Lige and the other applicants who took the November 6, 1971 test, as well as the black members of the police and fire divisions who were denied promotions in 1971, by "[n]ondiscriminatory selection and promotion methods . . . subject to the Director's approval." *Id.*

While the hearing examiner made recommendations to the Director, he did not explicitly recommend the implementation of a quota system. *See* Recommended Findings, *supra* note 1, at 46. In his recommended findings the hearing examiner concluded:

> [A]n order could include a requirement that the respondents cease and desist from the use of any examination which has not been properly professionally validated and from the use of supervisory evaluations, oral interviews and absolute discretion by the director of the department without effective standards and protections against racial discrimination. Such an order *could also provide for the respondents to take appropriate affirmative action to minimize the possible future effects of practices which have in the past resulted in racial discriminations.*

Id. at 46–47 (emphasis added).

[7] Lige v. Town of Montclair, 72 N.J. 5, 13–14, 367 A.2d 833, 837 (1976). The Director's order also imposed remedial quota relief on departmental promotions. *Id.* at 14, 367 A.2d at 837. That portion of the order required that

Montclair appealed that portion of the Director's order on the grounds that the imposed hiring and promotion quotas were invalid.[8] The New Jersey superior court, appellate division, struck the quotas from the order, holding that such relief was contrary to both the state and federal constitutions and was beyond the statutory power of the Division on Civil Rights.[9]

The Division's petition for certification was granted[10] and the New Jersey supreme court affirmed the decision of the appellate division in *Lige v. Town of Montclair*.[11] Therein, New Jersey's highest court held that the use of racial quotas violates article I, paragraph 5 of the New Jersey constitution.[12] In addition, the court agreed with the appellate division that the Director had exceeded his statutory authority.[13] Justice Pashman filed a dissenting opinion[14] in which he criticized the majority for interpreting the state constitution "more stringently than the Fourteenth Amendment,"[15] and analogized this case to federal cases which had upheld racial quotas.[16]

The impact of *Lige* on civil rights litigation and employment discrimination remedies in New Jersey can be best understood by first examining the statutory and constitutional foundations of the decision. This Note will focus upon the equal protection aspects of the state constitution and the Law Against Discrimination. These will be com-

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"[f]uture promotions in the Montclair Police Department shall be made on the following basis:

One qualified Black applicant shall be promoted for every one qualified white applicant until 50% of those minority applicants deemed qualified by the re-evaluation have been promoted."

Id.

[8] Lige v. Town of Montclair, 134 N.J. Super. 277, 278, 340 A.2d 660, 661 (App. Div. 1975), *aff'd*, 72 N.J. 5, 367 A.2d 833 (1976). N.J. STAT. ANN. § 10:5-21 (West 1976) provides that any "aggrieved" person may appeal the Director's final order to the appellate division of the superior court in the same manner "as an appeal from a State administrative agency." The court rules provide for an appeal as of right from a final determination of an administrative agency. N.J.R. 2:2-3(a)(2).

Montclair did not appeal those portions of the order which required the termination of all invalidated testing because it had revised the tests and other selection procedures. Lige v. Town of Montclair, 72 N.J. 5, 14, 367 A.2d 833, 837–38 (1976).

[9] Lige v. Town of Montclair, 134 N.J. Super. 277, 282, 340 A.2d 660, 663 (App. Div. 1975), *aff'd*, 72 N.J. 5, 367 A.2d 833 (1976).

[10] Lige v. Township of Montclair, 68 N.J. 490, 348 A.2d 531 (1975).

[11] 72 N.J. 5, 367 A.2d 833 (1976).

[12] *Id.* at 26, 367 A.2d at 844.

[13] *Id.* N.J. STAT. ANN. § 10:5-2 provides guidelines for the construction of the LAD: "Nothing contained in this act . . . shall be construed to require or authorize any act prohibited by law."

[14] 72 N.J. at 27, 367 A.2d at 845.

[15] *Id.* at 54, 367 A.2d at 859.

[16] *Id.* at 52–62, 367 A.2d at 858–63.

pared with the United States Constitution and federal civil rights legislation which have been interpreted as permitting a wider range of affirmative action remedies.

Article I, paragraph 5 of the New Jersey constitution, which was central to the *Lige* holding, states:

> No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin.

This section was added to the 1947 constitution in an apparent attempt to give a constitutional basis to the anti-discrimination principles expressed two years earlier in the LAD.[17] In construing this provision, the New Jersey supreme court has said: "Effectuation of [the constitutional] mandate calls for liberal interpretation of any legislative enactment designed to implement it."[18]

In *Morean v. Board of Education*,[19] for example, the New Jersey supreme court upheld what was alleged to be " 'a double standard of school assignment' "[20] utilized by the Montclair Board of Education as part of a student relocation plan.[21] The plan was challenged as being " 'racially motivated . . . and therefore violat[ive] [of] the equal protection' " clause of the Federal Constitution.[22] Most school assignments were made pursuant to a "neighborhood school policy"; but in order to avoid racial imbalance, certain black students were allowed to attend schools beyond their neighborhood.[23] The court noted that a school board could not "close its eyes to racial imbalance,"[24] even

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[17] *See* III STATE OF NEW JERSEY CONSTITUTIONAL CONVENTION OF 1947 (Committee on Rights, Privileges, Amendments and Miscellaneous Provisions and Committee on the Legislative Record) 344–45.

[18] Levitt & Sons, Inc. v. Division Against Discrimination, 31 N.J. 514, 524, 158 A.2d 177, 182, *appeal dismissed*, 363 U.S. 418 (1960).

[19] 42 N.J. 237, 200 A.2d 97 (1964).

[20] *Id.* at 241, 200 A.2d at 99.

[21] *Id.* at 243–44, 200 A.2d at 100. In an effort to reduce expenses, Montclair instituted a plan to consolidate its four junior high schools into one centrally located school. *Id.* at 238–39, 200 A.2d at 97–98. In the interim, the school board decided to eliminate the most costly of the four schools, Glenfield. *Id.* In order to prevent this temporary measure from effecting de facto segregation, the Glenfield student body, which was 90% black, was divided and reassigned to one of the three remaining schools, Hillside (60% black), George Inness (18% black), or Mt. Hebron (no blacks). *Id.* at 239–42, 200 A.2d at 98–100.

[22] *Id.* at 242, 200 A.2d at 99.

[23] *Id.* at 241, 200 A.2d at 99.

[24] *Id.* at 243, 200 A.2d at 100.

when the only remedy for this situation calls for color conscious relief.[25] Although "[c]onstitutional color blindness may be wholly apt when the frame of reference is an attack on official efforts toward segregation; it is not generally apt when the attack is on official efforts toward the avoidance of segregation."[26]

This racial awareness policy has been recognized by the court as having "gained wide acceptance"[27] as a legitimate, at times indispensible, tool in eliminating the effects of past discrimination.[28] The supreme court has maintained that "those who seek to end racial discrimination must often be acutely color conscious."[29] A prime example of a situation in which the supreme court determined that the state constitution posed no bar to color conscious official action appears in *Jenkins v. Township of Morris School District*.[30] The issue in *Jenkins* was whether the state commissioner of education had the power to eliminate de facto segregation by effectuating a merger of two adjacent, yet racially dissimilar school systems.[31] The conflict arose when the Township of Morris voted not to renew a sending-receiving agreement with their encircled neighbor, Morristown.[32] This agreement had allowed the township, which had no high school of its own, to send its high school age children to the town's school, Morristown High School.[33] Since most of the area's black population resided in Morristown,[34] a withdrawal by the Township of Morris would have reduced the number of " 'highly-motivated,' "[35] white, middle class students, and commensurately increased the percentage of lower class black students attending Morristown High School.[36] Appellants petitioned the state commissioner of education to prevent the withdrawal of Township of Morris students and to "effectuat[e] a

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[25] *Id.* at 242, 200 A.2d at 100.

[26] *Id.* at 243–44, 200 A.2d at 100.

[27] New Jersey Builders, Owners and Managers Ass'n v. Blair, 60 N.J. 330, 336, 288 A.2d 855, 858 (1972); *see* notes 50–59 *infra* and accompanying text.

[28] New Jersey Builders, Owners and Managers Ass'n v. Blair, 60 N.J. 330, 336, 288 A.2d 855, 858 (1972).

[29] *Id.*

[30] 58 N.J. 483, 279 A.2d 619 (1971).

[31] *Id.* at 485, 279 A.2d at 620.

[32] *Id.* at 491–92, 279 A.2d at 624.

[33] *Id.* at 488, 279 A.2d at 622.

[34] *Id.* at 487, 279 A.2d at 621. In 1971, only 5% of Morris Township's 20,000 inhabitants were black. In contrast, approximately 25% of Morristown's 18,000 residents were black. *Id.*

[35] *Id.* at 490, 279 A.2d at 622. The court quoted from findings of the N.J. Dep't of Education Hearing Examiner which "were adopted by the Commissioner of Education in his decision." *Id.* at 487, 279 A.2d at 621.

[36] *See id.* at 487–88, 279 A.2d at 621–22.

merger of the Morris Township and Morristown school systems."[37] Although the commissioner recognized that the requested relief "[was] highly desirable from an educational standpoint and [would] avoid racial imbalance,"[38] he perceived such relief to be beyond the pale of his authority.[39] The supreme court determined, however, that he had the power to forestall the withdrawal and effectuate a merger.[40] In arriving at this conclusion, the court looked to article I, paragraph 5,[41] and article VIII, section 4, paragraph 1, which require "a thorough and efficient system of free public schools."[42] These provisions, along with various statutes enacted pursuant thereto, were held to be directed toward the prevention of future, and the remedy of past and present, racial imbalance.[43] In 1971, it was clear to the court that "if . . . the educational and racial policies embodied in our State Constitution and its implementing legislation . . . are to be at all meaningful, the State Commissioner must have [the] power" to take appropriate action through racially motivated relief.[44]

The New Jersey legislature's response to discriminatory practices took substantive form as the Law Against Discrimination.[45] The LAD was enacted in 1945 to counteract the perceived threat to "democratic" ideals posed by invidious forms of discrimination,[46] and included an open-ended provision empowering the Director[47] to order

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[37] *Id.* at 485, 279 A.2d at 620.

[38] *Id.*

[39] *Id.*

[40] *Id.* at 508, 279 A.2d at 632–33.

[41] *Id.* at 496, 279 A.2d at 626.

[42] *Id.* at 494, 279 A.2d at 625.

[43] *See id.* at 493–501, 279 A.2d at 625–29.

[44] *Id.* at 501, 279 A.2d at 629.

[45] Law Against Discrimination, 1945 N.J. Laws, ch. 169 (codified at N.J. STAT. ANN. §§ 10:5-1 to -38 (West 1976)).

[46] 1945 N.J. Laws, ch. 169, § 3 (presently codified at N.J. STAT. ANN. § 10:5-3 (West 1976)).

Originally, the LAD merely prohibited discrimination in employment. 1945 N.J. Laws, ch. 169, § 4. Over the years, however, the LAD has undergone a number of revisions designed to expand the act's application. 1949 N.J. Laws, ch. 11, sec. 2 (amending § 4 to prohibit discrimination in public accomodation); 1961 N.J. Laws, ch. 106, sec. 1 (amending § 4 to include certain classes of private housing); 1962 N.J. Laws, ch. 37, sec. 3 (amending § 4 to include prohibition of age discrimination); 1970 N.J. Laws, ch. 80, sec. 9 (amending § 4 to include prohibition of discrimination based upon marital status or sex).

[47] N.J. STAT. ANN. § 10:5-17 (West 1976). Originally, enforcement authority was vested in the Commissioner of Education. 1945 N.J. Laws, ch. 169, § 16, at 596. The 1963 amendments to the LAD transferred responsibility for enforcement from the Department of Education to the Department of Law and Public Safety. 1963 N.J. Laws, ch. 40, §§ 2–11, at 127–33.

"such affirmative action" as necessary to "effectuate the purpose of th[e] act."[48]

A broad spectrum of remedial action pursuant to the LAD has been approved by the supreme court, which traditionally has given the act an interpretation which would best implement its underlying policy.[49] For example, in *New Jersey Builders, Owners and Managers Association v. Blair*,[50] the supreme court was faced with a challenge to the validity of a rule promulgated by the Division which the petitioners claimed was offensive to the very statute it sought to implement.[51] In question was the Multiple Dwelling Reporting Rule,[52] which requires owners of certain multiple dwellings to submit an annual report, consisting of the racial classification of their present and prospective tenants, to the Division.[53] The LAD, however, prohibits any person who sells or rents real estate from making or posting any lists or "mak[ing] any . . . inquiry . . . as to [the] race, creed, color, national origin, ancestry, marital status or sex" of any tenant or prospective tenant.[54] Thus, New Jersey Builders argued that the

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[48] N.J. STAT. ANN. § 10:5-17 (West 1976).

[49] *See, e.g.*, Passaic Daily News v. Blair, 63 N.J. 474, 308 A.2d 649 (1973) (Director's order prohibiting sex segregated classified employment advertising not an abridgement of freedom of press and within regulatory power of the Division); Jackson v. Concord Co., 54 N.J. 113, 253 A.2d 793 (1969) (award of compensatory damages to complainant injured by landlord's refusal to rent on basis of race), discussed at notes 60–69 *infra* and accompanying text; David v. Vesta Co., 45 N.J. 301, 212 A.2d 345 (1965) (sale and rental of private housing within jurisdiction of Division to prevent discrimination); Fraser v. Robin Dee Day Camp, 44 N.J. 480, 210 A.2d 208 (1965) (Division order requiring day camp to terminate discriminatory enrollment policy valid and within intended scope of LAD).

[50] 60 N.J. 330, 288 A.2d 855 (1972).

[51] *Id.* at 333, 288 A.2d at 856.

[52] N.J. ADMIN. CODE §§ 13:10-1 to -2.6 (1977).

[53] 60 N.J. at 333, 288 A.2d at 856. The Multiple Dwelling Reporting Rule, N.J. ADMIN. CODE § 13:10-2.2 (1977) provides:

> (a) The owner or owners of every multiple apartment development which has 25 units or more shall file an annual report with the Division on Civil Rights concerning the racial composition of the multiple dwelling and factors affecting that composition.

Section 13:10-2.3 specifies the contents of the report:

> (b) The report may include information concerning:
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> 1. Racial designation of applicants for apartment rental;
> 2. Racial designation of apartment leaseholders;
> 3. Apartment rental turn-overs;
> 4. Apartment rental recruiting techniques;
> 5. Rental rates and apartment sizes; and
> 6. Such other information as the Attorney General determines is necessary to effectuate the purposes of this rule.

[54] N.J. STAT. ANN. § 10:5-12(g)(3) (West 1976).

practice mandated by the Multiple Dwelling Reporting Rule was itself unlawfully discriminatory and that any attempted enforcement of the Rule by the Division would amount to a violation of the LAD.[55]

The court did not accept this contention, and looked instead to the underlying purpose of the LAD,[56] stating that "[w]here a literal rendering will lead to a result not in accord with the essential purpose and design of the act, the spirit of the law will control the letter."[57] The court noted that the rationale for the Rule was that the demographic information contained in the reports would point out possible discriminatory practices to be investigated.[58] It concluded that the reporting requirement fell within the scope of the Division's rule-making authority, and therefore the agency's decision to implement the regulation was affirmed.[59]

The supreme court also has looked to the underlying purpose of the LAD when scrutunizing actions of the Director ostensibly taken pursuant to his enumerated powers under that law. In *Jackson v. Concord Co.*,[60] the complainant was unsuccessful in his attempt to lease an apartment from Concord.[61] He filed a complaint alleging racial discrimination.[62] The Division determined that the real estate company had violated the LAD.[63] Although the LAD does not textually provide for such relief,[64] the final order issued by the Director

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[55] 60 N.J. at 334, 288 A.2d at 857.

[56] *Id.* at 335, 288 A.2d at 857. Noting the outward "inconsistency" of the Division's actions in imposing the rule, the court said "the fundamental purpose of the act will provide the touchstone to resolve the dilemma." *Id.*

[57] *Id.* at 338, 288 A.2d at 859.

[58] *Id.* at 335, 288 A.2d at 858. The reason for implementing the Multiple Dwelling Reporting Rule appears in the rule itself. N.J. ADMIN. CODE § 13:10-2.1 (1977) states: "The provisions of this [rule] are adopted to enable the Division of Civil Rights to study patterns of housing occupancy, investigate practices of discrimination and affirmatively administer the New Jersey Law Against Discrimination."

[59] 60 N.J. at 340–41, 288 A.2d at 861.

[60] 54 N.J. 113, 253 A.2d 793 (1969).

[61] *Id.* at 116, 253 A.2d at 794. Jackson, a black school teacher, was interested in leasing an apartment close to his employment. *Id.* at 118–19, 253 A.2d at 795–96. Concord owned and operated the Hartford Arms apartment complex. *Id.* Jackson applied for an apartment, but his application "met with a succession of incredible excuses and evasive replies . . ., a tactic obviously designed to discourage him from pursuing the rental." *Id.* at 119, 253 A.2d at 796.

[62] *Id.* at 119, 253 A.2d at 796.

[63] *Id.* at 116, 253 A.2d at 794.

[64] N.J. STAT. ANN. § 10:5-7 (West 1976) gives the Director, upon determining that the LAD has been violated, authority to

> issue and cause to be served . . . an order . . . to cease and desist from [any] unlawful employment practice or unlawful discrimination and to take such affirmative action, including, but not limited to, hiring, reinstatement or upgrad-

included an award of compensatory damages "equal to the increased rental and travel expenses resulting from [Jackson's] having to live elsewhere."[65] Concord appealed the Director's decision to the superior court, appellate division,[66] which set aside that portion of the order relating to the award of damages.[67] The appellate division assumed that the LAD's silence on the question was tantamount to a lack of authority to grant such relief.[68] The Supreme Court of New Jersey reinstated the award of damages, holding that the legislative history behind the LAD implied that the power to effectuate such affirmative relief was within "the overall design of the act."[69]

While there are numerous decisions by New Jersey courts discussing both the scope of the Division's role in remedying discriminatory practices and the Director's authority to take appropriate action,[70] the supreme court, in *Lige*, indicated that the Director's imposition of a remedial quota system pursuant to the statutory scheme presented a novel interpretation of the LAD.[71]

At the federal level a plethora of cases involving remedial quotas has been decided.[72] Those circuits which have had occasion to review

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ing of employees, . . . as, in the judgment of the director, will effectuate the purpose of this act . . . .

[65] 54 N.J. at 117, 253 A.2d at 795.

[66] Jackson v. Concord Co., 101 N.J. Super. 126, 243 A.2d 289 (App. Div. 1968).

[67] *Id.* at 133, 243 A.2d at 292–93.

[68] *Id.* The appellate division "[found] nothing in the New Jersey Law Against Discrimination which clothes the Director with authority to award damages." *Id.* at 133, 243 A.2d at 292.

[69] 54 N.J. at 126, 253 A.2d at 800. The *Jackson* rationale was later reaffirmed in Zahorian v. Russell Fitt Real Estate Agency, 62 N.J. 399, 301 A.2d 754 (1973), wherein compensatory damages for pain and suffering were awarded by the Division as part of the relief granted from unlawful sex discrimination. 62 N.J. at 416, 301 A.2d at 763.

[70] *E.g.*, Passaic Daily News v. Blair, 63 N.J. 474, 308 A.2d 649 (1973); Zahorian v. Russell Fitt Real Estate Agency, 62 N.J. 399, 301 A.2d 754 (1973).

[71] 72 N.J. at 17–18, 367 A.2d at 839–40. Although the validity of benign quota relief pursuant to the Law Against Discrimination had not been determined until *Lige*, the use of racial quotas as a means of restricting blacks had previously been condemned by Justice (then Judge) Sullivan in Taylor v. Leonard, 30 N.J. Super. 116, 103 A.2d 632 (Ch. Div. 1954). *Taylor* involved a constitutional challenge to the use of a quota to limit the number of black tenants in an Elizabeth, N.J., public housing project to roughly the same ratio as that of blacks in the immediate population. *Id.* at 117–18, 103 A.2d at 632–33. This restrictive quota was premised on the theory that blacks were entitled to no "more than their share of the available housing units" in Elizabeth. *Id.* at 119, 103 A.2d at 633. In reaching the conclusion that the quota system was unconstitutional, Justice Sullivan found it "immaterial . . . that the quota . . . bears some relation to the percentage of Negro population." *Id.*

[72] *E.g.*, United States v. International Union of Elevator Constructors Local 5, 538 F.2d 1012 (3d Cir. 1976) (33% black referral quota to trade employers mandated by long history of excluding minorities from union membership); EEOC v. Local 638, Sheet

the imposition of such relief pursuant to federal civil rights legislation have determined that the Federal Constitution does not prohibit the use of racial quotas in certain narrowly defined circumstances.[73] The evolution of the modern federal view of "affirmative action" has paralleled the judicial expansion of the equal protection clause of the fourteenth amendment.[74]

At one time, the concept controlling all equal protection claims regarding racial discrimination was the "separate but equal" doctrine of *Plessy v. Ferguson*.[75] Over a dissent by Justice Harlan, who maintained that the equal protection clause was "color-blind,"[76] the *Plessy* court upheld the validity of a racial classification, thereby acknowledging that color consciousness was constitutionally permissible.[77] Fifty-eight years later the Supreme Court, in *Brown v. Board of Education (Brown I)*,[78] said that separate is inherently unequal, implicitly accepting Justice Harlan's colorblind approach.[79] *Brown I* held that the equal protection clause of the fourteenth amendment requires that children be afforded equal access to public educational opportunities irrespective of race.[80] However, the difficulties of implement-

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Metal Workers' Int'l Ass'n, 532 F.2d 821 (2d Cir. 1976) (29% minority membership goal in union and apprenticeship program imposed based on finding of persistent pattern of discrimination); Boston Chapter NAACP v. Beecher, 504 F.2d 1017 (1st Cir. 1974) (upholding preferential hiring of qualified minorities found to have been discriminated against on a one-to-one basis with all eligible persons on the Boston Fire Department waiting list); NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974) (one black for one white hiring quota imposed upon Alabama state troopers where continuing pattern of racial discrimination found); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1972) (en banc) (one-to-two hiring quota of minorities to whites for positions in Minneapolis Fire Department until 20 qualified minorities were added to an all-white fire department); Germann v. Kipp, 429 F. Supp. 1323 (W.D. Mo. 1977) (preference plan for minorities and women upheld against challenge of reverse discrimination where Kansas City Fire Department was making effort to fill available positions with under-utilized classes). *See also* Slate, *Preferential Relief in Employment Discrimination Cases*, 5 LOY. CHI. L. REV. 315, 318–20, nn.8–10 (1974).

[73] *See* note 72 *supra*.

[74] For an account of the development of the fourteenth amendment into a vehicle for judicial policymaking, see R. BERGER, GOVERNMENT BY JUDICIARY (1977).

[75] 163 U.S. 537, 548 (1896) (Louisiana statute requiring railway companies operating intrastate to provide separate compartments for whites and blacks held not violative of the fourteenth amendment).

[76] *Id.* at 559.

[77] *See id.* at 543–48.

[78] 347 U.S. 483 (1954).

[79] *Id.* at 495.

[80] *Id. Brown I* dealt exclusively with the question of the constitutionality of segregated public schools. After determining that such a segregated school system violated the Constitution, the Court requested additional briefs from counsel relating to the imposition of appropriate remedies. *Id.* & n.13.

ing *Brown I* soon proved that colorblind remedies under a colorblind equal protection clause were not efficacious.[81]

By 1971, it had become clear that positive action was required to remedy the practices found unconstitutional in *Brown I*. The Supreme Court, in *Swann v. Charlotte-Mecklenburg Board of Education*,[82] decided that a result-oriented racial awareness policy was necessary.[83] Thus, the use of numerical goals as a "starting point" in the effort toward school desegregation was approved.[84] In a case decided the same day as *Swann v. Charlotte-Mecklenburg* and involving similar issues, the Court reiterated its result-oriented approach, stating that "[j]ust as . . . race . . . must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy."[85]

Significantly, federal chancellors have often imposed racially based employment quotas upon public employers where discriminatory employment practices in violation of the fourteenth amendment have been shown. The Fifth Circuit Court of Appeals, in *NAACP v. Allen*,[86] affirmed a lower court's imposition of quota relief upon a finding that the Alabama Department of Public Safety had engaged in a continuing pattern of racial discrimination in the hiring of state troopers.[87] The court of appeals noted that while there is no consti-

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Brown v. Board of Educ., 349 U.S. 294 (1955), formulated appropriate remedies intended to alleviate the unlawful segregation found in *Brown I*. *Id.* at 298. The Court there remanded the individual cases to their respective lower courts to retain jurisdiction while "requir[ing] that the defendants make a prompt and reasonable start toward" integration. *Id.* at 300–01.

[81] *See, e.g.*, United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 854 (5th Cir. 1966) (desegregation mandate not proceeding due to uncertainty of school boards and lower courts as to the extent of their authority to act affirmatively), *aff'd en banc*, 380 F.2d 385, *cert. denied*, 389 U.S. 840 (1967).

[82] 402 U.S. 1 (1971).

[83] *See id.* at 31. If, as the Court said, "[t]he task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution," *id.* at 16, then "[s]ubstance, not semantics, must govern." *Id.* at 31. Quoting from Green v. County School Bd., 391 U.S. 430, 439 (1968), the *Swann* Court reaffirmed the use of " 'a plan that promises realistically to work, and . . . to work *now*.' " 402 U.S. at 31 (emphasis by the Court).

[84] 402 U.S. at 25.

[85] North Carolina Bd. of Educ. v. Swann, 402 U.S. 43, 46 (1971).

[86] 493 F.2d 614 (5th Cir. 1974).

[87] *Id.* at 622; *see* NAACP v. Allen, 340 F. Supp. 703, 706 (M.D. Ala. 1972). In the 37 year history of the Alabama state troopers, no black had ever been hired as an officer, 493 F.2d at 616, although approximately 26.2% of the state's population was black. *Id.* at 617 n.3. Under those circumstances, the federal court felt that any neutral selection procedure would perpetuate "the pervasive effects of past racial discrimination." *Id.* at 618. The district court had imposed a hiring quota of one black applicant for every

tutional right to "proportionate representation in public employment,"[88] a district court "has 'not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.' "[89]

The appellate court viewed its role in *Allen* as a limited one, involving the sole question of whether the district court had exceeded its discretion in formulating an appropriate remedy.[90] While recognizing the federal courts' "nondiscretionary duty"[91] to eliminate all vestiges of racial discrimination, the court of appeals stated that this duty does not always call for quota relief.[92] Under the test formulated by *Allen*, it is only when "the chancellor determines that [the imposition of a quota] represents the only rational, nonarbitrary means of eradicating" unlawful racial discrimination, that such a decree would be capable of passing "constitutional muster."[93] In addition, when the quota relief is imposed, it must be "temporary . . . , seek[ing] to spend itself as promptly as it can by creating a climate in which objective, neutral employment criteria can successfully operate to select public employees solely on the basis of job-related merit."[94] According to the Fifth Circuit, once this goal has been achieved, continuation of the quota relief would be inappropriate.[95] Until then, however, the court implied that it would not rule out the use of quotas.[96]

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white applicant until approximately 25% of the Alabama troopers were black. 340 F. Supp. at 706. Although not specified in the district court order, the Fifth Circuit assumed that the order related to qualified individuals only. 493 F.2d at 617.

[88] 493 F.2d at 618; *accord*, Morrow v. Crisler, 491 F.2d 1053, 1056 (5th Cir. 1974); *see* Bridgeport Guardians, Inc. v. Bridgeport Civil Service Comm., 482 F.2d 1333, 1340–41 (2d Cir. 1973).

[89] 493 F.2d at 617 (quoting from Louisiana v. United States, 380 U.S. 145, 154 (1965)).

[90] 493 F.2d at 620.

[91] *Id.* at 617–18.

[92] *See id.* at 619, 621.

[93] *Id.* at 619.

[94] *Id.* at 621. The appellate court indicated that the district court may use discretion in establishing the duration of the quota by retaining jurisdiction to insure compliance with the original court order. *See id.* at 621–22. Once the intended results have been achieved, the court is under a duty to terminate the extraordinary relief. Morrow v. Crisler, 491 F.2d 1053, 1056 (5th Cir. 1974).

[95] *See* 493 F.2d at 621.

[96] *See id.* Substantially identical results have obtained in other circuits which have decided cases brought under civil rights legislation. *E.g.*, Boston Chapter NAACP v. Beecher, 504 F.2d 1017 (1st Cir. 1974); Vulcan Society v. Civil Service Comm., 490 F.2d 387 (2d Cir. 1973); Commonwealth v. O'Neill, 473 F.2d 1029 (3d Cir. 1973); Carter v. Gallagher, 452 F.2d 315 (8th Cir.) (en banc), *cert. denied*, 406 U.S. 950 (1972); Germann v. Kipp, 429 F. Supp. 1323 (W.D. Mo. 1977).

Not all courts, however, have so readily approved the use of quotas. *Kirkland v. New York State Department of Correctional Services*[97] is a recent example of a case in which the imposition of quota relief was deemed excessive. The Second Circuit, called upon to review the constitutionality of a promotional quota,[98] noted that it had approved the use of quotas in previous cases,[99] but called the imposition of numerical ratios "repugnant to the basic concepts of a democratic society."[100] The court of appeals reviewed the prior decisions affirming quota relief, finding them distinguishable on their facts, and noting that in those cases "clear-cut pattern[s] of long-continued and egregious racial discrimination" were evident.[101] Relief in such instances was made less offensive, in the court's view, by the fact that the quotas did not result in "identifiable reverse discrimination."[102] In *Kirkland*, however, the promotional quota would have "bumped" white correctional officers who were in line for promotion to sergeant, in favor of black and hispanic officers with less seniority.[103] The Second Circuit found that the district court order, invalidating the discriminatory promotional test and requiring the Department of Cor-

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[97] 520 F.2d 420 (2d Cir. 1975).

[98] *Id.* at 423. After demonstrating a statistical case of discrimination, black and hispanic correction officers within the New York State Department of Correctional Services prayed for an injunction against the further use of the discriminatory civil service promotions exam. *Id.* at 422–23, 425. The district court granted the requested relief, *id.* at 423, and ordered the Department of Correctional Services to develop a professionally validated test which would not discriminate against minorities. *Id.* Furthermore, all interim promotions were to be approved by the court to insure that "at least one out of every four such promotions" went to minority officers "until the . . . percentage of [minority] sergeants was equal to the . . . percentage of [minority] correction officers." *Id.* Finally, the district court ordered the continued promotion of "at least one [minority] employee for each [*sic*] three white employees promoted" even after the nondiscriminatory selection procedure has been effectuated "until the . . . percentage of [minority] sergeants [is] equal to the . . . percentage of [minority] correction officers." *Id.*

[99] *Id.* at 427; *e.g.*, Patterson v. Newspaper Deliverers' Union, 514 F.2d 767 (2d Cir. 1975) (court approved consent decree requiring quotas for union membership); Rios v. Enterprise Ass'n Steamfitters Local 623, 501 F.2d 622 (2d Cir. 1974) (court affirmed specific racial membership goal for union); Vulcan Society v. Civil Service Comm., 490 F.2d 387 (2d Cir. 1973) (court affirmed numerical quotas for hiring New York City fire fighters); Bridgeport Guardians, Inc. v. Bridgeport Civil Service Comm., 482 F.2d 1333 (2d Cir. 1973) (court approved quota hiring of minorities for the Bridgeport Police Department); United States v. Wood Lathers Local 46, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973) (court approved consent decree requiring union to issue fixed number of work permits to minority workers).

[100] 520 F.2d at 427.

[101] *Id.*

[102] *Id.* at 427, 429.

[103] *Id.* at 429.

rectional Services to develop a professionally validated exam, was sufficient to eliminate the challenged discrimination.[104] Use of a quota would have "constitute[d] court-imposed reverse discrimination without any exceptional or compelling governmental purpose."[105]

While there has been no final judicial resolution of the constitutionality of remedial quotas, no court has yet declared outright that their use is prohibited by the Constitution. Congress, however, has been quite clear in its attitude toward this remedy, as expressed in federal civil rights legislation.

Title VII of the Civil Rights Act of 1964 (Title VII)[106] was enacted

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[104] *See id.* at 428, 429–30, 431.

[105] *Id.* at 430; *see* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (discussed at notes 82–83 *supra* and accompanying text). In that case the Supreme Court stated: "In seeking to define even in broad and general terms how far [equitable relief] extends it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation." 402 U.S. at 16.

The policy that equitable relief should extend only as far as is necessary under the circumstances was also recognized by the Fourth Circuit in Harper v. Kloster, 486 F.2d 1134 (4th Cir. 1973), *modifying and aff'g* Harper v. Mayor and City Council of Baltimore, 359 F. Supp. 1187 (D. Md. 1973). Plaintiffs in that case appealed from an order of the district court which denied their request for fixed racial quotas to remedy past and present discriminatory hiring practices in the Baltimore Fire Department. 486 F.2d at 1135–36. The court of appeals affirmed those portions of the district court's order which required the use of properly validated tests, the elimination of current eligibility lists, the imposition of a three-year limit on seniority requirements for promotion to lieutenant, a one-year limit on seniority requirements for all other positions, and an absolute preference for applicants who live within the City of Baltimore. *Id.*; *see* 359 F. Supp. at 1218–19 (full text of the district court's order).

The lower court had consciously applied the strict scrutiny approach toward racial classifications, *see* Loving v. Virginia, 388 U.S. 1, 11 (1967); Korematsu v. United States, 323 U.S. 214, 216 (1944), and had failed to discern a compelling need in light of the alternative hiring restrictions imposed upon the fire department. Thus, the request for quota relief was denied. 359 F. Supp. at 1213–15. The Fourth Circuit affirmed, 486 F.2d at 1136, calling the relief granted "complete in and of [itself]." *Id.*

Since most of the minority population centered around the City of Baltimore, 359 F. Supp. at 1201, the actual effect of a city resident preference was to favor minority applicants. Although this type of remedy avoids the use of a controversial label such as "racial quota," which, as Justice Pashman noted, "evokes a visceral response," Lige v. Town of Montclair, 72 N.J. at 27, 367 A.2d at 845 (1976) (Pashman, J., dissenting), it still has the effect of displacing one class in favor of another. However, this type of preferential relief may suggest a way to circumvent the constitutional problems of racial quotas. Since the city resident *vis à vis* nonresident classification is not suspect in the traditional sense, necessitating merely the showing of a rational basis, preferential relief may validly be imposed where a racial quota per se may not be justified under the particular circumstances.

[106] Pub. L. No. 88-352, §§ 701–716, 78 Stat. 253, *as amended by* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (current version at 42 U.S.C. §§ 2000e to 2000e-17 (1970 & Supp. V 1975)). For the background of Title VII and its role in equal employment opportunity, see [1964] U.S. CODE CONG. & AD. NEWS 2355 (legis-

for the purpose of eliminating all forms of employment discrimination based on race, color, religion, sex, or national origin.[107] That legislation created the Equal Employment Opportunity Commission (EEOC), whose primary function was to investigate charges of unlawful discrimination.[108] In 1972, the Equal Employment Opportunity Act amended Title VII[109] so as to give the EEOC authority to engage in active enforcement.[110] Specifically, the amendments included a provision authorizing the use of affirmative action as a remedial device to end employment discrimination.[111] A proposed amendment to the 1964 Act, prohibiting any preferential relief based on racial criteria, was solidly defeated,[112] indicating congressional willingness to accept some form of color conscious relief in actions brought under Title VII.[113]

In *United States v. International Union of Elevator Constructors*,[114] the Third Circuit affirmed the use of a quota plan as part of a court imposed remedy for a Title VII pattern or practice of discrimination.[115] After determining that the union had violated Title VII by its under-utilization of blacks, the district court ordered, *inter*

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lative history and purpose); [1972] U.S. CODE CONG. & AD. NEWS 2137 (amendments authorizing affirmative action).

[107] 42 U.S.C. § 2000e-2(a) (1970); *see* H.R. REP. NO. 914, 88th Cong., 1st Sess. 26, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2391, 2401.

[108] 42 U.S.C. §§ 2000e-4, -5(a) (1970).

[109] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (amending 42 U.S.C. §§ 2000e to 2000e-17 (1970)).

[110] 42 U.S.C. § 2000e-5(e) (Supp. V 1975).

[111] *Id.* § 2000e-5(g) (Supp. V 1975). The provisions of this section bear a striking resemblance to the affirmative action provisions of the LAD. *Compare* N.J. STAT. ANN. § 10:5-17 (West 1976), *reprinted in* note 37 *supra*, *with* 42 U.S.C. § 2000e-5(g) (Supp. V 1975) which provides:

> 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 . . . . No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee . . . if such individual was refused admission, suspended, or expelled, or was refused employment of advancement . . . for any reason other than discrimination on account of race, color, religion, sex, or national origin . . . .

(emphasis added).

[112] 118 CONG. REC. 1661, 1676 (1972). The proposal was voted down 44 to 22. *Id.* at 1676.

[113] *See generally* Slate, *supra* note 72.

[114] 538 F.2d 1012 (3d Cir. 1976).

[115] *Id.* at 1018–20.

alia, "a 23% black membership goal" and "a 33% black referral quota."[116] The union appealed, charging that Title VII prohibits the imposition of quotas.[117] The court of appeals rejected the union's contention, saying " '[a]ny [such] interpretation would allow complete nullification of the stated purposes of the Civil Rights Act of 1964.' "[118] In this case, as in a host of Title VII decisions by other federal courts, the imposition of quota relief has withstood the argument that such a remedy is beyond the court's statutory or constitutional authority.[119]

The *Lige* majority was not persuaded by analogous federal decisions. Basing its conclusion wholly on state law,[120] the *Lige* court held that the use of a racial quota to remedy the effects of past dis-

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[116] *Id.* at 1017–18.

[117] *Id.* at 1018. The union referred specifically to 42 U.S.C. § 2000e-2(h) (1970) which provides:

> Notwithstanding any other provision of this subchapter, 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 or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

538 F.2d at 1018. The union also claimed that 42 U.S.C. § 2000e-2(j) (1970) prohibited the ordered relief. 538 F.2d at 1018. That section provides:

> 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 on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number of [*sic*] percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

[118] 538 F.2d at 1019.

[119] *Id.* at 1020. Substantially identical results have obtained in other circuits in cases brought pursuant to Title VII. *E.g.*, Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir. 1976); EEOC v. Local 638, Sheet Metal Workers' Int'l Ass'n, 532 F.2d 821 (2d Cir. 1976); Associated General Contractors v. Altshuler, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974); United States v. N.L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973).

[120] *See* 72 N.J. at 15–26, 367 A.2d at 838–44.

crimination is the legal equivalent of the discriminatory practices prohibited by both the LAD and the Constitution of the State of New Jersey.[121] While the court did not take issue with the underlying purpose of the quota remedy, the majority felt that the "benign" ends did not justify such malign means.[122] Neither did the court question the Director's power to effectuate appropriate relief for such discriminatory practices.[123] However, the *Lige* majority read this "broad remedial affirmative power" as applying solely to individual relief for specific acts of discrimination.[124] The court noted that the LAD never had been interpreted to permit the imposition of class quotas in an effort to compensate "individuals against whom no discrimination had been practiced."[125] Addressing itself to the argument that Title VII has been interpreted to permit the use of class quotas, the court cited the *Kirkland* test adopted by the Second Circuit,[126] apparently persuaded by the rationale that "a small identifiable non-minority group" of persons should not suffer from an attempt to remedy a general pattern of discrimination.[127] Such would have been the case had the quota in *Lige* been approved.[128]

While not insensitive to the disadvantages which minorities must overcome in obtaining employment, the *Lige* majority seemed to be more concerned with the problems which reverse discrimination might cause.[129] One of the difficulties perceived by the court was the lowering of standards for those positions which would have been subjected to hiring quotas.

> Although the new examination procedures for hiring and promotions are to be non-discriminatory, the order permits a less

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[121] *Id.* at 23–24, 367 A.2d at 842–43.

[122] *Id.* at 23, 367 A.2d at 842.

[123] *See id.* at 17–18, 367 A.2d at 839–40.

[124] *Id.* at 17, 367 A.2d at 839. Speaking of the Director's authority under the LAD, the court stated: "This broad remedial affirmative power includes the right to take positive action which will operate prospectively to eliminate and prevent unlawful discrimination." *Id.*

[125] *Id.* at 18, 367 A.2d at 839. *But see* David v. Vesta Co., 45 N.J. 301, 212 A.2d 345 (1965), where the supreme court referred to racial discrimination "as a public wrong and not merely the basis of a private grievance." *Id.* at 327, 212 A.2d at 359. If the wrong is indeed a "public" one, then it would seem consistent with the nature of equitable relief to formulate a remedy which would appease the "public," not merely the individual directly discriminated against.

[126] 72 N.J. at 19, 367 A.2d at 840; Kirkland v. New York State Dep't of Correctional Services, 520 F.2d 420 (2d Cir. 1975); *see* notes 97–105 *supra* and accompanying text.

[127] 72 N.J. at 19, 367 A.2d at 840.

[128] *Id.*

[129] *Id.* at 21–26, 367 A.2d at 841–44.

> qualified black to be employed or promoted over a more qualified white. . . . Inherent in the Division's orders is a rejection of the concept that the more or most qualified should be hired and promoted. This rejection violates the fundamental precept in a democratic society that merit, not skin color, should determine an individual's place in society.[130]

Furthermore, the court was determined to prevent what was perceived to be a potential for litigation brought by whites who would inevitably be displaced by minority workers under a remedial quota plan.[131] The court was likewise fearful that, should employers be required to hire blacks in proportion to their number within the community, a precedent would be set for all other ethnic groups.[132] This would " 'lea[d] to insoluble problems and pil[e] discrimination on top of discrimination.' "[133]

The court invalidated the impositions of hiring quotas by the Director and held that the use of such remedies violated the New Jersey constitution[134] and the Law Against Discrimination by discriminating against individuals solely on the basis of race.[135] The majority proposed a number of alternatives which could be used by the Division to enforce the policy of the LAD without violating the constitution.[136] These included job-related testing procedures, more active recruiting in both high schools and universities, and pre-test orientation sessions designed "to familiarize the applicants with the nature and type of examination."[137] Equality of educational opportunity,[138] along with attrition in the job market, would eventually allow the "unintentional discrimination [to] be rectified."[139]

According to Justice Pashman's dissent, the *Lige* holding not only deprived the Director "of an important tool in the arsenal of legal

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[130] *Id.* at 22, 367 A.2d at 842 (footnote omitted). The Director's order, however, referred only to qualified applicants—whether white or minority. *Id.* at 13–14, 367 A.2d at 837.

[131] *Id.* at 23, 367 A.2d at 843; *see* N.J. STAT. ANN. § 10:5-12a (West 1976). This statement assumes that the white applicant was qualified in the first place.

[132] 72 N.J. at 24, 367 A.2d at 843.

[133] *Id.* (quoting from the opinion below by Judge Halpern, Lige v. Town of Montclair, 134 N.J. Super. 277, 281, 340 A.2d 660, 662 (App. Div. 1975)).

[134] N.J. CONST. art. I, ¶ 5.

[135] 72 N.J. at 26, 367 A.2d at 844.

[136] *Id.* at 25, 367 A.2d at 843–44.

[137] *Id.*

[138] *Id.* at 21, 367 A.2d at 841. Just how this " 'coequality of opporunity [*sic*] in education' " was to come about was not revealed. *Id.* at 43 n.11, 367 A.2d at 854.

[139] *Id.* at 25, 367 A.2d at 843–44.

remedies for racial discrimination,"[140] but also, and perhaps more importantly, placed New Jersey in the position of being the only jurisdiction which has held the use of hiring quotas, no matter how necessary or benign, to be unconstitutional.[141] Apparently, Justice Pashman felt the impact of *Lige* to be that racial classifications in New Jersey are per se unconstitutional.[142]

This exceedingly narrow interpretation of the state constitution prompted Justice Pashman to state that "[i]t should be clear under our own Constitution, as it has been under the Federal Constitution, that the ideal of a color blind society does not rule out the recognition of racial factors in fashioning remedies."[143] After interpreting prior case law and the LAD as authorizing the use of racial quotas by the Division,[144] the dissenting Justice demonstrated that quotas could

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[140] *Id.* at 27, 367 A.2d at 845.

[141] *Id.* at 35, 367 A.2d at 849.

Although some circuits have at times denied quota relief under particular circumstances, *e.g.*, Kirkland v. New York State Department of Correctional Services, 520 F.2d 420 (2d Cir. 1975), no federal court of appeals has totally precluded the use of quota remedies. Similarly, no state has invalidated quota relief *in toto*. Those recent state cases which invalidated preferential quota plans have done so only after subjecting them to some form of compelling interest analysis. Bakke v. Regents of Univ. of Cal., 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *cert. granted*, 429 U.S. 1090 (1977) (setting aside 16 seats for disadvantaged applicants for medical school held not to have met the requisite compelling state interest where university did not show that alternative means of achieving a valid state objective were unavailable); *see* Alevy v. Downstate Medical Center, 39 N.Y.2d 326, 348 N.E.2d 537, 384 N.Y.S.2d 82 (1976) (dictum to effect that preference to minorities in university admissions is permissible where state can show substantial interest, and gain to be derived outweighs possible detrimental effects).

[142] *Id.* at 52, 367 A.2d at 858; *see id.* at 23, 367 A.2d at 842. This view that the New Jersey constitution is colorblind is not supported by New Jersey case law. In fact, several supreme court decisions have specifically approved of a racial awareness policy in order to combat discriminatory actions. *E.g.*, New Jersey Home Builders, Owners and Managers Ass'n v. Blair, 60 N.J. 330, 288 A.2d 855 (1972) (discussed at notes 50–59 *supra* and accompanying text); Jenkins v. Township of Morris School Dist., 58 N.J. 483, 279 A.2d 619 (1971) (discussed at notes 30–44 *supra* and accompanying text); David v. Vesta Co., 45 N.J. 301, 212 A.2d 345 (1965); Morean v. Board of Educ. of Montclair, 42 N.J. 237, 200 A.2d 97 (1964) (discussed at notes 19–26 *supra* and accompanying text).

[143] *Id.* at 54, 367 A.2d at 859.

Justice Pashman argued that quota relief is permitted by the LAD in appropriate circumstances. 72 N.J. at 29–34, 367 A.2d at 845–48. He felt that all the appropriate circumstances were not present in *Lige*, however, since the town had revised its testing procedures and was making efforts to eliminate discriminatory hiring and promotion. *Id.* at 61, 367 A.2d at 863. Justice Pashman would have allowed Lige, and the other applicants who were denied jobs because they failed an invalid test, to be hired on a one-to-one basis with whites, but would terminate the quota order once those discriminated against in the past had been hired. *Id.*

[144] *Id.* at 29–34, 367 A.2d at 845–48.

be "fai[r] and reasonabl[e]" when properly applied and controlled.[145] Referring specifically to the quota plan for Montclair, Justice Pashman considered "the quotas imposed by the Division on Civil Rights, being limited in scope and operation, to be valid exercises of the Division's remedial powers."[146]

The dissent criticized the court's concern for the maintenance of adequate standards in the Montclair Fire and Police Departments as misguided, especially since the remedial order required the hiring of only those black applicants who demonstrate sufficient occupational qualifications by passing a validated test.[147] Justice Pashman questioned the validity of the majority's assumption that "merit" is synonymous with performance on a standard written exam.[148] He noted that minority status might be viewed as a desirable qualification in certain areas of employment.[149] He also suggested that the use of physical ability tests to determine job-related qualifications, at least in the fire department, might be more appropriate than written tests.[150]

Finally, Justice Pashman reached the question of the validity of remedial quotas under the fourteenth amendment of the Federal Constitution[151]—a question the majority did not feel compelled to consider.[152] The Justice was of the opinion that article I, paragraph 5 should not have been accorded a construction more stringent than the prevailing federal interpretation of the equal protection clause.[153]

Under his analysis, a quota remedy pursuant to the LAD could withstand judicial review, if a "strict scrutiny standard which [would] examin[e] the risk that the terms of the quota will undermine the task of undoing past discrimination,"[154] were employed. As applied to the *Lige* situation, this standard would be satisfied to the extent that blacks

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[145] *Id.* at 35, 367 A.2d at 849.

[146] *Id.* at 41, 367 A.2d at 852.

[147] *Id.* at 42, 367 A.2d at 853.

[148] *Id.* at 41–46, 367 A.2d at 852–55.

[149] *Id.* at 45, 367 A.2d at 854–55. This might be the case in minority neighborhood fire and police precincts desiring to utilize local residents as officers and firefighters. Justice Pashman, however, acknowledged that this practice might cause more trouble than it would be worth. *Id.* n.13.

[150] *Id.* at 45–46, 367 A.2d at 855

[151] *Id.* at 52, 367 A.2d at 858.

[152] *Id.* at 25–26, 367 A.2d at 844.

[153] *Id.* at 42, 367 A.2d at 858. *See generally* Ely, *The Constitutionality of Reverse Discrimination*, 41 U. CHI. L. REV. 723 (1974).

[154] 72 N.J. at 58, 367 A.2d at 861; *see* Taxpayers Ass'n of Weymouth Tp. v. Weymouth Tp., 71 N.J. 249, 364 A.2d 1016 (1976).

who were actually discriminated against were hired.[155] The state's interest in effectuating the LAD did not necessitate a broader remedy in this particular case,[156] but Justice Pashman refused to accept the majority's conclusion that no set of circumstances could ever justify the use of a quota.[157]

The court's invalidation, on constitutional grounds, of racial hiring and promotional quotas will preclude their use as a form of prospective class relief to remedy the effects of past discrimination. If prompt achievement of the constitutional mandates is a measure of the Division's effectiveness in accomplishing the purposes of the LAD, then *Lige* is probably counterproductive.

Suits under Title VII and the prosecution of equal protection claims remain alternative remedies which may collaterally result in the imposition of quota relief, when deemed appropriate, under federal authority. Title VII, however, requires that the EEOC refrain from assuming jurisdiction over an individual's discrimination charge until any similar state agency, such as the Division, has had a reasonable opportunity to act.[158] To the extent that the Division affords adequate relief to aggrieved individuals under the LAD, the EEOC may effectively be foreclosed from assuming jurisdiction over the charge. The number of opportunities for imposition of prospective class relief in cases where an EEOC investigation might have revealed a long-standing pattern of racial discrimination necessitating the imposition of a quota, may thereby be reduced.[159]

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[155] 72 N.J. at 61, 367 A.2d at 862.

[156] *Id.* at 62, 367 A.2d at 863.

[157] *Id.*

[158] 42 U.S.C. § 2000e-5(c) (Supp. V 1975). This has been interpreted to allow an individual to first file a charge with the EEOC, which forwards it to the appropriate state agency. After a 60-day period has passed, the EEOC may automatically assert jurisdiction over the same charge where the state agency has not acted on the charge or has not found for the charging party. *See* Love v. Pullman, 404 U.S. 522, 525-26 (1972). *See also* 72 N.J. at 54 n.17, 367 A.2d at 859 (Pashman, J., dissenting).

[159] *See* 42 U.S.C. § 2000e-5(c) (Supp. V 1975).

The possible foreclosure of Title VII relief is most likely in those situations in which the state renders an adequate remedy to the aggrieved person where there has been no finding of discrimination against a class. However, since Title VII charges of discrimination have often been interpreted to allege class discrimination, *see, e.g.*, Jenkins v. United Gas Corp., 400 F.2d 28, 33 (5th Cir. 1968), class relief has often been predicated on the charge of an individual, despite the mootness of the charge. Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 428 (8th Cir. 1970). Although Title VII relief is not necessarily precluded by the rendering of a state remedy, a detrimental effect on Title VII may result. An individual who has received satisfactory relief from a state agency not empowered to impose a quota, may be less likely to pursue further relief under Title VII to obtain a quota to benefit his class.

The issue of the constitutionality of state imposed remedial quotas is currently before the United States Supreme Court in *Regents of the University of California v. Bakke*.[160] Unless the Court reaches the conclusion that such relief is not only constitutionally permissible, but actually mandated by the fourteenth amendment, *Lige* will continue to be controlling in New Jersey. As such, this decision represents the "formula for another generation of delay."[161]

Patterns of racial discrimination have been allowed to meld into the political and economic fabric of society despite the clear prohibition of both federal and state constitutions. While it may be that the elimination of employment discrimination of the character presented in *Lige* does not necessitate the imposition of racial hiring and promotional quotas, the New Jersey supreme court's sweeping prohibition of remedial quota relief under any circumstances seems somewhat strained in light of federal experience. The court could have limited the scope of its decision by subjecting the Division's quota relief to a form of strict scrutiny test. This could have invalidated the *Lige* quota without precluding the imposition of preferential quotas in order to eliminate invidious forms of discrimination. Instead, the *Lige* court has expressed its concern for upholding the letter of the law—failing, in the process, to take account of the underlying objective of article I, paragraph 5 and the spirit of the Law Against Discrimination. Clearly, the authors of those laws were less concerned with protecting the majority from discrimination against itself than they were with eliminating invidious discrimination as it has been practiced against minorities.[162] Turning the product of this concern into a prescription for freezing racially discriminatory patterns does not serve the purpose of the constitutional provision or its implementing legislation.

Dominic Caruso

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[160] 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *cert. granted*, 429 U.S. 1090 (1977). Some clue as to the outcome of *Bakke* may have come from the Supreme Court last term in the context of voter rights. In United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977), the Court stated that racial considerations are permissible in order to correct past discrimination. *Id.* at 162–65. When state action (racial classification in assignment of voters under a reapportionment plan) intends "no racial slur or stigma with respect to any race," *id.* at 165, but merely represents a lawful objective, such actions shall be subjected to a rational basis test rather than the traditionally applied strict scrutiny. *See id.* Given this less stringent standard of review, it would have been easier for the Regents of the University of California to have shown a rational basis for their actions.

[161] 72 N.J. at 62, 367 A.2d at 863.

[162] *See* III STATE OF NEW JERSEY CONSTITUTIONAL CONVENTION OF 1947 (Committee on Rights, Privileges, Amendments and Miscellaneous Provisions and Committee on the Legislative Record) 344–45.