

FEDERAL REMEDIES FOR EMPLOYMENT DISCRIMINATION IN THE CONSTRUCTION INDUSTRY

Within the past several years there have been attempts by the Federal Government to integrate the construction industry's skilled trades,¹ particularly the traditional skilled trade unions operative in the various crafts. This Comment examines and evaluates the present and potential effectiveness of certain federal programs designed to promote equal employment opportunity in the skilled construction trade unions. Part I examines the institutions that currently control employment and training in the construction industry. Part II analyzes how these institutions interact with affirmative action programs established or encouraged by the executive branch, and Part III considers judicial remedies imposed pursuant to Title VII of the Civil Rights Act of 1964.² Reference will be made to circumstances in San Francisco to illustrate the more general discussion.

I

INSTITUTIONS CONTROLLING EMPLOYMENT AND TRAINING IN THE CONSTRUCTION INDUSTRY

Access to well-paid construction jobs is primarily obtained through union membership, because unions largely control the makeup of the contractor's work force. In urban areas, contractors maintain few permanent employees and rely almost exclusively on the union referral system for their labor.³ Under this system the contractor has an exclu-

1. Unions typical of the group examined in this Comment include Electrical Workers Local 6 (wages \$7.98 per hour), Elevator Constructors Local 8 (\$8.15 per hour), Structural Ironworkers Local 377 (\$8.03 per hour), Lathers Local 65 (\$8.23 per hour), Operating Engineers Local 3 (\$5.75 to \$8.80 per hour), Plumbers Local 38 (\$7.52 per hour), Sheet Metal Workers Local 104 (\$7.17 per hour). SAN FRANCISCO BUILDING AND CONSTRUCTION TRADES COUNCIL, WAGE RATES AND STATISTICS, 1971, at 15-23, 37, 44, 46, 49 (1971). Total nationwide employment in these crafts in 1968 was 190,000, 14,500, 75,000, 30,000, 285,000, 330,000, and 50,000, respectively, which was less than 2 percent of the nation's work force. U.S. NEWS AND WORLD REPORT, Sept. 6, 1971, at 68-69.

2. 42 U.S.C. §§ 2000(e)-2000(e)-15 (1970), *as amended*, Pub. L. No. 92-261 (March 23, 1972).

3. Contractors Ass'n v. Secretary of Labor, 442 F.2d 159, 163 (3rd Cir. 1971) (Philadelphia); United States v. Ironworkers Local 86, 315 F. Supp. 1202, 1204, 1219 (W.D. Wash. 1970) (Seattle); Joyce v. McCrane, 320 F. Supp. 1284, 1291 (D.N.J. 1970) (Newark); San Francisco Plan, 36 Fed. Reg. 10868 (§ 60-6.10) (1971); Heat & Frost Insulators Local 53 v. Vogler, 407 F.2d 1047, 1049 (5th Cir. 1969) (New Orleans and Baton Rouge); Dobbins v. IBEW Local 212, 292 F. Supp. 413, 420 (S.D. Ohio 1968).

sive hiring hall contract with unions that typically requires all men hired be referred out of the union hall.⁴ Contractors also depend upon the unions to screen workers for fitness and ability.⁵ Although union membership may not legally be a criterion for determining whether a workman will be referred to a job,⁶ in practice union membership is of prime importance.

Minority membership and participation in the skilled construction unions has been minimal,⁷ although the explanations vary with the

Daniel Del Carlo estimates that less than 10 percent of the dollar volume of construction in San Francisco is nonunion, mostly in repairs or improvement rather than construction from the ground up. Interview with Daniel Del Carlo, Secretary Treasurer, San Francisco Building and Construction Trades Council, in San Francisco, April 22, 1971 [hereinafter cited as Del Carlo interview].

Accord, interview with J.B. Miller, Consultant, California Fair Employment Practices Commission, in San Francisco, March 22, 1971 [hereinafter cited as Miller interview]; interview with Mr. William Dacus, Regional Director, Office of Federal Contract Compliance, in San Francisco, March 24, 1971 [hereinafter cited as Dacus interview]; interview with Mr. George Meany, President, AFL-CIO, by unspecified reporter, February, 1970, on file with the *California Law Review*. Some contractors do maintain a core of highly specialized skilled workers, but this is generally a small portion of the total employment in the industry.

4. See authorities cited in note 3 *supra*.

5. Interview with Mr. Robert Mendes, Recruitment Specialist, Apprenticeship Opportunities Foundation, in San Francisco, April 1, 1971 [hereinafter cited as Mendes interview].

6. Labor-Management Relations Act (Taft-Hartley Act) § 8(b)(1), 29 U.S.C. § 158(b)(1) (1970); *Teamsters Local 357 v. NLRB*, 365 U.S. 667 (1961).

7. In San Francisco minority groups typically are represented in the skilled trade unions by the following percentages: Electricians: 10.5 percent black, 4 percent Spanish surnamed, 1.5 percent Asian; Sheet Metal Workers: 2.4 percent black, 5.7 percent Spanish surnamed, .09 percent Asian. The ethnic makeup of San Francisco has not yet been determined from the 1970 census, but the California Department of Public Health estimates that 30 percent of San Francisco's population is composed of ethnic minorities. Participation of minorities in apprenticeship programs is generally comparable to minority participation in membership. (For a discussion of apprenticeship programs see text accompanying notes 112-121 *infra*). Where there is greater percentage participation of minorities in apprenticeship than in membership, it is usually because of increased numbers of apprentices with Spanish surnames, rarely because of a significant number of blacks. Statement by Clifton R. Jeffers, Asst Regional Administrator for Equal Employment, U.S. Dep't of Housing and Urban Development, Dec. 15-17, 1970 (unpublished testimony at Public Hearings for the Purpose of Implementing Executive Order 11,246 conducted by the U.S. Dep't of Labor, San Francisco) [hereinafter cited as Jeffers statement]. The findings of the Department of Labor hearings on the San Francisco Plan indicates a slightly lower percentage of minority participation (these statistics grouped all minority groups together); Asbestos Workers, 7.4 percent; Sheet Metal Workers, 10.5 percent; Electricians, 8.3 percent; Elevator Constructors, 17.5 percent; Plumbers, 5.2 percent. San Francisco Plan, 36 Fed. Reg. 10868, 10868-69 (§ 60-6.11(b)) (1971).

In order to keep San Francisco in perspective, it should be noted that the E.E.O.C. recently reported that membership in the 3,500 local unions who operate hiring halls or refer persons for employment is 9.2 percent black, 6.7 percent Spanish surnamed, and less than 1 percent Asian. Among the more highly skilled construction trades, such as Elevator Constructors, Iron Workers, Plumbers, Pipe Fitters,

source. A study sponsored by the San Francisco Building and Construction Trades Council maintains that its constituent unions do not practice racial discrimination and that, in 1967, 20 percent of the members of its constituent unions were black and 18 percent had Spanish surnames.⁸ This study further maintains that, although minority participation in the more highly skilled trades was proportionately lower than in the lower paid semiskilled trades,⁹ the real barriers to minority entrance were lack of education and high unemployment in the industry.¹⁰ On the other hand, those who accuse the skilled unions of discrimination claim that these unions view themselves as closed to all outsiders,¹¹ which makes union membership difficult for outsiders to obtain. In fact, an examination of the two methods of acquiring union membership does reveal inherent obstacles to admission of minority craftsmen. Consequently, minority workmen with journeymen skills are frequently forced to operate as independent contractors, seek jobs through a nonunion, informal referral system, or give up working at their trade.¹²

Boilermakers, Electricians, and Sheet Metal Workers, membership was 1.6 percent Black, 3.2 percent Spanish surnamed, 0.7 percent Asian, and 0.7 percent Indian. BNA CONSTRUCTION LABOR REPORT, Feb. 10, 1971, at A-5 (Report of the Equal Employment Opportunity Commission). These figures indicate that San Francisco's skilled trade unions have a greater proportion of minority members than do such unions nationally.

8. ALESSANDRO BACCARI & ASSOCIATES, A STUDY FOR THE SAN FRANCISCO BUILDING AND CONSTRUCTION TRADES COUNCIL 7 (1967) [hereinafter cited as TRADES COUNCIL STUDY] on file with the *California Law Review*.

9. Computations from the TRADES COUNCIL STUDY indicated that, in 1967, 20 percent of the members of unions comprising the San Francisco Building and Construction Trades Council were black and 18 percent had Spanish surnames. Yet of almost 3,700 Black union members, at least 3,200 were either Laborers or Cement Masons, whose 1966 average annual earnings were \$2,512 and \$5,319 respectively. Average annual earnings for 1966 for almost every skilled trade exceeded \$6,000, and some went as high as \$11,000. TRADES COUNCIL STUDY 14-15 (ethnic composition of unions), 8 (total Council membership), 11 (total membership of the Cement Masons and Laborers), 28-29 (average annual incomes).

10. TRADES COUNCIL STUDY 39.

11. Interview with Mr. Oscar Williams, Counsel for the N.A.A.C.P. Legal Defense Fund, in San Francisco, April 17, 1971 [hereinafter cited as Williams interview].

12. Interview with Mr. Joseph Debro, Executive Director, National Association of Minority Contractors, in San Francisco, April 15, 1971 [hereinafter cited as Debro interview]; Dacus interview. Several local authorities in San Francisco claimed that there are significant numbers of minority journeymen, skilled in the higher paying trades, who are operating as independent contractors because they have found it impossible to get job referrals through local unions. Dacus interview; Debro interview. Union representatives claim that there are very few qualified minority journeymen. For example, Mr. Donald Slaiman, Director of the AFL-CIO Civil Rights Department, maintains that there are very few minority journeymen in San Francisco operating outside the traditional trade unions. Speech by Donald Slaiman, Director of the Civil Rights Department, AFL-CIO, to the Institute of Industrial Democracy, at Berkeley, August 13, 1971. However, Mr. Rayford Riley says that his organization, after

Union membership is usually obtained either by direct admission or by completion of a formal apprenticeship program.¹³ Direct admission, through which an individual is given job referrals without formally entering an apprenticeship program and learns his trade by working on the job, is the most common method.¹⁴ How these individuals get their job placements is subject to many variables, but the most common practice appears to be for those who are related to present members or are friends of members to get work through an informal referral system,¹⁵ or to learn the trade while working on nonunion projects.¹⁶

The second major means of entering the union is completion of a formal apprenticeship program. These are 3 to 5 year programs of on the job and classroom training, during which the apprentice receives a percentage of journeyman pay for the hours spent on the job.¹⁷ Admission standards for these programs are usually established by a joint labor-management committee that, in practice, has always been run by the unions.¹⁸ Only 15 to 30 percent of the skilled crafts journeymen in San Francisco come out of formal apprenticeships, although most minority journeymen have come out of these programs.¹⁹ Both

some initial difficulties, had no trouble finding minority workmen of journeymen or near-journeymen skills. Telephone interview with Mr. Rayford Riley, Program Coordinator, Bayview-Hunters Point Affirmative Action Program, November 18, 1971. See text accompanying notes 102-111 *infra*.

13. Mendes interview. Only a small proportion of the new membership are transferees from other locals.

14. In one study, 65 percent of the journeymen surveyed had learned their trade outside of traditional apprenticeship programs. When broken down by craft, over half of the journeymen in three of the four crafts surveyed had learned their trade through non-apprenticeship channels. The electricians were the exception to this general pattern. The major sources of non-apprenticeship training were nonunion residential construction, training by friends and relatives, and working in conjunction with journeymen in other trades. Foster, *Nonapprenticeship Sources of Training in Construction*, MONTHLY LABOR REVIEW, Feb., 1970, at 21-26. All of these means of entry are available only to those having some knowledge of employment opportunities, which is usually acquired from friends or relatives employed in the trade. Therefore, since those employed in a trade are of the same ethnic background as their friends and relatives, the ethnic makeup of the trade tends to be preserved.

15. For example, almost 38 percent of the journeymen surveyed by Foster were the sons of former construction workers. *Id.* at 25-26.

16. *Id.* at 22.

17. Interview with Mr. Frank Lee, Recruitment Specialist, Apprenticeship Opportunities Foundation, in San Francisco, April 1, 1971 [hereinafter cited as Lee interview]; Mendes interview. See also DEP'T OF LABOR, *ADMISSION AND APPRENTICESHIP IN THE BUILDING TRADES UNIONS* 50-55 (1971).

18. Lee interview; Mendes interview; Miller interview.

19. Lee interview; Mendes interview; Miller interview; Debro interview; see generally F. MARSHALL & V. BRIGGS, *THE NEGRO AND APPRENTICESHIP* (1967). The following figures indicate the percentage of minority apprentices in the programs for trades in California: asbestos workers, 10 percent; carpenters, 14.9 percent; electricians, 11.9 percent; ironworkers, 14.8 percent; operating engineers, 14.3 percent; plumbers, 9.4 percent; sheet metal workers, 17.8 percent. DIVISION OF LABOR STATISTICS AND

the unions and those who accuse them of discrimination agree that there is a reluctance on the part of minority youths to apply for apprenticeship. The unions claim that those minority youths who could qualify choose to go to college or to take a white-collar job.²⁰ Those who accuse the union of discrimination maintain that minority youths fail to apply because the unions are symbols of institutional racism and, as such, are considered to be effectively closed to them.²¹

There are economic and political reasons why restrictive referral, membership, and apprenticeship policies are in the union's self-interest, irrespective of any racial bias. Policy decisions are made by elected officials whose tenure depends heavily on their sensitivity to the wishes of their constituency.²² Consequently the entire range of union decisions will be a function of the membership's attitudes and beliefs on any given subject. As the members expect that their dues-paying status entitles them to preferred positions in obtaining job referrals,²³ and the referral systems are not subject to effective scrutiny on a daily basis, the potential for the leadership illegally to prefer union members is great.²⁴

Economic conditions and employment patterns in the construction industry also influence the leadership's political decisions regarding membership and referral policies. Technological advances in construction have dramatically reduced the amount of on-site man-hours necessary to complete a project. In 1967 a building project could be completed in half the time and with half the workmen that a similar

RESEARCH, DIVISION OF APPRENTICESHIP STANDARDS, CALIFORNIA DEP'T OF INDUSTRIAL RELATIONS SURVEY OF CALIFORNIA APPRENTICES 1969 at 60-62 (1969).

20. TRADES COUNCIL STUDY 40-41.

21. Williams interview.

22. The process of determining the union's wage demands shows the effect of internal union politics on the determination of economic policy. For example, union leadership feels politically pressured to insist on higher wages even though it may mean more long-term unemployment and greater incentive for developing laborsaving devices. The pressure comes from individual members who feel that because some unemployment is inevitable they want to get high wages when they do work to cover their period of unemployment. Del Carlo interview; *see generally* N. CHAMBERLAIN, COLLECTIVE BARGAINING 239-44 (1951).

23. Mendes interview; Miller interview.

24. Miller interview; Mendes interview. Although Mr. Del Carlo stated in his interview that hiring hall procedures were in accord with the Labor-Management Relation Acts, an interview with Mr. Mendes indicated that referral systems frequently violate the Act. Specifically, Mr. Mendes indicated that nonunion members could not sign the out-of-work book from which referrals were made. This violates § 8(b)(2) of the Labor-Management Relations Act, 29 U.S.C. § 158(b)(2) (1970). *NLRB v. IBEW, Local 269*, 357 F.2d 51 (3rd Cir. 1966). *See generally* C. MORRIS, THE DEVELOPING LABOR LAW 133-34 (1971). For an example of such practices in stipulated facts by union leaders, *see United States v. Ironworkers Local 86*, 315 F. Supp. 1202 (W.D. Wash. 1970).

project would have required ten years earlier.²⁵ From 1950 to 1971, contract construction workers fell from 5.2 percent of the national labor force to 4.5 percent²⁶ despite a 40 percent increase in the value of construction completed annually.²⁷ When coupled with the marked fluctuations in the volume of new construction that accompanies changes in the business cycle,²⁸ these advances result in recurring major unemployment in the industry.²⁹

When unemployment is high among the rank and file, the leadership may attempt to minimize dissidence by restricting the number of members, so that a larger percentage will be currently employed. The leadership may also restrict membership even when work is plentiful, thus preserving more overtime work for existing members. This policy of restricting union membership also facilitates union control of the labor market, thereby allowing unions more effectively to enforce their demands for higher wages.³⁰ For these economic and political reasons, unions are often reluctant to open their membership to anyone, regardless of race.

Given the union's political nature and its control of the labor market, the crucial issue in dealing with employment discrimination in the construction industry is the reallocation of membership opportunities.³¹ Increased minority participation may be realized either by

25. TRADES COUNCIL STUDY at 43-44.

26. BUREAU OF CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1971, at 217 (1971).

27. From 1950 to 1970 the value of new construction grew from \$43,576,000 to \$60,170,000 as measured by prices in 1957 and 1959. *Id.* at 658.

28. BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1971, at 306, 658 (1971).

29. National unemployment figures in the construction industry are as follows: 1966, 5.3 percent; 1967, 3.4 percent [EMPLOYMENT AND EARNINGS, Oct. 1967, at 23]; 1968, 3.5 percent; 1969, 4.7 percent [EMPLOYMENT AND EARNINGS, Oct. 1969, at 24]; 1970, 9.0 percent; 1971, 7.0 percent [EMPLOYMENT AND EARNINGS, Oct. 1971, at 30] (published by Bureau of Labor Statistics, Dep't of Labor).

Yet, despite the industry's sensitivity to the business cycle and technological advances, the Labor Department estimates the number of new workmen needed in San Francisco by 1975 at 33,500. BNA CONSTRUCTION LABOR REPORT, Feb. 24, 1971 at A-2. The Labor Department has predicted the following number of annual average job openings nationally in the 1970's for the trades indicated: carpenters, 39,300; electricians, 10,500; elevator builders, 500; lathers, 1,250; operating engineers, 14,800; plumbers and pipe fitters, 19,500; sheet-metal workers, 2,500; machine movers, 3,900. U.S. NEWS AND WORLD REPORT, Sept. 6, 1971 at 69.

30. According to preliminary figures of the Labor Department, during 1970 the average first year wage increase in the construction industry was 18.3 percent. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, *Preliminary Report on Annual Rate of Increases in Wages and Wages and Benefits in Construction Settlements Negotiated in 1970*, printed in BNA CONSTRUCTION LABOR REPORT, Feb. 10, 1971, at B-1, B-2.

31. Although free access to job referrals would ostensibly lead to integration of the workforce, most craftsmen who are regularly given job referrals are offered membership; therefore, the distinction between the two rights will generally not be meaningful.

expanding the number of journeymen admitted to the unions or by reallocating membership opportunities from whites to minorities. Were the union to expand membership, it would subject the members to greater unemployment during an economic downturn and lower wages generally. If existing employment opportunities are reallocated, current members would no longer be free to procure jobs for their relatives and friends.³² Neither of these alternatives will be popular with the membership, and its opposition will likely be reflected in the attitudes of the leadership. The remainder of this Comment examines the various means by which the government has attempted to encourage or coerce the unions to adopt procedures designed to integrate their memberships.

II

EXECUTIVE REMEDIES

The executive branch has undertaken or encouraged three closely allied programs to promote integration of the construction industry's skilled trades: area wide imposed plans promulgated pursuant to Executive Order 11,246;³³ private voluntary plans; and apprentice training programs.³⁴

A. Imposed Plans

Executive Order 11,246 requires all government contractors to undertake affirmative action to increase minority employment.³⁵ En-

32. The San Francisco Building and Construction Trades Council maintains that there is nothing improper in having the relatives of those already in a craft undertake a similar career. TRADES COUNCIL STUDY 40. But this is not an argument that relatives shall be discriminatorily preferred. Explanations for why relatives of current members constitute a large proportion of new members varies according to the source. See text accompanying notes 20-21 *supra*.

33. 41 C.F.R. § 60-1.3(g)-(m) (1971).

34. These programs are all funded by the Labor Department.

35. Executive Order 11,246 states that all employers operating under either a federal service or supply contract or a federally assisted construction contract must refrain from employment discrimination. Exec. Order No. 11,246 § 202, 3 C.F.R. 339, 340 (1964-65 Comp.); 41 C.F.R. 60-1.3(g)-(m) (1971). This obligation requires the bidder on such federal contracts to submit an acceptable plan for guaranteeing substantial minority employment as a condition to being awarded a contract. Exec. Order No. 11,246 § 202(1), 3 C.F.R. 339, 340 (1964-65 Comp.); 41 C.F.R. § 60-2.1 (1971). Such affirmative action plans usually include a set of goals and timetables for the utilization of minority employees. 41 C.F.R. § 60-2.1, 60-2.2 (1971). The contractor is, however, not strictly liable for compliance with his affirmative action commitment, as he is only required to make a "good faith effort." 41 C.F.R. § 60-2.13 (1971). If he fails to make such an effort he will be subject to sanctions, including cancellation or suspension of any contract, debarment from participation in future government contracts, publication of his name, and recommendations to appropriate agencies that actions, such as the filing of a lawsuit pursuant to the Civil Rights Act of 1964, be taken. Exec. Order No. 11,246, § 209, 3 C.F.R. 339, 342-44 (1964-65

forcement of this order is particularly difficult in the construction industry, however, since the turnover of personnel on any given job site is substantial,³⁶ and the union rather than the employer largely determines the ethnic composition of the employers work force.³⁷ Consequently, the government has adopted a specialized concept of affirmative action in the form of either an imposed plan, such as the Philadelphia Plan,³⁸ or a hometown solution, which is a voluntary plan often designed to avoid an imposed plan.

The Philadelphia Plan was implemented by the Labor Department in June 1969.³⁹ It requires that all bidders on federal or federally assisted construction contracts of \$500,000 or more submit, as part of their bid, an affirmative action program whose goals and timetables for minority participation are at least equal to Labor Department standards.⁴⁰ If a contractor subcontracts part of his work, the subcontractor must assume a similar commitment.⁴¹ If a contractor fails to meet the minority employment goals of his contract, he is sub-

Comp.). Administration of the Executive Order is undertaken primarily by that agency contracting for or funding the project. *Id.* This is done by individual agency compliance sections. To coordinate and oversee overall compliance, the Secretary of Labor, pursuant to the order, established the Office of Federal Contract Compliance [hereinafter referred to as OFCC]. UNITED STATES COMMISSION ON CIVIL RIGHTS, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT 46 (1970) [hereinafter cited as FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT].

36. Miller interview. Each contractor or subcontractor hires the labor he needs through the hiring hall and then lays the men off when his phase of the project is completed. *Id.*

37. See text accompanying note 3 *supra*.

38. FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT 53.

39. In the original Philadelphia Plan, contracting agencies and the OFCC attempted to obtain from bidding contractors preaward commitments to a detailed affirmative action plan to increase minority employment in eight of the skilled building trades. In 1969 the Labor Department abandoned this flexible plan and imposed a new one, explaining that the skilled craft trade unions effectively controlled the labor market and that they were engaged in such discriminatory practices as to make equal employment opportunity extremely difficult. FEDERAL CIVIL RIGHTS ENFORCEMENT 63-64.

As of March 1, 1971, the new plan was substantially altered. Office of Assistant Secretary, Dep't of Labor, Memorandum on Order Amending Philadelphia Plan, June 27, 1969, reprinted in BNA FAIR EMPLOYMENT PRACTICES MANUAL § 401:251 (1971). The new plan provides for a percentage of minority employment, in each of the affected trades, that increases annually over the life of the plan. The Philadelphia Plan "timetable" called for an increase in minority employment on federal projects from 1 percent of the work subject to the plan to approximately 22 percent over a 4-year period. *Id.* at § 401:259-60. The plan provides that the Labor Department take the following considerations into account in establishing goals and timetables: 1) current extent of minority group participation in the trade; 2) availability of minority group persons for employment in such trade; 3) need for training programs in the area or the need to assure demand for those in or from existing programs; and 4) impact of the program upon the existing labor force. *Id.* at § 401:251-54.

40. BNA FAIR EMPLOYMENT PRACTICES MANUAL § 401:252 (1971).

41. 41 C.F.R. § 60-1.4(c) (1971).

ject to the sanctions set forth in Executive Order 11,246, unless he can demonstrate that he made a good faith effort to meet his commitment.⁴²

1. *Criticisms of the Imposed Plans*

Although the Philadelphia Plan appears to be a well-designed scheme for integrating the construction industry, it is subject to criticism on three fronts. The first problem is its narrow application. For example, construction of federally owned buildings amounted to only 4 percent of the total national construction in 1970.⁴³ The federal government does participate in a large dollar volume of construction to which it makes grants-in-aid or renders other such assistance that would make the project subject to the Executive order,⁴⁴ but even with these federally assisted projects taken into account, the federal government's direct participation in the industry is minimal.⁴⁵

The second criticism of the Philadelphia Plan is that it is directed at the contractor, whereas in fact the union controls the labor supply.⁴⁶ Since contractors and subcontractors do not maintain a full-time work force, they are usually dependent on unions for their skilled labor.⁴⁷ This is especially true in cities like San Francisco where the unions so effectively control the labor market.⁴⁸ Because contractors are typically dependent on progress payments to finance their continued operations,⁴⁹ any major work stoppage can seriously endanger a company's financial well-being.⁵⁰ Consequently, even those contractors who are legitimately dedicated to equal employment opportunity have a strong incentive not to antagonize the unions over minority jobs.⁵¹ In

42. See note 35 *supra*.

43. See BUREAU OF CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1971, at 657 (1971).

44. Total grants amounted to approximately 9 percent of all construction expenditures (approximately \$8.5 billion). See OFFICE OF MANAGEMENT AND BUDGET, SPECIAL ANALYSIS, BUDGET OF THE UNITED STATES 1972, at 254 (1971).

45. Grants for urban renewal amounted to just over 1 percent of gross construction expenditures in 1970. See BUREAU OF CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1971, at 657, 681 (1971). This appears to be the primary source of federal grants for the construction of buildings in urban areas.

46. See text accompanying notes 3-6 *supra*.

47. See text accompanying notes 3-6 *supra*.

48. See note 3 *supra*.

49. Progress payments are periodically disbursed to the contractor to compensate him for the work completed since the preceding payment. Because of the substantial investment in materials and labor necessary to complete a major product, such payments are necessary for the contractor to finance his continued operations. Interview with Mr. Kenneth Harrington, President, Shamrock Construction Co., in Los Angeles, May 1, 1971 [hereinafter cited as Harrington interview]; Debro interview.

50. Debro interview; Harrington interview.

51. Interview with Mr. Robert Tiernan, Counsel, Industrial Relations, Kaiser

addition, there are other contractors who are not wholly dedicated to the concept of minority employment opportunities, so it is unlikely that pressure on the contractor will successfully secure the goal of equal employment opportunity.

Finally, even if the contractor were the most efficient focus for pressure, enforcement of the Plan has been too sluggish to make such pressure effective.⁵² As of September 1970, only seven companies have been subject to contract debarment proceedings under the Executive Order. None of these companies were in construction, and all but two were settled without imposition of sanctions.⁵³ Only seven notices of intent to impose sanctions were sent out in 1970, and only four low bidders on government contracts have been passed over for failing to present adequate affirmative action plans.⁵⁴ However, 124 contractors subject to the Executive order have been prodded to agree to comply by orders to show cause why they should not face debarment.⁵⁵

Enforcement efforts have also been hampered by a lack of personnel to police the job sites. To illustrate, the Western Regional Office of Equal Employment for the United States Department of Housing and Urban Development has only two compliance officers, who are responsible for overseeing compliance on projects totalling \$300,000,000 to \$500,000,00 in California, Arizona, Nevada, and Hawaii.⁵⁶ These defects in enforcement procedures lead contractors to believe that the government cannot demand compliance with the contractors' equal employment commitments. Therefore, contractors do not run the risk of antagonizing the unions, and the whole scheme collapses.⁵⁷

A striking example of enforcement failure is the Department of Housing and Urban Development's attempt to enforce the affirmative action commitments made in connection with the construction of the San Francisco Bay Area Rapid Transit (BART). According to Mr. Clifton Jeffers, Assistant Regional Administrator for Equal Employment Opportunity, the attempt to procure minority workmen for the BART

Industries Corporation, in Oakland, July 1, 1971 [hereinafter cited as Tiernan interview]; Mendes interview; Debro interview.

52. FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT 53.

53. *Id.* at 68-69.

54. *Id.* at 68 n. 341.

55. Testimony of Laurence Silberman, Under Secretary of Labor, *Hearings on H.R. 1746 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 92d Cong., 1st Sess. 75-76 (1971).

56. Interview with Andrew Corcoran, Employment Opportunity Compliance Officer, Dep't of Housing and Urban Development, in San Francisco, April 19, 1971.

57. Harrington interview, *supra* note 49; Tiernan interview *supra* note 51. See also FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT 53.

project was a total failure.⁵⁸ Reasons cited by Jeffers were the intransigent attitude of some labor unions, which remained totally closed to minorities, and the failure of many contractors to seek minority craftsmen from nonunion sources. Since minorities constituted less than 5 percent of the membership of those San Francisco unions referring workmen to the project,⁵⁹ almost one-third of the project's San Francisco contractors did not meet their affirmative action commitment. Nevertheless, no sanctions were imposed.⁶⁰

58. Jeffers statement, *supra* note 7. Although the BART project was not under the auspices of a Labor Department area-wide plan, it was subject to similar local affirmative action requirements. Jeffers statement; FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT 53-54.

59. Jeffers statement.

60. *Id.* Despite the validity of these criticisms, progress under the two well-established imposed plans, the Washington Plan and the Philadelphia Plan, appears to have met reasonable expectations. The Washington Plan, which is identical in design to the Philadelphia Plan, was running within its projected goals as of June 1971. Minority workmen had put in 16 percent of the man-hours logged under the plan as of June 1971. According to John Wilkes, Director of OFCC, of the nine unions whose work is generally subject to the plan, three have exceeded and four have met the projected goals for minority participation. BNA CONSTRUCTION LABOR REPORT (June 16, 1971) at A-4. However, special conditions in Washington make these figures somewhat misleading. Washington's population is over 60% black. BUREAU OF CENSUS, DEP'T OF COMMERCE, GENERAL POPULATION CHARACTERISTICS, DISTRICT OF COLUMBIA, Table 17 (1971), and government outlays for construction for fiscal 1971 accounted for \$160,611,000 [OFFICE AND MANAGEMENT AND BUDGET, THE BUDGET OF THE UNITED STATES, DISTRICT OF COLUMBIA, FISCAL 1972 at 23 (1971)] while total construction expenditures were \$313,000,000 for the calendar year 1970 [BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1971, 660 (1971)], and \$701,652,000 for the first 11 months of calendar year 1971 [Letter from John Otelsberg, Manager, Statistical Design and Methods, F.W. Dodge Division, McGraw-Hill Information Systems Co., to the author, Jan. 10, 1972, on file with the *California Law Review*].

Progress under the Philadelphia Plan has also met projected goals. According to Secretary of Labor Hodgson, minority workers have logged 14.2 percent of the man-hours put in by the six crafts subject to the plan. 102 minority workers were among the 703 journeymen whose work was covered by the plan. BNA CONSTRUCTION LABOR REPORT (Oct. 20, 1971) at A-5. Yet the Philadelphia Plan has generally failed to create any new jobs. Rather, a pattern of "checkerboard" integration has evolved whereby minority workmen are merely moved from private construction, on which there is no commitment to hire minorities, to public jobs on which there is such a commitment. Speech by Donald Slaiman, Director of Civil Rights Department, AFL-CIO, to the Institute of Industrial Democracy, in Berkeley, August 13, 1971. See generally *Hearings on H.R. 1746 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 92d Cong., 1st Sess. 196-97, 256-258 (1971). An example of such a pattern was evident at one project in Philadelphia where a contractor was required to comply with a 5 percent minority hiring quota for ironworkers. In this instance, two to four minority workmen were required and were supplied from among the 16 black members of the union who were already members before imposition of the plan. T. BROOKS, *BLACK BUILDERS: A JOB PROGRAM THAT WORKS*, 53-54 (1970). The total membership in the union totalled 850 at the time. Dep't of Labor, *Guidelines on Order Amending the Philadelphia Plan*, reprinted in BNA FAIR EMPLOYMENT PRACTICES MANUAL § 401:256 (1971).

2. *Strengthening the Imposed Plan*

Two of these defects can be remedied within the existing framework of the plans. For example, the narrow reach of the plan could be expanded. The first step in this direction was taken when the Assistant Secretary of Labor, Arthur Fletcher, announced that as of March 1, 1971, the Washington⁶¹ and Philadelphia Plans would be broadened to require all contractors working on federal projects in the plans' jurisdictions to undertake comparable affirmative action commitments on their local private projects.⁶² This will add to the potential impact of the plans by substantially increasing the dollar volume of construction subject to affirmative action. This change is part of a nationwide program proposed by John Wilkes, Director of the Office of Federal Contract Compliance (OFCC), to subject all federal contractors to affirmative action requirements on all other construction within the geographic confines of the local plan.⁶³ Such a program would focus additional pressure on the large prime contractors who can better deal with the unions. These contractors typically are better capitalized than their smaller counterparts and are more likely to have projects outside the jurisdiction of any one imposed plan. Therefore, they can better withstand labor problems arising out of their affirmative action efforts. Other possible alternatives would include requiring specified levels of minority participation in the construction of all housing to be sold pursuant to Federal Housing Authority and Veterans Administration insured loans,⁶⁴ or by pressuring state and local governments to implement comparable plans.⁶⁵ Such changes would tend to lessen the opportunity for unions and contractors to meet their equal employment commitments through checkerboard integration.⁶⁶

Whether the increased demand for minority workmen accompanying such broadening of the plan will significantly increase minority participation in the skilled trades will depend on whether the unions can

61. See note 51 *supra*.

62. BNA CONSTRUCTION LABOR REPORT (Feb. 24, 1971) at A-3.

63. Dacus interview. The first imposed plans to be made subject to these new requirements were the Philadelphia and Washington Plans. U.S. DEP'T OF LABOR News Release No. 71-108, Feb. 19, 1971.

64. Federal Housing Authority and Veteran Administration loans for residential housing totalled \$11,909,000 in 1970. BUREAU OF CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1971, at 679 (1971).

65. Total public construction amounted to \$28,187,000 or 30.9 percent of total construction in 1970. *Id.* at 657.

66. See note 60 *supra* and accompanying text. Checkerboard integration occurs when minority journeymen are moved from private to public construction projects in order to comply with minority utilization requirements on public construction. This frustrates the government's attempt to increase the net demand for minority workmen because public projects become integrated at the cost of leaving private projects with a largely white work force.

continue to provide sufficient minority workmen from their own ranks, the union's willingness to work with and upgrade minority workmen, the relative bargaining strengths of the union and contractors in the area, and how imperative the contractor feels his compliance is. Since unions are usually in the superior bargaining position, the most important and most variable factor will be the union's willingness to cooperate, and this will be largely a function of internal union politics.

Although any broadening of the plan's coverage would yield some progress, there will be genuine advances in integration only when the plan is implemented effectively. To accomplish this contractors must be convinced that the government can and will effectively enforce the Executive Order. Such enforcement of the contractor's obligation has been facilitated by the expansion of the compliance staffs of the government supervisory agencies.⁶⁷ However, until the government proves that it will more readily impose the sanctions provided by the executive order, contractors will continue to feel free to make only halfhearted efforts at compliance.⁶⁸

One way the government could increase compliance would be to organize and coordinate contractor's compliance efforts. Contractors have been left almost entirely to their own means to get the minority journeymen needed to meet their affirmative action commitments. This leaves most contractors dependent on the unions for minority workmen. To better balance the relative power of the contractors and unions, the OFCC should aid in organizing federal contractors into local associations that would represent their constituents in dealings with the unions in much the same manner as local contractor's associations. Such a unified front should, in conjunction with the expanded jurisdiction of the imposed plans, lead to more broadly based pressure on the unions to supply minority journeymen from their own ranks.

Another function OFCC might undertake would be to facilitate direct communication between federal contractors and minority journeymen. For example, the Labor Department is currently funding programs to train a pool of minority group journeymen outside the traditional union channels.⁶⁹ The institutionalization and consolidation of the informal nonunion referral systems⁷⁰ would give those trained in these programs direct access to jobs on federal construction projects.

Direct government action in the training and placing of minority journeymen outside traditional union channels raises one of the most

67. See FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT 58, 70, 78-79.

68. Interview with Mr. William Dacus, Regional Director, OFCC in San Francisco, Jan. 7, 1972.

69. See note 121 *infra*.

70. *Id.*

basic issues of the federal effort to achieve equal employment in the construction industry: whether the long run goal of the government in this area should be to establish a system of dual unionism or whether it should be to integrate the traditional craft unions. Any acts directed at unifying contractors and developing alternative labor sources might be characterized as antiunion. However, given the present limited scope of the government's efforts in this area and the Labor Department's avowed preference for voluntary plans,⁷¹ any such threat would be minimal. Furthermore, the government's unification efforts would probably be as unsuccessful as the contractors themselves have been in organizing themselves for collective bargaining.⁷² The most substantial benefit that could come out of these efforts would be to alarm the unions sufficiently that they would undertake the kind of meaningful action that would preempt the need for further government efforts in the area.

Even if the foregoing modifications were made in the imposed plans, their probability of success is uncertain. While effective enforcement of the plans would force the contractors to confront the unions on the issue of equal employment opportunity, and expanded jurisdiction of the plans would bring pressure from more contractors than otherwise, contractors may still be unable effectively to coerce unwilling unions to cooperate in equal employment opportunity programs. If contractors cannot effectively unite themselves for purposes of bargaining with the unions for wages, it is unlikely that they would do so over minority job opportunities. So long as the contractors remain fragmented and the unions united, the imposed plan cannot force union cooperation in the integration of their membership. Union cooperation in affirmative action plans may be enforced judicially, however, pursuant to Title VII of the 1964 Civil Rights Act.⁷³

Although this tactic has been little used in the past,⁷⁴ the recent decision of *United States v. Carpenters Local 169*⁷⁵ may lead to its increased use. In that case the federal government withheld federal

71. See note 86 *infra*.

72. Recognition of this situation is implicit in the formation of the Contractors Mutual Association to provide service support in labor negotiations throughout the nation. In commenting on the new association, President Nixon observed that the causes of the wage and price spiral in the construction industry were closely related to the highly fragmented organization and bargaining in the industry. B.N.A. CONSTRUCTION LABOR REPORT at A-11-12 (May 1971).

73. See text accompanying notes 74-83 *infra*.

74. *United States v. Carpenters Local 169*, — F.2d —, 4 F.E.P. Cases 85 (7th Cir. 1972) and *Joyce v. McCrane*, 320 F. Supp. 1284 (D.N.J. 1970) discussed in note 78 *infra* are the only reported cases on attempts to enforce the commitments undertaken pursuant to the executive order directly against a union.

75. — F.2d —, 4 F.E.P. Cases 85 (7th Cir. 1972).

funds for highway construction in two southern Illinois counties because of high costs and underutilization of minorities on the jobs. The Ogilvie Plan for increasing minority participation was then executed by representatives of the contractors, the black community, state and federal governments and some of the unions involved. The defendants, however, refused to sign or to cooperate with the plan.⁷⁶ The union refused to refer black workers for jobs covered by the plan, fined its members who worked in furtherance of the plan, and shut down jobs of contractors who hired black carpenters outside of the union referral system.⁷⁷ The Seventh Circuit found that the defendant's interference with the Ogilvie Plan was part of a continuing pattern of racial discrimination in violation of Title VII of the Civil Rights Act of 1964 and ordered the district court to formulate appropriate remedies. It further held that the union's obstruction of the Ogilvie Plan was a tortious interference with the contractual relations of others and ordered the district court to enjoin any further interference.⁷⁸

76. *Id.* at 89-90, 92.

77. *Id.* at 89.

78. *Id.* at 89-90, 92. In *Joyce v. McCrane*, 320 F. Supp. 1284 (D.N.J. 1970), several unions challenged an affirmative action plan promulgated under the executive order. The Labor Department, through the Office of Federal Contract Compliance, had held hearings on employment practices in the Newark area and concluded, on the basis of statistical data and direct testimony, that certain unions were systematically discriminating against minorities. Based on these findings, contractors on a government financed project were required to undertake affirmative action to recruit minority workmen. The plan also contained a membership admissions clause requiring that all minority workmen hired for the project were to be offered union membership if they met the qualifications set forth in the union by-laws. *Id.* at 1287-88.

The unions challenged the plan on several bases. They charged that certain of the data presented at the hearings were incorrect, and therefore the administrative determination that they were engaged in discrimination was mistaken. They also maintained that the membership admissions clause violated their right to choose their members, as guaranteed them under the Labor Management Relations Act. The court said that it would not undertake a reexamination of the evidence presented at the hearings so long as the conclusions reached by the OFCC had a factually reasonable basis. Based on its acceptance of the Labor Department's finding of discrimination, the court upheld the membership admissions clause on the basis that such a remedy was consistent with the antidiscrimination policies of the Civil Rights Act of 1964 and the Labor Management Relations Act. *Id.* at 1289-92.

The *Joyce* court's forced admission to membership of qualified minority journeymen is an effective remedy that has frequently been used in Title VII cases. *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir. 1971); *Heat and Frost Insulators Local 53 v. Vogler*, 407 F.2d 1047 (5th Cir. 1969). However, the court in *Joyce* jumped from the policies of the Labor Management Relations Act and Title VII to the enforcement of a provision in a contract to which the unions were evidently not signatories. If courts were to pay deference to an administrative determination of racial discrimination by unions, it would effectively give the Labor Department and other such enforcement agencies powers under the Executive Order that reach beyond those parties with whom the government has direct contractual relations.

The Executive Order is designed to pressure those who have government contracts or subcontracts to undertake affirmative action to increase minority employment

Few unions are likely to undertake the type of active resistance to minority employment programs evidenced by the union in *Local 169*. Consequently, prosecution of a suit on the basis of a tortious interference with contractual relations will not always be available. However, a suit under Title VII could be a distinct possibility if a union refused to cooperate with such a program. As indicated hereafter,⁷⁹ the incorporation of a minority recruitment program in the formulation of a judicial remedy for discrimination increases the likelihood of success of both remedial programs.

Enforcement of affirmative action plans by the use of Title VII suits increases the potential for meaningful progress under such programs. Because statistical data establishing a prima facie case against a union will shift the burden of proving nondiscrimination⁸⁰ to the defendant, unions subject to imposed plans would have the burden of exonerating their employment practices.⁸¹ Active resistance to implementation of an affirmative action plan would be further evidence of a pattern of discriminatory practices.⁸² The Seventh Circuit found that the existence of discriminatory administration of a subjective, nepotistic referral system, when coupled with evidence of active resistance to a plan, was sufficient to find a violation of Title VII.⁸³ If this type of

opportunities. See note 33 *supra*. Although the result reached in *Joyce* may be laudable, it seems clearly beyond the intended scope of the Executive Order. The court's reasoning in *Joyce* would amount to a grant of power to the Labor Department, or any other agency charged with enforcing the order, of the right to formulate judicially enforceable orders merely by requiring inclusion of such remedies in the construction contracts pursuant to an administrative determination of the advisability of such action.

The propriety of such a judicial deference to administrative findings is beyond the scope of this Comment. However, in view of Congress's apparent rejection of the use of judicial enforcement of administrative orders issued by the Equal Employment Opportunity Commission, direct judicial action to substantially the same end appears to violate congressional intent. See S.2515, 92d Cong., 1st Sess. § 4 (1971) (proposed amendment to 42 U.S.C. § 2000(e)(5) (1970)).

79. See text following note 156 *infra*.

80. *United States v. Ironworkers Local 86*, 443 F.2d 544, 551 (9th Cir. 1971); *United States v. Carpenters Local 169*, — F.2d —, 4 F.E.P. Cases 85, 87 (7th Cir. 1972).

81. Those unions subject to an imposed plan have a disproportionately small number of minority members compared with the population generally. San Francisco Plan, 36 Fed. Reg. 10868, 10868-69 (§ 60-60.611(b)) (1971); Dep't of Labor, *Guidelines on Order Amending the Philadelphia Plan*, reprinted in BNA FAIR EMPLOYMENT PRACTICES MANUAL § 401:256 (1969); The Washington Plan, 41 C.F.R. § 60-5.11 (1971). Consequently they will generally have the burden of proving nondiscrimination. If such a statistical showing could be made against a union involved in a voluntary plan, there is no reason why the analysis set forth in the text accompanying notes 73-78 would not be equally applicable to it.

82. *United States v. Carpenters Local 169*, — F.2d —, 4 F.E.P. Cases 85, 90 (7th Cir. 1972).

83. *Id.*

evidence is sufficient to find discrimination, the imposition of judicial sanctions pursuant to Title VII for resisting an affirmative action plan will be a useful tool in the enforcement of these plans.

B. Voluntary Plans

In order to increase union cooperation, voluntary rather than imposed plans are often used. These plans, generally known as hometown solutions, are usually designed by a tripartite committee representing organized labor, building contractors, and the minority community.⁸⁴ The OFCC has frequently undertaken the responsibility of helping select a group to represent each of the parties and of overseeing, but not shaping, the formulation of a program.⁸⁵ The Labor Department will refrain from imposing a plan⁸⁶ if it feels a voluntary plan is having reasonable success.⁸⁷ Naturally, where the Labor Department does acquiesce in a voluntary plan, it monitors the plan's performance to assess whether its continued approval is warranted.⁸⁸

The reasons unions and contractors participate in voluntary plans doubtlessly vary greatly. Unions claim to prefer voluntary plans, because they are more likely to foster union cooperation and are therefore potentially more effective.⁸⁹ Local political pressures may also encourage cooperation between unions and the minority community. Furthermore, participation in such a program may avoid imposition of an imposed plan or the prosecution of a class action or pattern and practice suit under the Civil Rights Act of 1964.⁹⁰ This last incentive for cooperation may become increasingly important, for interference with an affirmative action program may be enjoined as a tortious interference with contractual relations or may encourage the initiation of a suit under Title VII.⁹¹

84. Dacus interview.

85. Dacus interview. The OFCC was, as of April 1971, active in substantiating that all representatives in fact fully represent their constituencies. In one instance in Monterey County, Calif., OFCC said it would not abide by any arrangements made by the tripartite body as formulated because it felt the minority group representatives did not fully represent the minority community. *Id.*

86. Labor Secretary Schultz expressed his preference for these solutions over an imposed solution, but said that the latter would follow in the absence of such areawide agreements. Department of Labor News Release, No. 11-027 (Feb. 9, 1970).

87. Dacus interview.

88. *Id.*

89. Interview with Mr. George Meany, President AFL-CIO, by unspecified reporter, February, 1970, on file with the *California Law Review*. The circularity of this argument is readily apparent.

90. See text accompanying notes 73-78 *supra*, 123-131 *infra*.

91. *United States v. Carpenters Local 169*, — F.2d —, 4 F.E.P. Cases 85 (7th Cir. 1972); *Joyce v. McCrane*, 320 F. Supp. 1284 (D.N.J. 1970). See text accompanying notes 73-83 *supra*.

Although hometown solutions vary, they tend to be formulated along the lines of the OFCC Model Areawide Plan.⁹² The model plan provides for numerical or percentage goals of minority employment in the trades covered at the completion of each year of the plan; plans for recruitment, training, and counseling of journeymen, apprentices, and preapprentices; and conciliation, grievance and arbitration procedures. Most significantly, hometown solutions have not been limited to federal or federally assisted construction but apply generally to all construction in the area.⁹³ This opens a wider, more stable segment of the industry to minority employment. The essential price to be paid for this opportunity is the surrender of direct sanctions to enforce the contractual obligations of the signators to the plan. Consequently, the hometown solution's success must depend on the signators' good faith and on indirect political pressures to enforce the contractual commitments. The varied results achieved under the hometown solutions attest to the plans' dependence on local political factors for success.

The Chicago Plan, instituted in January 1970, was the first hometown solution. The plan covered all construction, both public and private. Its stated purpose was participation in the construction trades of minority group craftsmen in the proportion that the minority community bore to the population at large. This was to be accomplished within a 5-year period. The plan provided that the parties endeavor to place 1,000 minority journeymen, prepare 1,000 minority individuals for the apprenticeship examinations, and arrange for 1,000 on-the-job trainees in the first year. These programs were contingent on obtaining appropriate government funding and on general business conditions.⁹⁴

As of April, 1971, figures prepared by those Chicago unions participating in the plan indicated that 72 journeymen had been placed and 265 apprentices indentured.⁹⁵ However, a U.S. Department of Labor task force found only five of the 44 journeymen contacted still working and could identify only 46 of the apprentices.⁹⁶ Mr. J.T. Wardlaw, OFCC Regional Director in Chicago, attributes much of this apparent failure to a multitude of considerations, not the least of which was poor staff selections.⁹⁷ According to Assistant Secretary of Labor

92. Dep't of Labor News Release No. 11-027 (Feb. 9, 1970). Both the Chicago and Indianapolis Plans were similar to the OFCC model. See text accompanying notes 94-101 *infra*. The New Haven hometown solution also follows these guidelines, BNA CONSTRUCTION LABOR REPORT, March 10, 1971, at A-8.

93. See sources cited in note 92, *supra*.

94. The Chicago Plan, on file with the *California Law Review*.

95. Letter from J.T. Wardlaw, Regional Director, OFCC Regional Office, Chicago, to the author, July 28, 1971, on file with the *California Law Review*.

96. *Id.*

97. *Id.*

Arthur Fletcher, the decision to supplant the Chicago Plan with an imposed plan has already been made.⁹⁸

Another hometown solution, the Indianapolis Plan, is quite similar to the OFCC-proposed model plan. It has made good progress despite setbacks due to labor strikes.⁹⁹ In the first four months of the two year program, one-half of the first year's goals were met. Since that time a series of strikes hampered progress, and a sampling of selected unions indicate compliance running at about one-half of the projected goals, with only six months remaining.¹⁰⁰ This progress has occurred despite a general reluctance on the contractor's part to confront unions on the issue of minority employment and union reluctance to admit minorities to the trades for fear of losing control of the job market. Mr. Herman Walker, Director of the Indianapolis Plan, attributes much of this progress to support from the mayor and to union and contractor fears that the plan's administrative body will withhold funds for construction and thereby shut down projects for failure to comply with the plan.¹⁰¹

A countywide plan was imposed in San Francisco in July 1971, thereby precluding the formulation of a metropolitan-wide hometown solution.¹⁰² However, a more limited version of a voluntary plan is currently in force in the Bayview-Hunters Point district of San Francisco. Under the Model Cities Program, \$200,000,000 of new construction will be undertaken in this area.¹⁰³ Since the Bayview-Hunters Point

98. BNA CONSTRUCTION LABOR REPORT, June 9, 1971, at A-2.

99. Letter from Herman Walker, Project Director, Indianapolis Plan for Equal Employment, Inc., to the author, August 13, 1971 [hereinafter cited as Walker letter], on file with the *California Law Review*. The plan had placed 175 minority workmen, including 39 journeymen, 40 advanced trainees, and 96 apprentices, in the period from March 1970 to July 1971. Indianapolis Plan for Equal Employment, Inc., Monthly Progress Report, July 1971, on file with the *California Law Review*.

100. According to the supplemental agreements executed by five of the unions involved, 160 minority workmen were to be recruited during 1970 and 1971. With only 6 months remaining in 1971, 77 had been recruited. Compliance with the contractual commitments varied greatly depending upon the craft. The compliance of various crafts for the 2-year period is as follows:

Union	Goal	Recruited
Pipefitters	40	17
Electricians	20	25
Plumbers	30	4
Painters	40	21
Asbestos Workers	30	10

The Indianapolis Plan for Equal Employment, Inc., Monthly Progress Report (July 1971) on file with the *California Law Review*; The Indianapolis Plan and Supplemental Agreements, on file with the *California Law Review*.

101. Walker letter.

102. 36 Fed. Reg. 10868, 10868-72 (§§ 60-6.11-60.623) (1971).

103. Interview with Mr. Reuel Brady, Recruiter and Skill Bank Analyst, Bayview-Hunters Point Affirmative Action Program, August 13, 1971 [hereinafter cited as Brady interview]. Such programs which remove large-scale projects from

district is composed of 85 percent minorities, and since federal funds will be directly involved in the area redevelopment, the Bayview-Hunters Point Model Neighborhood Agency endeavored to enlist contractor and union cooperation in formulating an affirmative action program that aspired beyond the goals of the typical voluntary or imposed plan.¹⁰⁴ Under the terms of the agreement "no less than fifty percent of the work force in each craft used to perform [work covered by the plan] . . . will be recruited from among residents of the Model Cities Project Area."¹⁰⁵ According to Rayford Riley and Reuel Brady of the Bayview-Hunters Point Affirmative Action Program, the signatory unions and contractors have agreed to take on up to one resident apprentice for every three journeymen, if this proves necessary to meet the 50 percent participation goal, whereas there is normally only one apprentice for every five journeymen.¹⁰⁶ Mr. Riley indicated that despite early difficulty in locating residents with construction skills, the program has now located a significant number of minority workmen who have construction experience but who have not been able to get work through the San Francisco unions.¹⁰⁷ Those who still possess journeyman skills will be referred directly to jobs, while those who do not will enter a program for upgrading their present skills.¹⁰⁸ Since the duration of the Model Cities Project will likely run longer than the period necessary to complete apprenticeship, a substantial number of minority journeymen could come out of this effort.¹⁰⁹

Both Brady and Riley indicated that union cooperation on the limited work that had been undertaken so far had been excellent and that prospects for continued cooperation were good.¹¹⁰ Mr. Riley attributed this cooperation to the union's active participation in the program. However, he did state that the threat of the minority comun-

the jurisdiction of the local area-wide imposed plans, might be viewed as a union device to neutralize the impact of the larger plan. However, in light of the more ambitious goals undertaken in these limited programs compared with the area-wide plans, and the more effective enforcement evident in these more limited plans, this is unlikely. Interview with Mr. William Dacus, Regional Director, OFCC, January 8, 1972 in San Francisco.

104. Brady interview.

105. Memorandum of Agreement between Associated General Contractors of California Inc., San Francisco Building and Construction Trades Council and Bayview-Hunters Point Model Neighborhood Agency, ¶ 5, November 25, 1970, on file with the *California Law Review*.

106. Telephone interview with Mr. Rayford Riley, Programs Coordinator, Bayview-Hunters Point Affirmative Action Program, in San Francisco, November 18, 1971. [hereinafter cited as Riley interview]; Brady interview.

107. Riley interview.

108. Brady interview; Riley interview.

109. Riley interview.

110. Brady interview; Riley interview.

ity's shutting down neighborhood construction on which minorities were denied employment was undoubtedly of some weight.¹¹¹

Of the alternative plans developed pursuant to the executive order, the various forms of the hometown solutions have the greatest potential for success. The success of the metropolitan-wide voluntary plans, such as the Chicago and Indianapolis Plans, have depended largely on local factors, such as union attitudes and political influence. These plans have the advantages of applying to all construction in the area and of having minority community representatives sit on policymaking supervisory boards, thereby influencing the decisionmaking process. Furthermore, the metropolitan-wide voluntary plans are more likely to foster at least some cooperation by the unions than is an imposed plan, and they are therefore more likely to succeed.

Of all the forms of voluntary plans, those covering local redevelopment projects, such as the Bayview-Hunter's Point Plan in San Francisco, have the greatest potential for meaningful integration of the construction trades. These programs are conceptually similar to the metropolitan-wide plans. However, unlike the larger-scale plans, the minority community has an effective extrajudicial means of enforcing the unions' and contractors' commitments by physically disrupting the work and thereby closing down the job site. The community's willingness to undertake such bold action stems from a strong belief that the people of the community should actively participate in its rehabilitation. With this tactic as the community's basic source of power, it may place representatives in key administrative and policy making positions, and thereby effectuate a meaningful affirmative action integration program.

C. *Apprenticeship Programs*

Federal pressure for integration of the skilled construction trades has had significant impact on apprenticeship practices. The principal manifestation of this activity has been the evolution and development of AFL-CIO sponsored minority "apprenticeship outreach" programs. These programs consist of seeking out minority youths interested in a career in construction, preparing them for apprenticeship examinations, helping them procure job placements, and giving them moral support.¹¹² These programs, funded by the Labor Department, are usually an outgrowth of the traditional joint union-contractor apprenticeship program or are organized and run by minority community organizations under

111. Riley interview. A group of residents of the Bayview-Hunters Point area had physically obstructed work on some construction sites in their neighborhood to protest the lack of jobs for local residents on neighborhood projects. This action effectively closed the job site. Riley interview.

112. Lee interview.

Labor Department contracts. As of May 1971, outreach programs had placed approximately 10,000 minority apprentices in the building and construction trades.¹¹³ Somewhere between 30 and 80 percent of those apprentices indentured never became journeymen. However, the program conducted by the Workers Defense League, one of the largest networks of such programs, has had an attrition rate of only 19 percent.¹¹⁴

The San Francisco version of these outreach programs is the Apprenticeship Opportunities Foundation.¹¹⁵ The Foundation has arranged to have 301 minority apprentices indentured in its first 2 years.¹¹⁶ Of these about 50 percent are still in the programs.¹¹⁷ The Foundation also polices union apprenticeship entrance requirements by referring complainants to state authorities. It was successful in initiating hearings by the California Department of Industrial Relations, Division of Apprenticeship Standards, on the fairness of union apprenticeship entrance examinations. Some potentially unfair portions of these examinations were eliminated from the exam as a result of these hearings.¹¹⁸ However, according to Mr. Frank Lee, a recruiter at the Foundation, the only reason the Foundation remains at all effective is that unions feel the Foundation is more trustworthy than any foreseeable alternative.¹¹⁹

On balance, minority apprenticeship participation alone does not appear to be a viable means of integrating the skilled trades in San Francisco. Only 15 to 30 percent of the journeymen now working came up through apprenticeship programs, though such programs are the principal means of entry for most minority, or at least black, entrants.¹²⁰ Nevertheless, the Labor Department continues to fund these

113. MANPOWER ADMINISTRATION, U.S. DEP'T OF LABOR, OUTREACH PROGRAM ACTIVITY SUMMARY CHARTS (May 1971), on file with the *California Law Review*.

114. T. BROOKS, BLACK BUILDERS: A JOB PROGRAM THAT WORKS 35-36 (1971).

115. Lee interview.

116. *Id.* As of May, 1971, 301 apprentices had been indentured, 136 as carpenters, 44 as iron workers, and the remainder scattered among the other trades, with no more than 20 in any one trade. MANPOWER ADMINISTRATION, U.S. DEP'T OF LABOR, OUTREACH PROGRAM ACTIVITY SUMMARY CHARTS 4a (May 1971), on file with the *California Law Review*.

117. Lee interview.

118. Miller interview.

119. Lee interview.

120. Debro interview; Mendes interview; Williams interview. Examination of the ratio of apprentices to members illustrates the point: Electricians—1202 members, 129 apprentices; Structural Ironworkers—1162 members, 86 apprentices; Lathers—184 members, 12 Apprentices; Operating Engineers—32,000 members, 616 apprentices; Plumbers—2,748 members, 196 apprentices; Sheetmetal Workers—960 members, 95 apprentices. Jeffers Statement, *supra* note 7. About one-half of those who start apprenticeships do not become journeymen, and at most only 20 to 25 percent of those currently enrolled will become journeymen in any single year. Even if 50 per-

programs, including the Apprentice Opportunities Foundation, at the rate of approximately \$800 per apprentice trainee per year.¹²¹

D. Viability of Executive Remedies

The effectiveness of executive affirmative action plans will vary greatly. The most effective are those limited jurisdiction hometown solutions that cover large scale redevelopment projects in the minority community. As such voluntary programs spread beyond areas that the minority community may supervise and control, successful implementation of the programs will become more dependent on factors such as local politics and union attitudes toward affirmative action. However, even given the inconsistent performances of these metropolitan-wide plans, they are a more effective shortrun executive remedy for integrating the skilled trades than are the imposed plans. The imposed plans will do little to increase minority participation in the construction industry unless they are substantially broadened in scope and more effectively enforced. The apprenticeship outreach programs may, in the long run, effectively supplement the voluntary plans, but because of the large percentage of journeymen that come out of nonapprenticeship sources, apprenticeships will be a small, but growing, source of minority journeymen. Whether voluntary or imposed, progress will flow only from a plan that applies directly to unions and that is strictly enforced. These requisites are best met in the remedies imposed pursuant to suits under Title VII of the Civil Rights Act of 1964.¹²²

cent of all apprentices were from minorities, and apprenticeship was the only means of admissions to membership for anyone, new minority membership would at most amount to 1 percent per year of the total membership. Jeffers statement; Debro interview; Williams interview; Lee interview.

121. Some of those programs originally designed to recruit and train preapprentices are now being expanded to train and upgrade the skills of minority workmen to journeymen levels. Although these programs are presently conducted only for those with some prior skill and experience, and are accordingly limited in scope, they are evidence of a growing tendency on the part of the Labor Department to undermine or bypass union control over apprenticeship selection and training by funding community action groups to perform these functions. For example, two contracts totaling \$648,000 were awarded to the Philadelphia Urban Coalition to train and place 180 trainees with some prior industry experience. This is innovative in that instead of funding AFL-CIO outreach programs, such as San Francisco's Apprenticeship Opportunities Foundations, the Labor Department directly funded minority community affirmative action groups. Secretary of Labor Hodgson's announcement reported in BNA CONSTRUCTION LABOR REPORT Feb. 17, 1971, at A-8. The Labor Department's Manpower Administration also gave the administrative body of the Pittsburgh Hometown Solution a \$471,225 grant to prepare 158 minority youths for traditional apprenticeships and to upgrade the skills of 156 construction workers who do not possess journeyman skills. BNA CONSTRUCTION LABOR REPORT March 17, 1971, at A-19.

122. 42 U.S.C. §§ 2000(e)-2000(e)(15) (1970), as amended, Pub. L. No. 92-261 (March 23, 1972).

II

JUDICIAL REMEDIES: TITLE VII AND RACIAL QUOTAS

Title VII of the Civil Rights Act of 1964 provides that employers, labor unions, and employment agencies may not discriminate in hiring, discharge, or terms and conditions of employment on the basis of race, color, religion, sex, or national origin.¹²³ Enforcement can be undertaken either by the individual complainant, the Equal Employment Opportunity Commission, or the United States Attorney General.¹²⁴ Through recent legislation, Congress has revised the means of enforcing the prohibitions of Title VII,¹²⁵ thereby increasing the Act's potential effectiveness.

Enforcement by the Equal Employment Opportunity Commission, which was established to administer and aid in the enforcement of Title VII,¹²⁶ is effected either by processing individual complaints or processing charges filed by one of the agency's commissioners.¹²⁷ When a complaint is filed, the EEOC must first defer to the appropriate state agency, but if that agency does not act, the Commission may investigate the charges. If the Commission believes discrimination has in fact occurred, it may attempt conciliation.¹²⁸ Prior to the 1972 amendment of Title VII, the Commission could do nothing beyond attempting to conciliate the dispute. Under the new Act, the Commission may bring a civil suit on behalf of an individual or a class against a non-governmental respondent who it feels has violated Title VII.¹²⁹ The Attorney General, who formerly was empowered only to bring "pattern and practice" suits against non-governmental defendants, is now authorized to bring suits against governmental bodies as well.¹³⁰

123. 42 U.S.C. § 2000(e)-(2) (1970), *as amended*, Pub. L. No. 92-261, § 703 (March 23, 1972).

124. 42 U.S.C. §§ 2000(e)-(5), (6), (8), (9) (1970), *as amended*, Pub. L. No. 92-216, § 706 (March 23, 1972).

125. Pub. L. No. 92-261 (March 23, 1972), *amending* 42 U.S.C. §§ 2000(e)-2000(e)(15) (1970).

126. 42 U.S.C. §§ 2000(e)-(5), (8), (9) (1970), *as amended*, Pub. L. No. 92-261 §§ 705, 706, 709 (March 23, 1972).

127. 42 U.S.C. § 2000(e)-(5) (1970), *as amended*, Pub. L. No. 92-261 (March 23, 1972).

128. *Id.*

129. Pub. L. No. 92-261, §§ 706, 707 (March 23, 1972), *amending* 42 U.S.C. §§ 2000(e)-(5) (1970). The Act does not explicitly provide that the Commission shall have the power to institute class actions. The House version of the bill prohibited such suits, but this provision was eliminated in conference committee. 79 LAB. REL. REP. No. 25, § 3a, at 6 (News and Background Information, Part II) (March 27, 1972).

130. Pub. L. No. 92-261 § 706, *amending* 42 U.S.C. § 2000(e)-(6) (1970). A pattern and practice suit may be brought any time the Commission or the Attorney General has cause to believe that a party is systematically violating Title VII.

Prior to the new amendment, the complainant could sue the respondent directly if the Commission could not successfully conciliate the matter within 60 days; he must now defer to any action instituted by the Commission or the Attorney General, but may proceed with an individual or class action if they choose not to file suit.¹³¹

As discussed below, the body of judicial precedent established under Title VII represents the groundwork for substantial progress in the field of equal employment opportunity. With the transformation of the Equal Employment Opportunity Commission into a potentially effective enforcement body, the likelihood of meaningful enforcement will be substantially increased and, hopefully, so will the deterrent to engaging in discriminatory employment practices.

A. *An Active Judicial Approach*

1. *A Recent Model*

Title VII's application to the building trades unions presents unique problems. *United States v. Ironworkers Local 86*¹³² shows the various subtle forms of discrimination in the construction trades and the resulting problems that courts face in shaping appropriate remedies; it is also the most ambitious and comprehensive example of judicial activism in remedying racial discrimination in the construction industry. For these reasons it is an appropriate model to exhibit the current and evolving state of the law in this area.

Local 86 was instituted by the Justice Department as a pattern and practice suit against a number of Seattle unions and joint apprenticeship committees. The complaint alleged that the unions and apprenticeship programs discriminated on the basis of race in job referral, union membership, and apprenticeship admission. The court found that the union not only withheld from blacks information readily available to whites regarding work availability, opportunities for union membership¹³³ and apprenticeship,¹³⁴ but also knowingly gave blacks false and misleading information regarding procedures for union membership,¹³⁵ job referrals¹³⁶ and apprenticeship training programs.¹³⁷

131. *Id.*, amending 42 U.S.C. § 2000(e)-(5) (1970). *Miller v. International Paper Co.*, 408 F.2d 283 (5th Cir. 1969); *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968).

132. 315 F. Supp. 1202 (W.D. Wash. 1970), *aff'd* 443 F.2d 544 (9th Cir. 1971), *cert. denied*, — U.S. —, 92 S. Ct. 447 (1971).

133. 315 F. Supp. at 1205-07, 1213, 1220-21, 1232. If a worker is found to be suitable for referral, he will usually be offered membership; therefore denial of referral is tantamount to denial of membership. *Id.* at 1214.

134. *Id.* at 1217, 1226.

135. *Id.* at 1220-21, 1231.

136. *Id.* at 1213, 1220-21, 1231.

137. *Id.* at 1209, 1210, 1217-18.

Furthermore, blacks had to meet standards higher than those required for whites in order to be eligible for any of these benefits.¹³⁸ Blacks were not recruited by the union even though whites were actively recruited;¹³⁹ even when blacks did get job referrals, they were referred to lower-paying jobs.¹⁴⁰ Finally, the unions gave preference to relatives and friends of union members and contractors in referrals and membership, thereby further restricting employment opportunities for blacks.¹⁴¹

The remedial system devised by the court included virtually every remedy employed in hiring hall discrimination cases¹⁴² and added some novel remedies of its own. To remedy the defendant unions' refusal to admit blacks to membership, the court established objective standards for admission. The job referral system was restructured so that referrals were based solely on residence and job-related criteria. To facilitate enforcement, detailed records of all applications for membership or job referrals were to be kept, and explanations of why any black was denied a job referral were to be included. Furthermore, since the court found that the defendant unions had a reputation among the Seattle black community for being discriminatory, the unions were required to disseminate information in the black community apprising the residents of the opportunities now available in the construction industry.¹⁴³

The court was equally thorough in its remedies for the joint apprenticeship committees. Admission requirements were standardized and all qualifications requiring a subjective determination were eliminated. The court established a percentage of minority apprentices that should participate in each apprenticeship class in order to eradicate the effects of past discrimination. In addition, the court ordered that a special apprenticeship program be established to train those blacks too old for regular apprenticeship and who either had no previous experience in the trade or who had less than journeymen skills. The

138. *Id.* at 1205-08, 1210-11, 1231, 1232-33.

139. *Id.* at 1218, 1223.

140. *Id.* at 1219, 1228, 1231, 1233.

141. *Id.* at 1209-10, 1216, 1225-26, 1233.

142. Hiring hall discrimination cases include all those cases in which the principal source of labor is a union hiring hall. This typically includes the construction and longshore industries. The only previously used remedies not utilized by the court in *Local 86* were those invoked by the district court in *Vogler v. McCarty, Inc.*, 2 F.E.P. Cases 491 (E.D. La. 1970). There the court ordered that specified individuals be admitted to membership. *Id.* at 493. The court also ordered that those currently employed be retained no longer than 30 days on their current jobs, if not laid off sooner, and that in referring individuals to new jobs, referrals be on a one-to-one ratio, black to white. *Id.* at 497.

143. 315 F. Supp. at 1238-45.

court also ordered that a sufficient number of special apprentices be indentured so that at least a specified number of journeymen would be graduated from each class annually. Special apprentices were to be referred for work in addition to the normal contingent of regular apprentices and were to be paid regular apprenticeship salaries. The court ordered an interim preapprenticeship program to be established immediately, which would be phased out when the special apprenticeship program began. The joint apprenticeship committees were also required to apprise the black community of the opportunities now available in the apprenticeship programs and to solicit black apprentices. To oversee the implementation of the court-established program, an advisory committee composed of representatives of unions, contractors, the minority community, and state and local government was established.¹⁴⁴

2. *The Aftermath of Local 86*

Following Judge Lindberg's final decree in *Local 86*, in June 1970, a series of events took place that illustrates the potential for interaction of various institutions to achieve successful integration of the skilled construction trades. In July 1970, the United Construction Workers Association [UCWA] was founded, organized by the American Friends Service Committee with Tyree Scott as its director. Mr. Scott is a militant leader of the Seattle minority community's efforts to achieve integration in the construction trade.¹⁴⁵ UCWA undertook affirmative action to implement the court's decree effectively. It first contacted all workers specifically mentioned in the court's order and explained its meaning. It then organized and implemented a long-range plan to procure jobs for those and other minority journeymen and apprentices. It contacted contractors directly and solicited jobs for minority workmen. When the UCWA succeeded in getting a job commitment for a minority tradesman, it sent him to the union hiring hall. The contractor then called the hall and requested that individual by name, as specifically allowed in the court's decree. UCWA has also served as an informal supervisory and compliance organization. It attempts to conciliate differences between contractors and minority workmen and files complaints with the Justice Department when it feels the court's orders are being violated. It ensures that its members follow

144. *Id.* at 1246-50. Joint apprenticeship committees are independent organizations run by the union and the contractors for the purpose of selecting and training apprentices.

145. Interview with Mr. Frank Petramallo, attorney, United States Attorney General, in San Francisco, April 14, 1971 [hereinafter cited as Petramallo interview]. For a recount of both Mr. Scott's former activities and the events preceding *Local 86*, see *Washington v. Baugh Construction Co.*, 313 F. Supp. 598 (W.D. Wash. 1969).

proper referral procedures, have transportation to work, and are properly equipped. It also serves the important function of relaying to the minority community the impact the court order is having.¹⁴⁶

The UCWA also actively aids implementation of the special apprenticeship programs established by the court. During the week of September 3, 1970, UCWA screened some 300 applicants for positions as special apprentices; it then took those qualified to the appropriate joint apprenticeship committee¹⁴⁷ to make formal application. Many of the apprentices ultimately dispatched by the joint apprenticeship committees were originally referred by UCWA.¹⁴⁸

Implementation of the court's decree in *Local 86* has not been without its difficulties. For example, the court's decree required that the defendant joint apprenticeship programs develop a preapprenticeship program for potential minority apprenticeship applicants. Two months after the court's decree no such preapprentices had been placed. This led to a series of protest demonstrations led by Tyree Scott, and a court hearing for supplemental relief on September 11. The court ordered the contractors to hire 90 preapprentices within 10 days.¹⁴⁹ UCWA helped place 59 of the preapprentices by October 1¹⁵⁰ and has continued to check on the employment status of these apprentices to head off any potential problems. Seventy-seven of these 90 apprentices were still on the job as of April 1971.¹⁵¹

Another problem was union compliance with the UCWA job placement system. The Electrical Workers began refusing to refer those minority tradesmen who had been sent to the hiring hall specifically so that a contractor could call for him by name. The union claimed this was not required by the court's decree. However, Mr. Petramallo, the Justice Department attorney on the case, felt that the union's real reason was a fear that the UCWA would develop as a rival black union; union representatives had indicated they were not overly concerned with the remedies the court had imposed, but they were quite upset over the prospect of the emergence of an alternative source of labor, particularly when their hiring hall was an instrument of that source.¹⁵² This suspicion was largely allayed when UCWA supported

146. Petramallo interview; United Construction Workers Association, Report on Tyree Scott and the United Construction Workers Association, Oct. 15, 1970 (unpublished report to Court Advisory Board) [hereinafter cited as Report on Tyree Scott] on file with the *California Law Review*.

147. These are independent organizations run by unions and contractor for the purpose of selecting and training apprentices.

148. Petramallo interview.

149. *Id.*

150. Report on Tyree Scott.

151. Petramallo interview.

152. *Id.*

a series of strikes during the summer of 1971 by refusing to refer black workers to struck jobs.¹⁵³

Judge Lindberg's decree has, through the interaction of judicial supervision and the concerted efforts of the UCWA, been successful in increasing minority employment opportunities. Since the court's decree in July 1970, 400 black workers, including 200 journeymen, have been placed and are continuing to work on a fairly steady basis.¹⁵⁴ Initially the majority of these workers were referred by UCWA. However, as the success of the court's remedies has become more widely known, minority workmen began to enter the industry independently of UCWA. Many of these workers are journeymen who had been employed in Seattle's shipyards but had been reluctant to seek jobs in the construction industry because of the union's reputation for discrimination. The court's remedies are thus benefitting those minority journeymen who are likely to have been the victims of past discrimination by the defendants.

Those minority workmen who gained access to the construction jobs as a result of UCWA's efforts have been well accepted by both the unions and contractors.¹⁵⁵ Contractors have been utilizing black workers referred by UCWA on jobs subject to the Seattle Hometown Plan, thereby satisfying two commitments simultaneously. The success of the court's plan is further indicated by the Labor Department's decision to exempt those trades covered by the court's decree when it imposed an area-wide plan in Seattle.¹⁵⁶

3. *Title VII's Role in Integrating the Construction Industry*

Assuming *Local 86* to be the current model of effective judicial remedies, the outlook for effective integration is still subject to certain external variables. Two forces at work in Seattle are outside the court's order, but have been significant factors in making the remedies so effective—the UCWA and the Seattle hometown solution. The affirmative action requirements of the hometown solution are creating a demand for minority workers that would not otherwise exist and the UCWA, as a source of minority labor, is satisfying that demand. Consequently, the court's remedial scheme, interacting with two non-judicial institutions, is successfully challenging union control over the labor market.

The interaction of these institutions illustrates some salient fea-

153. Interview with Mr. Tyree Scott, Director, United Construction Workers Association, at San Francisco, Nov. 11, 1971.

154. *Id.*

155. *Id.*

156. BNA CONSTRUCTION LABOR REPORT, June 23, 1971, at A-4.

tures of judicial remedies in this area. Effective compliance with the court order is dependent on an active supervision of the defendant's employment practices and effective dissemination of the information regarding the court's decree throughout the minority community. These functions are best performed by local community organizations possessing the ability to organize minority workmen. The existence of nonjudicial incentives for the contractor to utilize minority workers also facilitates effective implementation of the judicial remedies. A local plan, voluntary or imposed, will frequently fill this requirement. By appropriately shaping its remedial scheme, a court may act as a catalyst, guide, and enforcer to bring these various factors into an interrelated system of effective affirmative action.

B. Legal Precedents and the Use of Quotas.

The district court's remedies in *Local 86* may be divided into two broad categories: the alteration of union practices and policies as they effect job access in general and the imposition of racial quotas in the execution of these policies and practices. The first broad category includes judicial establishment of objective criteria for union membership, apprenticeship opportunities, and job referrals; the requirement that unions and apprenticeship committees actively solicit minority participation; and the development of special apprenticeship programs for those previously denied equal employment opportunities. Judicial precedent for these forms of relief is substantial.¹⁵⁷

1. Arithmetic Guidelines: Definitional Problems

The most far reaching issue raised in *Local 86* is the use of arithmetic ratios to remedy the present effects of past discrimination. This

157. In *United States v. Sheet Metal Workers Local 36*, 416 F.2d 123 (8th Cir. 1969), the court ordered the unions, as a remedy for past discrimination in referrals and membership, to adopt specified criteria for union membership and job referral priority classifications, all of which were to be trade related. *Id.* at 131-37. The court further ordered changes in the referral procedures and required the unions actively to solicit black apprentices. *Id.* at 140. The Fifth Circuit, in *Heat & Frost Insulators Local 53 v. Vogler*, 407 F.2d 1047 (5th Cir. 1969), sustained a district court's injunction ordering the establishment of objective trade-related criteria for admission to the union. This included eliminating the requirement of sponsorship by union members or substantial work experience as membership criteria. *Id.* at 1054-55. The court also directed admission of certain specified individuals and ordered the union to develop an objective criteria related to industry need for the determination of membership size. *Id.* at 1053. The judicial establishment of the special apprenticeship programs for those previously denied the opportunity to acquire journeymen skills was novel among hiring hall cases, but it was in accord with substantial legal precedent addressing itself to the eradication of the present effects of past discrimination. See *Carter v. Gallather*, 452 F.2d 315, 4 F.E.P. Cases 121 (8th Cir. 1972).

issue is relevant not only to cases arising under Title VII but also to Executive Order 11,246¹⁵⁸ and to cases arising under the Civil Rights Act of 1866.¹⁵⁹

The use of arithmetic ratios as a means of effectively measuring a union's compliance with a judicial decree has been uniformly approved by the federal courts of appeal.¹⁶⁰ The need for such a device arises from the union's unfettered control of the referral process.¹⁶¹ There are two crucial questions involved in the utilization of such guidelines: First, what constitutes an acceptable remedial guideline as opposed to a racial quota that violates equal protection, and second, what factors may a court use to define the class of individuals to be benefited by the arithmetic guidelines.

The first question involves a very difficult problem of line-drawing, as was discovered by the Eighth Circuit in *Carter v. Gallagher*.¹⁶² *Carter* involved discrimination by the Civil Service Commission of the City of Minneapolis in its hiring of firemen. Because state discrimination, rather than individual discrimination was at issue, the fourteenth amendment and the Civil Rights Act of 1866¹⁶³ applied in lieu of Title VII.¹⁶⁴ The district court has ordered the Commission to hire its next 20 firemen from among qualified minority applicants as a means of mitigating the present effects of past discrimination. The Eighth Circuit initially reversed and held that such a mandatory racial preference violated the fourteenth amendment by discriminating against whites.¹⁶⁵ However, on rehearing en banc, the court modified its position to allow the imposition of a guideline to hire one-third from minorities for the next 60 positions filled.¹⁶⁶ The court again held that

158. 3 C.F.R. 339 (1965). See also *Contractor's Ass'n v. Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971).

159. 42 U.S.C. §§ 1981, 1983 (1970).

160. See *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1972); *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir. 1971); *Heat & Frost Insulators Local 53 v. Vogler*, 407 F.2d 1047 (5th Cir. 1969); cf. *Contractor's Ass'n v. Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971). The Supreme Court has yet to rule on the use of arithmetic guidelines as a device to remedy past discrimination in employment. It has approved their use as an objective criteria with which to begin fashioning a remedy for school segregation, but it specifically rejected the concept that there is a substantive right to any particular degree of racial balance. *Swann v. Charlotte-Mecklenburg Board of Educ.*, 402 U.S. 1, 23-25 (1971).

161. See text accompanying notes 3-5 *supra*.

162. 452 F.2d 315 (8th Cir. 1971).

163. 42 U.S.C. §§ 1981-1995 (1970).

164. 42 U.S.C. §§ 2000(e)-2000(e)-(15) (1970), as amended, Pub. L. No. 92-261 (March 23, 1972). Title VII did not apply to discrimination by states or political subdivisions thereof. The recent legislation expanded the Act's jurisdiction to include states and their political subdivisions. See text accompanying note 130 *supra*.

165. *Carter v. Gallagher*, 452 F.2d 315, 325 (8th Cir. 1972).

166. *Id.* at 331.

an absolute requirement that the next 20 firemen hired be from minorities violated the fourteenth amendment.¹⁶⁷

The court reasoned that the approved requirement was not a true quota because it was only a temporary remedial device designed to allocate to minorities those jobs they would likely have procured but for past discrimination. Such requirements are not for the purpose of guaranteeing that minorities be allocated that proportion of available positions in any given trade that corresponds to their proportionate representation in the population as a whole.¹⁶⁸ The court implied that such a guaranteed representation would be an impermissible quota, not a permissible guideline,¹⁶⁹ and recognized that over the long term minorities may still be over or under-represented in various trades even where discrimination is not present. The guidelines require only that the ethnic composition of the general population be considered by the court in formulating its initial remedies for past discrimination. The court further justified the imposition of guidelines on the ground that the testing procedures were unfair, therefore, job qualification rankings were suspect, and a hiring ratio would not necessarily prefer less qualified minority persons over more qualified white persons.¹⁷⁰

The *Carter* court also attempted to distinguish these guidelines from constitutionally unacceptable quotas on the basis of the degree of preference granted to minority job applicants. The court reasoned that an absolute preference for the next 20 positions would be unconstitutional because jobs would be given to less qualified minority applicants over more qualified white applicants.¹⁷¹ Why this consideration is inoperative in the allocation of 20 of the next 60 jobs to minorities, however, is unclear. Furthermore, if the testing procedure were truly unreliable, allocating the first 20 jobs to minorities could not be said to have this effect since there would be no standard by which to measure qualifications. Realistically, therefore the court's attempt to distinguish the deferred from the immediate preference is not meaningful. The only effect of such a distinction is that the short-term remedy will be operative over a somewhat longer period. The distinction is a futile attempt to retain some of the original *Carter* decision

167. *Id.* at 328.

168. *Id.* at 330-31.

169. Although the Supreme Court has held racial classification to be inherently suspect [*Loving v. Virginia* 388 U.S. 1 (1967)], it has never maintained that such classifications are per se violations of the fifth and fourteenth amendments, [*id.* at 13 (Stewart, J., concurring)]. The court has approved the use of both racial classification and arithmetic guidelines for the purpose of remedying segregation of schools [*Swann v. Charlotte-Mecklenburg Board of Education* 402 U.S. 1, (1971)]. The only court fully to address the issue of quotas is the Seventh Circuit in *Carter*.

170. 452 F.2d at 330-31.

171. *Id.* at 328.

while still upholding the validity of arithmetic guidelines. The court should have faced the issue directly and recognized that rectifying the effects of past discrimination may require some temporary reverse discrimination, arguing that equal protection is not violated because the remedy is carefully tailored to meet a particular wrong and is reasonable because it has a built-in requirement that it cease when the evil is corrected.

The second, and more difficult, question is what factors the court may use in defining the class of individuals to be benefited by its remedial decree. Because discrimination usually takes the form of denying an employment opportunity, little or no record remains of the contact between the victim of discrimination and the discriminatory party. Therefore, it is difficult for courts to determine who are the individual victims of past discrimination.¹⁷² The usual approach is to establish guidelines whose beneficiaries were more likely to have been the victims of past discrimination than other members of their race.¹⁷³ These are beneficiaries who had some connection with the trade controlled by the defendant or were old enough that they were more likely to have been the victims of past discrimination than, for instance, a minority youth just entering the job market.¹⁷⁴ The court in *Carter*, however,

172. See, e.g., *United States v. Sheet Metal Workers Local 36*, 416 F.2d 123 (8th Cir. 1969).

We recognize that each of the cases cited . . . can be distinguished on the ground that in each case, a number of known members of a minority group had been discriminated against Here, we do not have such evidence, but we do not believe that it is necessary. The record does show that qualified Negro tradesmen have been and continue to be residents of the area. It further shows that they were acutely aware of the locals' policies toward minority groups. . . . In the light of this knowledge it is unreasonable to expect any Negro tradesman working for a Negro contractor or a nonconstruction white employer would seek to use the referral systems or to join either Local.

Id. at 132.

173. See *United States v. Sheet Metal Workers Local 36*, 416 F.2d 123 (8th Cir. 1969). In *Heat & Frost Insulators Local 53 v. Vogler*, 407 F.2d 1047 (5th Cir. 1969), the Fifth Circuit upheld the district court's requirement that future referrals of journeymen mechanics and journeymen improvers be made on an alternating black-white basis. *Id.* at 1055. This arithmetic guideline was clearly for the benefit of those presently in the trade already and therefore for the benefit of those more likely to have been discriminated in the past. See also *United States v. Central Motor Lines*, 325 F. Supp. 478 (W.D. N.C. 1970), and *United States v. Sheet Metal Workers Local 10*, 3 CCH EPD Cases ¶ 8068 (W.D. N.J. 1970), in which preliminary injunctions were issued ordering the employment of existing minority tradesmen.

174. The district court in *Local 86* undertook, through its special apprenticeship program, to benefit those minority group members who were too old to enter regular apprenticeship. Such an action can be viewed as an attempt to remedy past discrimination by opening the trades to those who would have applied for employment but for the defendant's past reputation for discriminatory policies. See text accompanying note 144 *supra*. The preference given those with some skills in the trade in applying for the special apprenticeship program is consistent with the notion of helping victims of past discrimination by the use of arithmetic guidelines.

held that race per se was an acceptable means of defining the class of beneficiaries of that portion of the decree calculated to eradicate the present effects of past discrimination.¹⁷⁵ In doing so, the Eighth Circuit became the first circuit court explicitly to approve the use of arithmetic guidelines based solely on race.¹⁷⁶

The abandonment of this distinction raises an important question of policy in the eradication of the present effects of past discrimination. If minority groups are favored in the allocation of job opportunities, the ultimate burden of such a policy will fall on those white workers who are displaced.¹⁷⁷ Assuming these displaced workers did not aid or participate in the defendant's past discrimination, the question is to what extent they should be forced to bear the burden of rectifying the defendant's wrong.

In the construction industry this problem arises most acutely in respect to the allocation of opportunities to enter the trade.¹⁷⁸ In these circumstances, the white applicants for employment are the ones who would be adversely affected, and they are less likely to have participated in the past discrimination being remedied than the white journeymen whose existing employment opportunities were given some protection by past discriminatory policy. Similarly, the minority job applicant who benefits is not likely to have suffered discrimination by the defendant union or employer. Consequently, the preferential allocation of entrance level job opportunities to minorities in order to remedy the effects of past discrimination shifts the burden of remedying the past transgressions of white unions and employers to those who have individually not participated in such discrimination.

In only one case has a court that imposed such entrance level racial guidelines attempted to reallocate the burden of remedying past discrimination. In *Local 86*, the district court ordered that the apprentices hired pursuant to the special apprenticeship program be hired in ad-

175. 452 F.2d at 330-31.

176. Despite the necessity for some sort of objective means by which to measure a defendant's compliance efforts those circuits that have approved the use of arithmetic remedial guidelines have largely avoided coming to grips with the constitutional implications of state imposed discrimination in favor of minorities. See *Heat & Frost Insulators Local 53 v. Vogler*, 407 F.2d 1047, 1053 (5th Cir. 1969); *United States v. Ironworkers Local 86*, 443 F.2d 544, 553-54 (9th Cir. 1971); *Contractors Ass'n v. Secretary of Labor*, 442 F.2d 159, 172-73 (3rd Cir. 1971).

177. See *Vogler v. McCarty, Inc.*, 451 F.2d 1236 (5th Cir. 1971).

178. Employment in the construction industry is intermittent and individual workers are not usually employed by any one employer for a prolonged period. Consequently seniority, as used in an industrial setting, is not a workable criteria by which to allocate employment opportunities. See *Local 189 Papermakers & Paperworkers v. United States*, 416 F.2d 980 (5th Cir. 1969) regarding judicial reallocation of employment opportunities in an industrial context.

dition to, and not in lieu of, normal apprentices.¹⁷⁹ In this fashion the burden of providing additional minority job opportunities was shifted principally to the contractors, by requiring them to hire more apprentices.¹⁸⁰ Allocation of this cost is a crucial decision, and therefore it should be made with a concern for the relative abilities of the parties involved to absorb this burden.

2. *Arithmetic Ratios Keyed to Community Racial Composition*

Because the allocation of employment opportunities to minority job applicants has been,¹⁸¹ and likely will continue to be, done with an eye to the ethnic composition of the immediate community, sections 703(a) and 703(j) of the Civil Rights Act are germane to the utilization of arithmetic guidelines as a means of remedying employment discrimination. Opponents of racial quotas pursuant to suits under Title VII maintain that the prohibitions of sections 703(a) and 703(j) preclude judicial actions to that end. Section 703(j) provides:

Nothing contained in this subchapter shall be interpreted to require any employer . . . [or] labor organization . . . to grant preferential treatment to any individual or to any group because of the race . . . 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 . . . in any community . . . or other area.¹⁸²

Section 703(a) contains the basic prohibition against racial classifications for purposes of employment.¹⁸³ Opponents also cite a United States Attorney General's opinion prepared at the request of those legislators who feared Title VII would result in judicial or administrative quotas.¹⁸⁴ The Attorney General maintained that no part of either Title VII or the entire Civil Rights Act of 1964 would require, or even allow, any federal agency or federal court to require preferential treatment for any individual or group for the purpose of achieving racial balance. He further maintained that to attempt to do so would almost certainly run afoul of Title VII.¹⁸⁵

179. See text accompanying note 144 *supra*.

180. The existing journeymen will bear some of the burden of this scheme by their loss of work to the special apprentices.

181. *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1972).

182. 42 U.S.C. § 2000(e)-(2)(j) (1970), *as amended*, Pub. L. No. 92-261, § 703(j) (March 23, 1972).

183. 42 U.S.C. § 2000(e)-(2)(a) (1970), *as amended*, Pub. L. No. 92-261, § 703 (March 23, 1972).

184. Brief for Appellant at 116-126, *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir. 1971).

185. 110 CONG. REC. 7207 (1964) (opinion of Attorney General). See also 110 CONG. REC. 7213, 7218 (1964) (Interpretative Memorandum of Title VII submitted by Sen. Clark and Sen. Case).

However, appellate courts have interpreted the prohibitions of 703(j) quite narrowly, generally finding that the section does not restrict the court's powers to establish objective criteria by which to evaluate a defendant's compliance efforts. For example, in *United States v. IBEW Local 38*,¹⁸⁶ the Sixth Circuit found that, in light of the Act's stated purpose and the broad affirmative relief authorized by other sections of the Act, section 703(j) could not be construed as a ban on affirmative relief against continuation of the effects of past discrimination resulting from present practices, neutral on their face, that have the practical effect of continuing past injustices.¹⁸⁷ The Ninth Circuit adhered to this interpretation in affirming *Local 86*,¹⁸⁸ as did the Fifth Circuit in *Heat & Frost Insulators Local 53 v. Vogler*.¹⁸⁹

Also, the Third Circuit read section 703(a) in much the same way in upholding the legality of the Philadelphia Plan.¹⁹⁰ The court rejected the plaintiff's contention that the Philadelphia Plan violated section 703(a) by requiring contractors to refuse to hire whites on the basis of race. The court said that to read the section as a ban on affirmative relief would be to attribute to Congress an intent to maintain the status quo and to prevent remedial action under other programs designed to overcome existing wrongs. The court felt that the "affirmative action" language of the Executive Order¹⁹¹ could only mean that government contractors should be color conscious.¹⁹²

Were sections 703(a) and 703(j) interpreted any other way, Title VII would be largely an ineffective remedy for employment discrimination in the construction industry. Union control of the referral process is unchallenged and supervision of that system is most difficult.¹⁹³ Therefore, the use of some objective measure of the defendant's compliance is a necessity.

Furthermore, an examination of the considerations that led to the passage of section 703(j) indicates that it was not intended to be a limitation on the court's powers to devise an effective remedy. The principal concern was that without section 703(j), Title VII might be

186. 428 F.2d 144 (6th Cir. 1970).

187. *Id.* at 149.

188. *United States v. Iron Workers Local 86*, 443 F.2d 544, 553-54 (9th Cir. 1971).

189. 407 F.2d 1047. At least two other district courts have used racial quotas as at least a provisional remedy for past discrimination. *United States v. Central Motor Lines*, 325 F. Supp. 478 (W.D.N.C. 1970); *United States v. Sheet Metal Workers Local 10*, 3 [CCH] EPD Cases 8068 (W.D.N.J. 1970).

190. *Contractors Ass'n v. Secretary of Labor*, 442 F.2d 159 (3rd Cir. 1971).

191. Exec. Order No. 11246, § 201(1), 3 C.F.R. 339, 340 (1964-65 Comp.).

192. See also *Southern Illinois Builders Ass'n v. Ogilvie*, 327 F. Supp. 1154 (S.D. Ill. 1971).

193. See text accompanying notes 3-6, 24 *supra*.

interpreted to require businessmen to prefer unqualified minority workmen merely because they do not have a percentage of minority employees representative of the general community, notwithstanding any finding of actual discrimination.¹⁹⁴ Judicial use of arithmetic guidelines has not been to guarantee that minorities will have their proportionate number of available jobs but rather to expedite their obtaining those jobs they would have obtained but for discrimination. The difference between these concepts is essential to the interpretation of 703(j), difficult as it may be in application.

CONCLUSION

The most acceptable means of achieving integration in the skilled trades is a system of voluntary metropolitan-wide hometown solutions. As these plans are rooted in a spirit of cooperation rather than coercion, they would be less likely to give rise to lasting animosities. However, such plans require union cooperation that could adversely effect the leaders' ability to keep present union members fully employed, to fully control the labor market, and to continue to preserve job opportunities for the membership's friends and relatives.

The strength of forces pushing for integration of the skilled trades will also affect the union decisionmaking process. Factors such as demands by the minority community and local government for integration of the skilled trades, the threat of a Title VII suit, and the possible imposition of a Philadelphia-type plan will all be relevant to the union's decision. However, although the strength of these pressures will vary greatly from city to city, they will probably be insufficient to coerce an otherwise intransigent union to cooperate meaningfully in any metropolitan-wide affirmative action program.

In such cases, more limited agreements pertaining to local redevelopment projects may play a significant role. Because these projects are undertaken within the minority community, neighborhood organizations can better supervise the compliance efforts of the unions and contractors. If the minority community feels that a party to the plan is not complying with that party's affirmative action commitment, community organizations can readily shut down a job site in order to coerce compliance.¹⁹⁵ This source of power will give the minority community the opportunity to actively participate in the formulation and administration of the local program. Furthermore, these projects are frequently large and lengthy endeavors, thereby providing an oppor-

194. See 110 CONG. REC. 8921 (1964) (remarks of Senator Williams); 110 CONG. REC. 9881-82 (1964) (remarks of Senator Allott).

195. See text accompanying notes 110-111 *supra*.

tunity to fully train a significant number of minority workmen on a single project. These factors make the prospects for meaningful progress under this type of programs encouraging.

The imposed plan in its present form will not serve as an effective means of achieving integration. Its most basic defects are its narrow scope and its failure to exert direct pressure on the unions, as evidenced by the poor results in the implementation of existing plans. The dollar volume of construction covered by the plan could be increased by including other forms of construction in which the federal government in some way participates. Until this broadening of jurisdiction is undertaken, checkerboard integration will continue and little real progress will be possible.¹⁹⁶ Yet broadening of the programs will by no means guarantee meaningful progress. Even if contractors truly feel pressured to push unions to recruit and place minority workmen, there is no certainty that the union will acquiesce. For these reasons, the imposed plan will play a significant role only insofar as it may motivate a given union to agree to an effective affirmative action program.

The use of judicial action to force unions to cooperate with plans formulated pursuant to Executive Order 11,246 represents a potentially effective means of bringing pressure on those who control employment opportunities. Although the range of factual situations in which judicial enforcement may be appropriate is not well defined,¹⁹⁷ it is clear that finding a violation of Title VII would allow imposition of direct sanctions against unions. By integrating the machinery of local affirmative action plans into judicial remedies, the courts can be invaluable in promoting the success of both.

Even with a favorable political atmosphere coercive measures will undoubtedly continue to be imposed to force unions to integrate their membership. Of the alternative approaches available under federal law, the greatest potential for imposed integration of the skilled construction trades lies in the remedies available against the unions under Title VII, as implemented in *Local 86*. Some of the most important attributes of Judge Lindberg's remedial scheme in that case are its precise and explicit administrative procedures and guidelines and its comprehensive approach to the entire employment process, from recruitment through training to referrals and membership. Perhaps its most important attribute is its minimal impact on the current employment system. As the apprenticeship and training programs produce minority workmen who can meet the objective membership criteria set forth by the court, they

196. See note 60 *supra*.

197. See text accompanying notes 74-83 *supra*.

will enter the union as members and presumably cease to be dependent on the judicial remedies for their employment opportunities.

In the short run, certain nonjudicial institutions will play a significant role in the process of encouraging such judicial pronouncements. The activities of groups like the United Construction Workers Association¹⁹⁸ will undoubtedly be important for organizing minority workmen and of supplementing formal compliance supervision of the judicially imposed remedies. Minority employment affirmative action requirements, whether the product of voluntary or imposed plans, will facilitate the process by creating additional demand for minority workers and by supporting training and recruitment programs. In light of the recently passed legislation¹⁹⁹ the number of such suits should increase substantially, and the court's will therefore have more opportunities to apply the kind of remedies used in *Local 86*. The prospect for meaningful integration of the skilled construction trades would be quite good under such circumstances.

Lance Jay Robbins

198. See text accompanying notes 145-156 *supra*.

199. See text accompanying notes 129-131 *supra*.