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While the federal government should play a significant role in monitoring the use of excessive force by police officers, this role is not limited to the varying interpretations of federalism in the federal courts. The United States Commission on Civil Rights has advocated a legislative solution—the reopening of the federal forum by amending section 1983 with the enactment of a provision which would make liable the governmental entity, the individual supervisory officer, and the individual state official who violated section 1983. The amendment would establish liability against an official who failed to take affirmative steps to prevent the recurrence of known misconduct.[140]

Legislation is also pending in Congress which would increase the penalties for violations of section 242. The proposed changes would relieve the government of the burden of proving specific intent when a person, under color of law, violates constitutional or federal rights.[141] Those modifications of existing law would improve the federal role in enforcing civil rights guarantees. Given that *City of Philadelphia* has been dismissed on appeal and that existing remedies remain ineffectual, a legislative solution seems the most tenable at the present time, but it is not the only alternative. It will remain so, however, as long as communities rely on the government and the courts to intervene and demand that police departments be held accountable.

STEPHANIE L. FRANKLIN

DETROIT POLICE OFFICERS' ASSOCIATION v. YOUNG: THE OPERATIONAL NEEDS JUSTIFICATION FOR AFFIRMATIVE ACTION IN THE CONTEXT OF PUBLIC EMPLOYMENT

I. INTRODUCTION

When Coleman Young, the City of Detroit's first black mayor, took office in January 1974, he inherited a city that still showed the tension of two major race riots—one in 1943, the other in 1967.[1]

tive's invoking the jurisdiction of the federal court and (2) direct action. The United States avers that *City of Philadelphia* involves the United States appearing before a federal court seeking relief and that its role as the enforcer of federal law is pertinent to the suit. Brief for Appellant, United States v. City of Philadelphia (3rd Cir., filed April 22, 1980) at 5.

140. Alexander *supra* note 125 at 26. In conjunction with Owen v. City of Independence, *see* text accompanying note 101 *supra*, which provides absolute liability for a municipality, individual defendants will be unable to rely on "good faith" defense.

141. *Id.* It is not clear whether this legislation would eliminate the need to establish *mens rea* and whether it would be constitutional.

1. Detroit Police Officers' Assn. v. Young, 446 F. Supp. 979 (E.D. Mich. 1978): vacated and *rev'd*, 608 F.2d 671 (6th Cir. 1979). *See* Brief for the United States and Equal Employment Oppor-

In each instance the "hostility" between the city's black community and the predominantly white police force was a major contributing factor to the civil disorder.[2] With this in mind, Mayor Young proceeded to change the racial composition of the Detroit Police Department. For his efforts he was the named defendant in *Detroit Police Officers' Association v. Young*[3]—a "reverse discrimination" case with far-reaching implications.

In 1967 the situation in Detroit was by no means unique. The President's Commission on Law Enforcement and Administration of Justice released a study about the status of minority representation in police departments of major cities in the United States. The report revealed that large scale discrimination existed against minorities, and that this group was "grossly under-represented in the police departments of most large cities," naming Detroit as a classic example.[4] Further, the President's Commission said that law enforcement efforts faced a critical problem due to the severe lack of minority personnel in all ranks of the police force. As a result, the tension between minorities in these communities and the police would not improve until "a sufficient number of minority group officers were obtained at all levels of activity and authority."[5] The study further specified:

> Police departments in all communities with a substantial minority population must vigorously recruit minority group officers. The very presence of a predominantly white police force in a Negro community can serve as a dangerous irritant. . . . In neighborhoods filled with people suffering from a sense of injustice and exclusion, many residents will reach the conclusion that the neighborhood is being policed not for the purpose of maintaining law and order but for the purpose of maintaining the status quo.[6]

In 1974, the historical effects of exclusionary hiring policies towards blacks in the Detroit Police Department was evidenced by the woefully low number of black officers and sergeants on the force. The entire department was 17.2% black as of June 1974, but a mere 5.1% of the sergeants were black (61 of 1185). In the rank of lieutenant, 4.7% were black (11 of 230)[7]. The 1970 census data indicated that the labor market in Detroit was 45.8% black and the population of black residents was 43.7%.[8]

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tunity Commission as Amicus Curiae, Detroit Police Officers Assn. v. Young, 608 F.2d 671 (5th Cir. 1979) at 34. *See generally* R.R. SHOGUN and T. CRAIG, THE DETROIT RACE RIOT (1964); WALTER WHITE and THURGOOD MARSHALL, WHAT CAUSED THE DETROIT RIOT? (1943); REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, 48 (1968) [hereinafter cited as KERNER COMMISSION REPORT].

2. For an extensive analysis of civil disorders in the United States *see* the KERNER COMMISSION REPORT, *supra* note 1.

3. Detroit Police Officers' Assn. v. Young, *supra* note 1, 446 F. Supp. at 994. Also named as defendants in the suit were Chief of Police, Philip Tannian; members of the Board of Police Commissioners; and the City of Detroit.

4. KERNER COMMISSION REPORT, *supra* note 1, at 6. *See* The President's Commission on Law Enforcement and Administration of Justice, TASK FORCE REPORT: THE POLICE 172 (1967) [hereinafter cited as Task Force Report: The Police] at 167-171.

5. *Id.* at 7 quoting The PRESIDENT'S COMMISSION on Law Enforcement and Administration of Justice, THE CHALLENGE OF CRIME IN A FREE SOCIETY 99 (February, 1967) at 101.

6. *Id.*

7. *Id.* at 32, n.163.

8. *Detroit Police Officers' Assn. v. Young, supra* note 1, 608 F.2d at 688 (1979).

The Police Chief of Detroit[9] was well aware that these startling statistics evidenced the mounting friction between Detroit's black community and the police. Thus, when Mayor Young took office in 1974 his main goal for reform was to "racially balance all levels of the city government" at an equal proportion of white to black.[10] The police chief responded to the Mayor's new policy by instituting a rigorous recruiting and promotional campaign to place more blacks into all ranks of the police department up to the position of sergeant at an equal ratio (50/50) of white to black.[11]

As a result, between August 1, 1974 through May 23, 1976, a series of promotions to the level of sergeant were made whereby a number of white officers with higher ranks were passed over in favor of black officers with lower status.[12]

Shortly thereafter, a class action suit was brought by a group of white patrolmen and the Detroit Police Officers' Association [hereinafter cited as DPOA] to enjoin the Major and the Detroit Police Department from proceeding with the voluntary affirmative action program which intentionally passed over white officers for promotion to the rank of sergeant solely due to their race.[13] The plaintiffs alleged that this plan violated their rights under Title VII of the Civil Rights Act of 1964[14] [hereinafter cited as the Act] and the equal protection clause of the Fourteenth Amendment.[15]

This paper will analyze the opinions of the district court and the Sixth Circuit Court of Appeals in *Young*, paying particular attention to the broader implications this case might have for the future of blacks in public employment in general.

II. THE CASE

Specifically, with respect to Title VII, DPOA claimed that the police

9. In 1974, Mayor Young appointed Philip Tannian to serve as Police Chief under his administration.

10. 446 F. Supp. at 995.

11. *Id.*

12. *Id.* at 987-989. On November 1, 1973, the City of Detroit Police Department instituted a promotional policy for the position of sergeant. A written examination was given to applicants applying for promotion, and their test scores would determine the order of priority among them. On April 9, 1974, a list of applicants eligible for the position of sergeant was prepared based on the scores of the written examinations. Promotions of applicants would be made according to the order of their rankings on the eligibility list, and also provided that they complied with certain college or seniority requirements. On May 9, 1974, the police chief approved the first round of promotions to be made from the eligibility list. Thirty promotions resulted, including twenty-nine whites and one non-white. Later, on June 7, 1974, an amendment was made of the April 9, 1974, eligibility list for promotions to sergeant. The amended list was lengthened by the addition of seventy-seven police officers whose rank on the list was determined by their test score on the written examination. *Id.* at 986.

13. 446 F. Supp 979.

14. 42 U.S.C. §§ 2000e- 2000e-5(1976). The police officers also brought an action under 42 U.S.C. §§ 1981, 1983, 1985(3) (1976), Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-6 (1976), MICH. CONST. art. 1, 2, and various state civil rights statutes. 446 F. Supp. 985-986, 1002-17. This note will analyze only Title VII and federal constitutional claims.

15. U.S. Const. amend. XIV, § 1 provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

department's affirmative action plan violated section 703(a),[16] as amended, of the Civil Rights of 1964. The constitutional challenge raised by DPOA, was that the promotional plan violated the equal protection clause of the Fourteenth Amendment because it invidiously discriminated against white officers.[17]

The district court held that the racial preference promotional practices of the police department did violate the rights of the white officers both under Title VII, sections 703(a) and (j),[18] and the equal protection clause.[19]

The court of appeals reversed the judgment of the district court and refused to uphold the plaintiffs' claim of Title VII violations. As to the equal protection argument, the Sixth Circuit remanded the case for further deliberation of the constitutional issues.[20]

The defendants advanced two major justifications for the race conscious promotional plan. First, the plan was defended as a reasonable effort to remediate past discrimination.[21] Second, the plan was deemed as mandated by the "operational needs" of the department in order to improve the general effectiveness of law enforcement in Detroit.[22]

The district court rejected both arguments and granted plaintiffs the injunctive relief sought.[23] The Sixth Circuit disagreed.[24] A unanimous panel dissolved the injunction and recognized the efficacy of both the "past dis-

16. Section 703(a), 42 U.S.C. 2000e-2(a), provides that:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

17. 446 F. Supp. at 986.

18. 42 U.S.C. 52000e-5(j) provides:

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint-management committee subject to this subchapter to grant preferential treatment to any individual or any group because of the race, color, religion, sex or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex or national origin employed by any employer.

19. 446 F. Supp. at 1016-1017.

20. 608 F.2d at 698.

21. 446 F. Supp. at 994-1002.

22. *Id.* at 1001-1002. The defendants made two other minor arguments in defense of the promotional plan. The first was based on Schaefer v. Tannian, 394 F. Supp. 1128 (E.D. Mich. 1974). The case involved gender discrimination in the Detroit Police Department where the district court ordered limited preferential hiring of women to remedy past discriminatory practices after finding a violation of Title VII. Defendants relied on this authority to analogize that the same relief should be available for black officers and other minorities. The court was unconvinced saying that the facts of the two cases were so different that the application of Schaefer was precluded here. *Id.* at 997. Second argument in defense of the affirmative action plan was because the police department faced the loss of federal funds from the Law Enforcement Assistance Administration (LEAA) if they did not recruit more blacks into the force. However, the district court found no basis for this argument because it pointed out that the LEAA never issued any pre-affirmative action complaints against the department, and furthermore, in 1976, the LEAA accepted an Equal Employment Opportunity plan submitted by the department. *Id.* at 1001.

23. *Id.* at 1001-1002.

24. 608 F.2d at 697.

crimination" and "operational needs" arguments.[25]

The defendants' past discrimination justification was based upon the twin assertions: 1) that blacks were severely underrepresented in the department as compared with the proportion of blacks in the city's population and 2) this underrepresentation was in large part due to the disparate impact of the criteria being utilized for hiring and promotion.[26] In support of their underrepresentation allegation, the defendants established that in 1974 only seventeen percent of the department was black. Moreover, only 5.1% of the sergeants and 4.7% of the lieutenants were black in 1974.[27] This was in stark contrast to the fact that in 1974 the City of Detroit boasted a black population of forty-four percent making it the fourth largest concentration of blacks in the nation.[28]

The district court was not impressed with this evidence, finding that "the naked numbers of black and white hired is susceptible to a multitude of conclusions."[29] In the court's words:

> . . . [W]hile the statistics do show a significant difference between the number of black and white appointees from 1968 to 1975, the data base upon which these figures were derived reveals a multitiude of errors in the reporting process seriously impairing any responsible analysis.[30]

The court totally rejected the statistical evidence presented by the defendants to show past discrimination within the department between 1968 to 1975. In the district court's view, a correct labor market analysis in the instant case would have to involve three steps:[31]

1) definition of the geographical area from which the employer recruits;

2) determination of the percentage of blacks with the minimum requirements for employment;

3) comparison of this figure with the percentage of blacks employed by the employer.

Essentially, the court differed with the defendants' definition of the geographical area from which the department recruited. The court accepted expert testimony that the relevant labor market was not the City of Detroit alone but, rather, the tri-county area known as the 1970 Standard Metropolitan Statistical Area (SMSA).[32]

By including the predominantly white suburbs in the calculation, the court ameliorated the seeming disparity between the composition of the department and the general population. The court proceeded to narrow the gap even further by sharply defining the available pool, stating that:

> General popular statistics are inappropriate because they include persons who are not part of the applicable civilian work force, e.g., those below sixteen and those over sixty-five, those not seeking employment and those

25. *Id.*
26. 446 F. Supp. at 994-1002.
27. *See* note 7 *supra* and accompanying text.
28. 446 F. Supp. at 994 n.28.
29. *Id.* at 998.
30. *Id.*
31. *Id.* at 995.
32. *Id.* at 996.

employed.[33]

This two step process suggested that only 18.6% of the relevant labor market was black. Compared with 17.23%, the percentage of blacks in the department in 1974, this seemed to substantiate the court's conclusion that blacks were only "slightly underutilized" by the police force.[34]

Even had the court found severe underrepresentation, the panel did not appear to be disposed toward finding that this underrepresentation amounted to a statutory or constitutional violation giving rise to some necessary remedial action. The court explicitly rejected the assertion that the entry level written exam, performance evaluation ratings and seniority based preferences were racially discriminatory barriers to the hiring and promotion of black officers.[35] Insofar as any possible arguable violation of Title VII was concerned, the court found that the city could not have been liable under that provision prior to the 1972 amendments extending its coverage to state and local governments.[36] And while such a pre-Act conduct could give rise to a constitutional claim, such a claim could be sustained only upon proof that the alleged discriminatory acts were purposely or intentionally executed by the department.[37] In the court's opinion, the evidence adduced by the defendants failed to establish either any prior or post Act intentional discrimination.[38]

The second and most novel claim that the defendants made in support of the affirmative action plan was the constitutional argument that it was an "operational necessity" to hire more black officers for the effective operation of the police force in the predominantly black district of Detroit.[39] The court framed the defendants' claim as follows:

> . . . [S]ince the City of Detroit is largely black, greater numbers of blacks in all ranks of the police force will tend to enhance communication and cooperation with the community, install greater respect for the department, reduce and solve crime, and in general, improve the overall effectiveness of the department.[40]

In fact, the defendants argued that there was evidence of a decrease in the crime rate and citizen complaints since the introduction of the affirmative action plan. However, the district court was unpersuaded by what it considered insufficient evidence to support the defendants' "amorphous" claim.[41] On the contrary, the court said that the record supported the conclusion that:

> . . . [A] police officer's effectiveness, as a professional law enforcement officer both within the department and the community in which he serves, is dependent upon his education, skill training, attitude and sense of pro-

33. *Id.* at 996 n.41.

34. *Id.* at 996.

35. *Id.* at 1007-1011. In addition, the court said that the allegation of past discrimination by the department was simply outweighed by the totality of the evidence in the record. From 1968 to the present, the department had begun various recruiting drives within the black community in Detroit via the media, local area offices and state colleges, the court noted. *Id.* at 997.

36. 42 U.S.C. § 2000e(a). *Id.* at 1006, 1008.

37. *Id.* at 1013-1014. *See* Washington v. Davis, 426 U.S. 229 (1976). In Davis, the Supreme Court held that in an equal protection clause violation in a state action case proof of purposeful or intentional racial discrimination must be presented.

38. *Id.* at 1000, 1009-1010.

39. *Id.* at 1014-1016.

40. *Id.* at 1001.

41. *Id.*

> fessionalism. The unalterable pigmentation of his skin has no bearing upon these facts and neither enhances nor depreciates *his* professional enforcement effectiveness.[42]

The court treated this argument with such dispatch that the defendants nearly abandoned it on appeal.[43]

On appeal the Sixth Circuit reversed and remanded the case. The opinion written by Judge Lively disagreed with the district court on practically every count.[44]

According to the panel, the district court erred in its response to both the "past discrimination" and "operational needs" justifications of the defendants.[45] As to the past discrimination claim, the court of appeals found that the district court erred both as a matter of fact and law on both the "underrepresentation" and "disparate impact" assertions of the defendants.[46] The court concluded that:

> Reexamination of the law and evidence reveals that the district court's conclusion that the Detroit Police Department did not engage in unlawful discrimination was erroneous.[47]

Agreeing with the defendants that their labor market data had probative value in terms of showing past underrepresentation of blacks in the department, the Sixth Circuit concluded that the district court had erred in holding that this evidence had no "statistical verity."[48] Relying on such evidence, the court of appeals noted that from 1944 to 1973 the rate of blacks hired by the police department was fifty-eight percent below average of the entire period, if the hiring standard had been based on the racial composition of the Detroit labor market.[49] By accepting the defendants' data in this form, the Sixth Circuit thereby rejected the district court's conclusion that the labor market statistics required proof to a mathematical certainty.[50] Rather, the proper standard required the district court to accept this labor market data for whatever evidentiary value it had despite suspected deficiencies in the defendants' method of statistical analysis.[51]

> There was no indication that the reporting errors accounted for the 'striking racial imbalance' indicated by the data.[52]

With respect to the defendants' assertion that there was significant evidence of prior discrimination by the department largely due to the disparate impact of the entry written examination, performance evaluation process and seniority based promotions, the Sixth Circuit agreed:

> [T]here was substantial evidence that the Department has a 'custom' or 'tradition' of racial discrimination in job assignments, conducted unvalidated entry tests with racially disparate effects, maintained physical job requirements with discriminatory impact, and created opportunities for ra-

42. *Id.* at 1002.
43. 608 F.2d at 684.
44. *Id.* at 697.
45. *Id.* at 696-697.
46. *Id.* at 686.
47. *Id.*
48. *Id.* at 683; 446 F. Supp. at 998.
49. *Id.* at 687. The figure of fifty-eight percent is derived by dividing 13.7%/23.6%.
50. *Id.* at 687. *See* Vulcan Society of N.Y.C. Fire Dept. v. Civil Service Comm'n, 490 F.2d 387, 393 (2d Cir. 1973).
51. 608 F.2d at 687.
52. *Id.* (quoting Vulcan Society of N.Y.C. Fire Dept. v. Civil Service Comm'n, *supra* note 50).

cial discrimination in the background investigation of job applicants.[53]

Because racial discrimination by a public employer was not made illegal under Title VII until March 24, 1972,[54] the district court considered all evidence presented by defendants of prior Title VII violations irrelevant for purposes of proof of past discrimination.[55] However, the Sixth Circuit disagreed, finding that there was evidence of post-1972 discriminatory practices in the department which therefore justified an inquiry into practices antedating the 1972 amendments as well.[56] Having established both pre-and post-Act discrimination by the department, the Sixth Circuit rejected the district court's conclusion that section 703(j)[57] of Title VII did not support the defendants' claim that "racial balancing is a legitimate non-discriminatory reason for employment preferences."[58] The panel said that the district court had mistakenly followed the court of appeals in *United Steelworkers of America v. Weber*,[59] and instead was bound by the Supreme Court's finding in the case that 703(j) does not expressly proscribe race-based preferential treatment by the employer.[60] Furthermore, quoting *Weber* the Sixth Circuit said:

> [A] preferential hiring plan which seeks to alleviate an imbalance caused by traditional practices of job segregation is a reasonable voluntary response "whether or not a court, on these facts, could order the same step as remedy.[61]

In relation to the constitutional issues in *Young* the Sixth Circuit applied the *Davis* standard which specifies that proof of invidious discriminatory purpose or intent is required to establish a constitutional offense.[62] Such discriminatory racial purpose or intent could be evidenced by an express act or a logical inference drawn from the totality of the relevant facts, according to the panel.[63] On the issue of the department's race-conscious preferential treatment program, which was challenged by the white officers under the equal protection clause, the Sixth Circuit found that *Weber*[64] and the plurality opinion of the Brennan group in *Regents of the University of California v. Bakke*[65] were controlling.[66]

The Sixth Circuit saw the defendants' operational needs claim as having "considerably more substance" than the district court perceived.[67] The panel agreed with the defendants' assertion that effective law enforcement is

53. *Id.* at 690.
54. 42 U.S.C. § 2000e(a) (1976 & Supp. II 1978).
55. 446 F. Supp. at 1006, 1008.
56. 608 F.2d at 689.
57. *Id.* at 689-690. 446 F. Supp. at 1004. *See* note 18 and accompanying text *supra*.
58. 446 F. Supp. at 1004.
59. Weber v. Kaiser Alum. & Chem. Corp. 563 F.2d 216 (5th Cir. 1977); *rec'd sub nom*. United Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979).
60. 608 F.2d at 689-690.
61. *Id.* at 690. *See* United Steelworkers of America v. Weber, 43 U.S. 193 (1979) [Blackmun, J., concurring].
62. *See* note 37 and accompanying text *supra*.
63. *See* 608 F.2d at 693.
64. 443 U.S. 193 (1979).
65. 438 U.S. 265 (1978).
66. 608 F.2d at 697.
67. 608 F.2d at 695.

achieved through community support and cooperation.[68] Judicial notice was taken of the fact that the claim was founded upon "law enforcement experience" and several national surveys of the highest regard which showed that police officers probably have the most "visible, personal and important," encounters with citizens than any other government worker.[69] The Sixth Circuit quoted a position taken by the President's Commission in 1967 which was offered as evidence by the defendants:

> In order to gain the general confidence and acceptance of a community, personnel within a police department should be representative of the community as a whole.[70]

Citing another national survey, the Court of Appeals emphasized a point in the report which said that minority groups should also be represented in the policy and important decision-making ranks of police departments in order to assure other minorities that control of authority is not concentrated solely among white officers.[71]

The panel further expressed its support of the Kerner Commission Report, which said that "the presence of a mostly white police force in minority communities can be a 'dangerous irritant' which can trigger a violent response," as it did in Detroit on two separate occasions.[72]

Moreover, the Sixth Circuit said that the police witness testimony in the case was "consistent" with what the national reports typified: in predominantly black communities it is essential to have black officers represented in significant numbers on the force in order to achieve cooperation and assistance from the community residents.[73] In summary, the Court of Appeals said:

> [T]he focus is not on the superior performance of minority officers, but on the public's perception of law enforcement officials and institutions. It is therefore apparent that the district court misconstrued this justification for affirmative action, and that the justification offered by the defendants is a substantial one.[74]

Remanding the case as to the constitutional justifications raised by defendants, the Sixth Circuit said that a resolution of these questions will "require a determination of whether the [department's] affirmative action plan is justified under the alternative claim of operational needs."[75]

III. LEGAL ANALYSIS

By bringing state and local governments within the coverage of Title VII with the adoption of the 1972 amendments, Congress intended no substantial alteration of or encroachment on the sovereign power of states and their subdivisions. Rather than alter those obligations of state and local gov-

68. *Id.* at 695-696.
69. *Id.* at 695.
70. *Id.*
71. *Id. See* TASK FORCE REPORT: THE POLICE *supra* note 4 at 172.
72. 608 F.2d at 695. *See* KERNER COMMISSION REPORT, *supra* note 1 at 315, 120. *See also id.* at 84-108 (chronology of events of 1967 Detroit civil disorders). *See also supra* note 1 and accompanying text.
73. 608 F.2d at 695.
74. *Id.*
75. *Id.* at 697.

ernments which already existed by virtue of the Fourteenth Amendment, it was Congress' express intention to provide an efficient administrative mechanism for enforcement of those obligations. The legislative history of the amendments clearly manifests this intention.

To properly analyze the legislative history of Title VII, it is important to begin with the recognition that this statute, as originally conceived, focused exclusively on private employment. The interests which were balanced against the Congressional concern for expanding employment opportunities for minorities were not the diverse and often compelling concerns of government, but rather the essentially commercial concerns of private industry.[76] The 1972 amendments, amending, *inter-alia*, the definition of "employer" to include state and local governments, were grafted onto a piece of legislation which was oriented to the private employment sphere.[77]

The extensive legislative debates on the 1972 amendments consistently evidence a relatively unambitious purpose in extending Title VII's coverage to state and local governments. The report by the Education and Labor Committee on the House version of the legislation reads:

> The Constitution is as imperative in its prohibition of discrimination in state and local government employment as it is in barring discrimination in federal jobs. The courts have consistently held that discrimination by state and local governments, including job discrimination, violates the Fourteenth Amendment and is prohibited.
>
> While an individual has a right of action in the appropriate court if he has been discriminated against, the adequacy of protection against employment discrimination by state and local governments has been severely impeded by the failure of Congress to provide federal administrative machinery to assist the aggrieved employee. . . Although the aggrieved individual may enforce his rights directly in the Federal district court, this remedy, as already noted, is frequently an empty promise due to the expense and time involved in pursuing a federal court suit. It is unrealistic to expect disadvantaged individuals to bear the burden.
>
> The Committee feels that it is an injustice to provide employees in the private sector with an administrative forum in which to redress their grievances while at the same time denying a similar protection to the increasing number of state and local employees. Accordingly, H.R. 1746 provides that the administrative remedies available to employees in the private sector should also be extended to state and local employees.[78]

These comments clearly show that this aspect of the 1972 Act was designed to provide a federal administrative mechanism for enforcement of rights and prohibitions already extant by virtue of the Fourteenth Amendment.[79]

At present, the extent to which Title VII allows a defense other than one of proven past discrimination in order to validate a preferential treatment system is governed by *United Steelworkers of America v. Weber*.[80] In the

76. *See* 446 F. Supp. at 1003.

77. *See* note 36 *supra* and accompanying text.

78. *See* note 36 *supra* and accompanying text. *See also Interpretive Memorandum of Title VII of H.R. REP.* [No. 7152, 110 CONG. REC. 7213-7218, daily ed. April 8 (1964)].

79. *See* Brief for Citizens for Affirmative Action in Detroit (CAADET) [Detroit Police Officers' Assn. v. Young, 608 F.2d 671 (5th Cir. 1979) at 23-30 *Amicus Curiae* brief)]. *See also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-418 (1975).

80. 443 U.S. 193 (1979).

post-*Weber* era, a strong argument can be made on at least two grounds that the statute *does* permit such an outcome in certain instances.[81]

In *Weber*, the Supreme Court addressed the issue of the validity of an affirmative action plan voluntarily instituted by a private employer without a judicial determination of past discrimination. In an opinion written by Justice Brennan, the Court held by a 5-2 decision that Title VII did not forbid "all private, voluntary, race-conscious affirmative action plans."[82]

In 1974, the Kaiser Aluminum & Chemical Corporation and the United Steelworkers of America (USWA) voluntarily agreed to adopt an affirmative action plan to eliminate manifest racial disparity among white and black craftsmen in a local Kaiser plant.[83] Prior to 1974, statistics showed that a mere 1.83% of the skilled workers were black compared to a local black labor force of thirty-nine percent.[84] The affirmative action plan provided for the establishment of an on-the-job training program to increase the number of skilled black and white workers at a 50/50 ratio. Thus, fifty percent of the available slots for in-plant training were reserved for black employees.[85] A challenge to this plan arose when a white employee, Weber, brought a class action suit claiming that the civil rights of white craftsmen had been violated under sections 703(a) and (d) of Title VII because the affirmative action plan gave preferential treatment to junior black employees by reserving fifty percent of the in-plant training positions for them. Because senior unskilled white workers were passed over to accommodate such a plan, plaintiffs alleged that Kaiser discriminated against them as a consequence of their race.[86]

Writing for the majority, Justice Brennan opined that voluntary affirmative action is permitted when it is shown that a job category is "traditionally segregated," that is "when there has been a societal history of purposeful exclusion of blacks from the job category resulting in a persistent disparity between the proportion of blacks in the labor force and their proportion among those who hold jobs within the category."[87]

Although he joined the majority, Justice Blackmun advanced a different test. Blackmun would uphold a voluntary affirmative action program when it is a reasonable response to an "arguable violation" of Title VII.[88] Blackmun considered the "arguable violation" standard affording several advantages: (1) it is a good practical mechanism to administer Title VII by allowing an employer to voluntarily initiate corrective measures based upon arguable violations of Title VII due to past discriminatory practices;[89] (2) it

81. *See* the majority opinion in *Weber* written by Justice Brennan and the concurring opinion of Justice Blackmun for an explanation of these two theories. United Steelworkers of America v. Weber, 443 U.S. at 197-209 (Brennan, J., writing for the majority) and 209-216 (Blackmun, J., concurring).

82. *Id.* at 208.

83. *Id.* at 197-198.

84. *Id.* at 198-199.

85. *Id.* at 198.

86. *Id.* at 199-200.

87. *Id.* at 209.

88. *Id.* at 211.

89. *Id.* at 211. *See* Weber v. Kaiser Alum. & Chem. Corp., 563 F.2d, at 236. [(Wisdom, J., dissenting). Judge Wisdom took the position that private employers who had performed "argu-

makes the contours of the law under Title VII more predictable;[90] and (3) it carries out the purpose of the Act by effectuating employer responses to arguable commissions of Title VII violations.[91]

The "traditionally segregated job category" and "arguable violation" approaches may well yield different outcomes in many instances. However, *Young* is not such an instance. Regardless of which approach is taken, the record on the case supports the decision of the Sixth Circuit insofar as it finds that Title VII would not outlaw Detroit's affirmative action plan.

Even if Title VII allows a public employer to adopt a preferential treatment plan to remedy past discriminatory acts, there is still a constitutional issue raised by the instance of state action. Because the promotional program of the department involved a racial classification, the applicable constitutional standard in *Young* is the two-tiered strict scrutiny test.[92] The first component of the test is a compelling state interest requirement. The second prong of the analysis calls for the least obstructive means of reaching the state objective.[93] The defendants in *Young* defended their preferential promotional plan on the grounds that this was a remediation of past discrimination by the department.[94] While the district court was not persuaded, the Sixth Circuit concluded that the defendants sufficiently demonstrated a compelling state interest to hire and promote more black officers in an attempt to enhance the effectiveness of the police force in Detroit.[95]

With respect to the second prong of the test, arguably the defendants' preferential promotional program was based on a reasonable basis to hire and promote black officers at a rate of 50/50 percent black to white. For instance, a 100 percent black promotional goal would have been significantly more intrusive as an alternative means. An additional justification was given by the defendants for their preferential promotional plan. It was simply that more black officers were needed at all levels of the department as an "operational necessity" to improve the effectiveness of the police force in Detroit.[96]

The Sixth Circuit's acceptance of the operational needs claim was a surprising victory for the defendants considering the novel nature of the argument and the fact that the court was not obliged to reach the constitutional issues once it had disposed of the statutory questions.[97]

IV. CONCLUSION

Why did the court of appeals choose to explore the potential of the

able violations" under title VII should be able to voluntarily devise reasonable remedies without the threat of lawsuits by whites. *Id.*].

90. *Id.*

91. *Id.*

92. For an illustration of application of this test, *see Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

93. *Id.*

94. 446 F. Supp. at 994.

95. 608 F.2d at 688-691. *See* C. Williams, The "Compelling Governmental Interest" Defense and Title VII Suits Against State and Local Governments (Spring 1979) (unpublished J.D. thesis at the University of Pennsylvania Law School).

96. *See* notes 67-75 and accompanying text.

97. *See* 608 F.2d at 695-696.

operational needs theory? Perhaps because the strongest argument is the case is the prudential one underlying the bold significance of the defendants' claim. The City of Detroit is a classic case of an urban center populated mostly by blacks. Faced with the prospects of renewed civil unrest, the city was forced to take a hard look at the stark reality of urban existence for many of its black residents. Daily close encounters between a predominantly black community and a virtually all white police force situated in a black community constantly reinforced the perception that the mission of the police force was to preserve and protect the status quo with all its inherent injustices—rather than to maintain law and order and assure justice within he black community.

The City of Detroit finally realizing the urgency of the concerns of its residents, proceeded to devise a program to increase the number of blacks actively and visibly in every level of capacity on the police force, including the highest ranks of policy-making authority.

Detroit officials realized that if community residents were to be persuaded to cooperate and aid police in the law enforcement function, such as providing information to the police about illicit activity or suspicious conduct, then the police department would have to be responsive to and representative of the community in which it operated. The increased visibility of black officers in the community would thereby give the local residents more assurance that more blacks were taking a role in the operations of the Detroit Police Department.

Finally, there are two significant considerations presented by the outcome of the *Young* case. The first is a troubling one. To what extent will exclusively white communities seize the "operational needs" defense as a means to justify the exclusion of blacks from public employment? Will this backlash be so pervasive and detrimental that it offsets any benefits gained through cases like *Young*? Will a continued reliance on the strict scrutiny two-tier analysis be a sufficient amulet for the courts to protect themselves against frivolous or contrived claims that lack a compelling governmental interest.

The second consideration is a tactical one. To what degree should the "operational needs" defense be extended to other state employer institutions? Could equally compelling arguments be made in favor of increasing the numbers of black lawyers, judges, correctional officials and other personnel working in positions where it is important to maintain the general confidence, cooperation and support of the black community? Would increased numbers of blacks in all levels and ranks of the legal system—from bench to bar to police department to prison—improve the overall administration of justice in America? And if so, would this be a sufficiently compelling justification for extending the "operational needs" defense to these other relevant areas of the legal process?

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