

NOTE

The General Aptitude Test Battery and the Debate Over Race Norming, Racial Preferences, and Affirmative Action

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It has been argued that the use of affirmative race-conscious remedies inflicts an immediate harm on some, in the hope of ameliorating a more remote harm done to others. . . . Some have compared the use of such race-conscious remedies to using alcohol to get beyond alcoholism, or drugs to overcome a drug addiction, or a few more cigarettes a day to break the smoking habit. . . . Affirmative action is not, as the analogies appear to imply, a symptom of lack of societal will-power; when judiciously employed, it is instead an instrument for sharing the burdens which our history imposes upon us all.

Justice Thurgood Marshall¹

Introduction

When Congress passed the 1991 Civil Rights Act,² its intent was to overturn seven recent Supreme Court civil rights cases.³ In addition, the Act contained a provision specifically prohibiting one type of conduct—race norming.⁴

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1. Address to the Judicial Conference of the Second Circuit Court of Appeals (1986), quoted in *Mr. Justice Marshall Lives on in His Words*, NAT'L L.J., Feb. 8, 1993, at 8.

2. Civil Rights Act of 1991, Pub. L. No. 102-166, § 106, 105 Stat. 1071, 1075 (1991) (codified at 42 U.S.C. § 2000e-2(1)) [hereinafter 1991 Civil Rights Act].

3. See, e.g., 137 CONG. REC. E3, 837 (1991). The cases overturned by the Civil Rights Act included *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) and *Martin v. Wilkes*, 490 U.S. 754 (1989).

4. 1991 Civil Rights Act, *supra* note 2. Section 106 states in part:

(1) It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

Race norming is the practice of adjusting minority employment test scores⁵ so that a minority test-taker's score is based on a comparison with other test-takers of the same race instead of with the general population of test-takers.⁶ Conversion of test scores was performed primarily in conjunction with the General Aptitude Test Battery (GATB), a job referral test administered by state employment agencies across the country.⁷

When journalist Robert G. Holland brought race norming to national attention,⁸ he sparked a national debate.⁹ This debate exposed a broad-based concern over affirmative action programs and the question of potential reverse discrimination. The controversy over the use of race norming on the results of general ability tests reflects more fundamental concerns about affirmative action policies. Are the tests valid predictors of job performance? What kind of job referral program, if any, should the government promote? When, if ever, is it acceptable to utilize racial classifications in hiring practices? How can our society reconcile the positive goals of affirmative action with the negative backlash against perceived reverse discrimination?

The Department of Labor (D.O.L.) is examining the General Aptitude Test Battery (GATB) in depth.¹⁰ As former Labor Secretary Lynn Martin explained, "[t]he concentration on race norming has had the beneficial effect of forcing the department to scrutinize not just [the] GATB, but the entire testing system."¹¹ Pursuant to the 1991 Civil Rights Act, the D.O.L. has ordered state employment service agencies to discontinue race norming.¹² Although the D.O.L. explained that states are still free

5. The practice of race-norming test scores is not limited to the employment context; it can also come into question in educational testing. This Note, like the provision in the Civil Rights Act of 1991, focuses solely on race norming as it relates to employment.

6. Race norming is officially termed "within-group scoring" by the Department of Labor. See *infra* part I.B for a discussion of the mechanics of race norming.

7. See *infra* notes 22-32 and accompanying text.

8. See Robert G. Holland, *Big Brother's Test Scores*, NAT'L REV., Sept. 3, 1990, at 35, 36. See also Linda S. Gottfredson, *Hiring Quotas Exist, But Employers Won't Tell*, N.Y. TIMES, Aug. 1, 1990, A20 (letter to the editor).

9. See, e.g., *The Quota Question: When Does Affirmative Action Become Reverse Discrimination?*, ECONOMIST, Nov. 30, 1991, at 27; Phil Gailey, *Civil-Rights Fight Brings Racial Subtext to the Surface*, CHI. TRIB., June 7, 1991, § 1, at 25; Holly K. Hacker, *Adjusted Federal Employment Tests Stir Controversy*, L.A. TIMES, June 6, 1991, at A5; Ethan Bronner, *Scoring of Job Tests Under Fire*, CHI. TRIB., May 25, 1991, § 1, at 2.

10. The D.O.L. originally proposed a two-year, \$6 million research project aimed at improving the validity and predictability of the GATB. Steven A. Holmes, *State Job Agencies May Not Give Edge to Minority Testees*, N.Y. TIMES, Dec. 14, 1991, § 1, at 1, 47. The Bush administration chose HRStrategies, Inc. of Grosse Pointe, Michigan to conduct a one-year project that will include reviewing and updating the GATB. See *Bush Administration and Corporate America Choose Michigan Firm to Help Attack U.S. Work Force 'Skills Gap'*, PR NEWSWIRE, Jul. 24, 1992 [hereinafter *Michigan Firm*].

11. *Labor Secretary Calls Race Norming Aptitude Test Review 'In-Depth'*, Daily Rep. Exec. (BNA) No. 165, at A3 (Aug. 26, 1991).

12. Holmes, *supra* note 10, at 1.

to use the GATB, it recommended that the test be used in conjunction with other employment criteria such as job experience and educational levels.¹³ Most states, however, have abandoned the GATB as a referral tool until the D.O.L. completes its in-depth review.¹⁴

The race norming debate implicates broader concerns about how to combat societal discrimination against minorities. Two decades ago, it was perhaps easier to recognize employers who intentionally discriminated. Today, unintentional, subtle discrimination is often most discernible by observing the disparate impact of various hiring practices on minorities. From an equal protection viewpoint, there appears to be little the Supreme Court will do to protect against this type of discrimination;¹⁵ from a societal viewpoint, it is imperative that we find the means to combat this problem.

This Note looks at the constitutional issues raised by use of the GATB and the practice of race norming. Although race norming in the employment context was outlawed by Congress with the passage of the 1991 Civil Rights Act, it should still be examined in the context of racial preferences more generally. Outlawing race norming does not end the dilemma posed by racial preferences; it is only one more development in the equal protection and affirmative action debate. The GATB, though currently in disuse, will probably be heavily utilized again by state employment agencies.¹⁶ Meanwhile, other employment and promotion tests continue to present similar disparate impact problems.¹⁷ It is also possible that non-minorities¹⁸ will challenge past employment decisions that may have been affected by race norming. Therefore, it is imperative that two goals be simultaneously pursued: first, test developers must attempt to update employment tests so that they truly correlate with job performance without excluding capable minorities;¹⁹ second, employers must be able to use race-conscious measures other than race norming in order to evaluate a potential employee in a manner that is fair to minorities and

13. Holmes, *supra* note 10, at A1.

14. *Michigan Firm*, *supra* note 10.

15. See *infra* part II.A. Title VII can provide a cause of action for disparate impact. See *infra* part II.B.2.

16. See *Michigan Firm*, *supra* note 10. The GATB is being updated so that it will be "as good a predictor and placement tool as possible," but no exact time frame has been set for how long this will take. *Id.*

17. See, e.g., *Bridgeport Guardians v. City of Bridgeport*, 735 F. Supp. 1126 (D. Conn. 1990), *aff'd*, 933 F.2d 1140 (2d Cir. 1991); *San Francisco Police Officers Association v. San Francisco*, 979 F.2d 721 (9th Cir. 1992).

18. Although the term "non-minority" overwhelmingly means "white" in the affirmative action context, the United States Employment Services (U.S.E.S.) included "Asian" in the non-minority category when it developed score conversion charts for the GATB. See *infra* note 27. Depending on the context, this Note will utilize both "non-minority" and "white."

19. This was a goal stated by former Secretary of Labor Lynn Martin upon awarding a contract to HRStrategies to study the GATB. *Michigan Firm*, *supra* note 10.

non-minorities alike. This Note attempts to further both goals by examining constitutional and Title VII questions posed by using an employment test, with or without race-conscious measures, as a referral and hiring tool, and by proposing potential race-conscious solutions. The GATB and race norming will be used as models to determine the validity of other employment tests and race-conscious hiring practices.

Part I presents background information on the General Aptitude Test Battery and the implementation and mechanics of race norming. Part II examines the validity of race norming and the GATB and analyzes the Supreme Court's treatment of race-conscious measures under both the Equal Protection Clause of the Fourteenth Amendment²⁰ and Title VII of the 1964 Civil Rights Act.²¹ Part III explores approaches the Court has taken toward equal protection and Title VII that support race-conscious measures and offers proposals for race-conscious measures that would garner the approval of the Court.

I. Background Information on the General Aptitude Test Battery and the Mechanics of Race Norming

A. The General Aptitude Test Battery

The GATB is a federally sponsored employment test that measures basic skills such as math, reading, and manual dexterity for low-level manufacturing and clerical jobs.²² It was developed in the late 1940s by the U.S. Employment Service (U.S.E.S.), a division of the Department of Labor.²³ While the format of the test was designed by the U.S.E.S., actual implementation has been governed by state-administered employment services. The results have been used for vocational counseling and job referral purposes.²⁴ Job applicants who have taken the GATB have been referred to both private and public sector employers in over 12,000 job categories.²⁵ Prior to the enactment of the 1991 Civil Rights Act, state employment services had administered the test to approximately 600,000 people per year in thirty states.²⁶

20. The Equal Protection Clause of the Fourteenth Amendment provides, in relevant part: "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

21. 42 U.S.C. §§ 2000e-1 to 2000e-17 (1964).

22. Holmes, *supra* note 10, at 47.

23. FAIRNESS IN EMPLOYMENT TESTING: VALIDITY GENERALIZATION, MINORITY ISSUES, AND THE GENERAL APTITUDE TEST BATTERY I (John A. Hartigan & Alexandra K. Wigdor eds., 1989) [hereinafter FAIRNESS].

24. *Id.*

25. *Id.* at 3.

26. Holmes, *supra* note 10. State employment service personnel see between 17 million and 18 million job-seekers every year. *DOL Officials Announce Termination of Controversial GATB Scoring Method*, DAILY REP. EXEC. (BNA) No. 241, at A10 (Dec. 16, 1991) [hereinafter *Termination*].

B. The Mechanics of Race Norming

In order to achieve a racially balanced job referral system, the D.O.L. implemented within-group score conversion, or race norming, for the GATB. State employment service agencies converted the raw scores of the GATB into percentile scores within the categories of "black," "Hispanic," and "other."²⁷ These percentile scores were determined using conversion tables created by the U.S.E.S.²⁸ The percentile scores were then forwarded to both public and private sector employers.²⁹ Although raw scores were available, many employers were not aware that test scores were being adjusted.³⁰

The U.S.E.S. justified the use of race norming because it balanced out the inequities created by top-down GATB score reporting.³¹ According to the U.S.E.S. staff, "[t]he purpose of these score adjustments, which serve to erase group differences in test scores, is to mitigate the adverse effects that rank-ordering on the basis of test score would otherwise have on the employment opportunities of minority job seekers."³²

C. The Rise and Fall of the Race-Normed GATB

Debate over the GATB and its disparate impact on minority applicants can be traced back to a 1972 referral policy negotiated between the D.O.L., the Equal Employment Opportunity Commission (E.E.O.C.), and the Department of Justice (D.O.J.). This policy stipulated that "referrals of tested minority applicants should be in proportion to their presence in the applicant pool in all cases in which the tests had not been validated for minority applicants to the job in question."³³ This policy reflected two basic concerns. The first concern explicitly centered on the question of valid prediction of job performance. In 1972, there was little information on correlation between the GATB scores and subsequent job performance, leaving a high risk of discrimination against minority applicants who scored low on the test.³⁴ A second, related concern was the desire to promote equal employment opportunity; minorities who were equally capable of performing well at a job would not have been hired

27. FAIRNESS, *supra* note 23, at 20. "Other" encompasses all those not in the first two categories and includes both whites and Asians. *Id.*

28. *Id.* In conducting their review of the GATB, the authors of the FAIRNESS report had difficulty replicating the factors used to create the conversion tables despite a careful review of the GATB technical manuals. *Id.* at 84.

29. *Id.* at 1.

30. *Id.* at 213.

31. Without race-norming the GATB results, top-down score reporting would have had a disparate impact on the hiring of minority test-takers.

32. *Id.* at 2.

33. *Id.* at 21-22.

34. *Id.* at 21.

without the adoption of race norming.³⁵

The D.O.L. found it had a dilemma. Rank, or top-down, ordering of GATB scores would have had an adverse effect on the employment opportunities of minority jobseekers,³⁶ yet the test had not been validated for correlation with job performance.³⁷ The D.O.L. regarded the implementation of race norming as an extension of the 1972 referral policy, designed to avoid discrimination against minorities.³⁸

Faced with budget cuts and staff reductions, the Department of Labor hoped to increase use of the GATB for job referrals because use of an employment test could be more efficient than other referral methods.³⁹ Yet the D.O.L. realized that it was in a Catch-22 situation. Under the Equal Protection Clause, race norming could be construed as reverse discrimination, whereas under Title VII, use of the GATB *without* race norming would be invalid because it would result in a disproportionate impact on minority job seekers. As noted by the authors of the Fairness in Employment Testing report,

employee selection on the basis of rank-ordered test scores will screen out a large proportion of black and Hispanic candidates and thus expose employers (and the Employment Service) to legal action under the civil rights laws on grounds of discrimination; the use of score adjustments to mitigate these adverse effects on the employment chances of minority job seekers creates vulnerabilities to charges of reverse discrimination.⁴⁰

Before the D.O.L. undertook the study resulting in the Fairness in Employment Testing report, race norming was its solution to this dilemma. This same dilemma will continue to face employers and employment agencies who utilize the GATB or any other test to make hiring and promotion decisions.

In response to a D.O.J. challenge to race norming,⁴¹ the D.O.L. asked the National Research Council (N.R.C.)⁴² to study the validity of the GATB in predicting job performance.⁴³ The N.R.C. studied the issue of race norming, the validity of the GATB as a predictor of success-

35. *Id.*

36. *Id.* at 2.

37. *Id.* at 22.

38. *Id.* at 21.

39. *Id.* at 1. The D.O.L. was also hoping to increase economic activity by improving the person-job match. *Id.*

40. *Id.* at 3.

41. This challenge was brought in 1986. *Id.* at 34.

42. The members of the National Research Council are drawn from the councils of the National Academy of Sciences, the National Academy of Engineering, and the Institute of Medicine. The National Research Council provides research services to the federal government, the public, and the scientific and engineering communities. *Id.* at ii.

43. This study resulted in the FAIRNESS IN EMPLOYMENT TESTING report. See FAIRNESS, *supra* note 23.

ful job performance, and the effects on various groups of widespread adoption of the GATB as a referral tool.⁴⁴ According to the study, high GATB scores did show modest correlation with successful job performance,⁴⁵ but the N.R.C. found there was a "far less than perfect relation between [an applicant's] score and job performance."⁴⁶ This "far less than perfect" relation was the scientific justification posited by the N.R.C. for the continued use of race norming for minority examinees' scores.⁴⁷

As noted by the report's authors, "the modest validities of the GATB cause selection errors that weigh more heavily on minority workers than on majority workers."⁴⁸ When selecting by rank order of test scores, there is always the risk that applicants who will not turn out to be successful workers will still be referred to employers because of high test scores. This defect is known as false-acceptance. Conversely, applicants who can perform successfully at work may be screened out of job referral because of lower scores. This is known as false-rejection.⁴⁹ Without race norming of the GATB results, false-rejection selection errors would result in a disproportionate number of minority job applicants not selected for employment who are capable of performing well once on the job.⁵⁰

As a result of the 1991 Civil Rights Act, employment test results can no longer be race normed. However, continued use of the GATB without race norming of test results could be the subject of legal challenges based on alleged invalidity of the test and disparate impact on minorities.⁵¹ There are a number of grounds on which a lawsuit could be brought, depending on the particular circumstances in which the GATB is used.

II. Constitutional Analysis of Race-Conscious Employment Decisions

In 1986, the Department of Justice challenged the practice of race-

44. *Id.* at 2.

45. *Id.* at 5. Many of the objections to race norming are based on the assumption that the GATB has high validities for job performance, yet this is not actually the case. *See infra* notes 143-161 and accompanying text.

46. FAIRNESS, *supra* note 23, at 8.

47. *See id.* at 6-8.

48. *Id.* at 7. The authors of the report also noted that "[t]his outcome is at odds with the nation's express commitment to equal employment opportunity for minority workers." *Id.*

49. *See id.* at 6-8.

50. *Id.* *See infra* part II.B.2 for a complete discussion on the problem of selection errors.

51. These challenges would be based on Title VII grounds because they would likely fail on constitutional grounds. *See infra* part II.B.1 for an analysis of the constitutionality of the GATB without race norming.

norming GATB results on a reverse discrimination theory.⁵² The D.O.J. viewed race norming as unconstitutional because it classifies job seekers by race or national origin, and the preferential treatment of some to the disadvantage of others constitutes intentional racial discrimination.⁵³ The dispute over the legality of race norming underscores a larger debate over the meaning of the Equal Protection Clause in the context of affirmative action.

One view of equal protection is that racial preferences such as race norming violate an individual's right to be free from discrimination.⁵⁴ The countervailing view holds that in order to promote equal employment opportunity and avoid discrimination against minority group members, race-conscious policies which may favor minority group rights over an individual's rights are often necessary to protect against discrimination.⁵⁵ The authors of the Fairness in Employment Testing report posited a group rights interpretation of equal protection as part of the legal justification for race norming.⁵⁶ Both the individual rights and the group rights interpretation of equal protection have found support in Supreme Court decisions.⁵⁷

The fate of the attempts at race-norming employment tests provides an informative guide to how other race-conscious measures might fare under a constitutional or a Title VII challenge. A current example highlights the constitutional and Title VII issues surrounding race norming and employment tests. As of January 1992, the City of Chicago ordered a freeze on promotions because the results of the most recent police pro-

52. The challenge was brought by William Bradford Reynolds, then Assistant Attorney General for Civil Rights. FAIRNESS, *supra* note 23, at 21.

53. *Id.*

54. This view is known as the nondiscrimination principle, which advocates a colorblind approach to equal protection. It was the view of equal protection advocated by the D.O.J. throughout the Reagan and Bush administrations. See generally William B. Reynolds, *Individualism vs. Group Rights: The Legacy of Brown*, 93 YALE L.J. 995 (1984) (arguing that the true concern of equal protection is to protect individual, not group, rights, and that racial classifications should not be tolerated because they are morally wrong). See also *infra* notes 166-173 and accompanying text for a discussion of colorblind doctrine.

55. According to Owen Fiss, the Equal Protection Clause can only be interpreted in terms of group protection, and it confers protection on individuals only by reason of their membership in groups. Burke Marshall, *A Comment on the Nondiscrimination Principle in a "Nation of Minorities,"* 93 YALE L.J. 1006, 1007 (1984) (discussing Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976)). Marshall argues that when the discrimination is against a people, the remedy must "correct and cure and compensate for the discrimination against the people and not just the discrimination against the identifiable persons." Marshall, *supra*, at 1006. Marshall was Assistant Attorney General for Civil Rights during the Kennedy and Johnson Administrations. FAIRNESS, *supra* note 23, at 36.

56. FAIRNESS, *supra* note 23, at 21-22. The scientific justification for race norming is based on selection errors that unduly burden minority test-takers. See *infra* notes 143-161 and accompanying text.

57. See, e.g., *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978) (individual rights) and *Brown v. Board of Educ.*, 374 U.S. 483 (1954) (group rights).

motion exam—given in 1988—had been adjusted by race norming.⁵⁸ In order to adhere to the 1991 Civil Rights Act the city can no longer race-norm results of promotion exams. To ensure that qualified minority candidates are offered promotions, the city must now examine its options, including giving a new promotion exam, adjusting the old exam, or eliminating exam-based promotions.⁵⁹

Because some promotions have already been made as a result of race-norming the 1988 exam, there are several challenges that could arise. First, white officers not promoted while race norming was in effect could claim reverse discrimination and constitutionally challenge the earlier promotions.⁶⁰ Second, if the City of Chicago adjusts the old exam, using a race-conscious method other than race norming, white applicants could challenge current promotions on a reverse discrimination theory. Finally, if the city promotes from the old exam without utilizing race-conscious measures, or if it gives a new exam that has a discriminatory impact on minorities, minorities could sue for a Title VII violation under a disparate impact theory. These dilemmas will serve as a basis for comparison for both constitutional and Title VII analysis of race norming and other race-conscious measures used in conjunction with employment tests.

A. Equal Protection Applied to Race Norming and the GATB

1. *Race Norming's Constitutionality Under Strict Scrutiny*

The starting point for evaluating the constitutionality of race norming is *Regents of the University of California v. Bakke*.⁶¹ Allan Bakke, a white male who had been denied admission to the medical school at the University of California at Davis for two consecutive years, challenged the medical school's special admissions program for minorities which reserved sixteen places for minorities in each year's entering class. Bakke contended that the program excluded him from the school on the basis of his race in violation of the Equal Protection Clause of the Fourteenth Amendment.⁶²

Justice Powell announced the plurality judgment for the Court, ap-

58. Laurie Goering, *Rights Law Delays Cop Promotions*, CHI. TRIB., Jan. 5, 1992, at 3.

59. *Id.*

60. This could be a real possibility even though the City of Chicago believes that the earlier promotions are not problematic. See Goering, *supra* note 58 (reporting that mayor's press secretary doubts earlier promotions would create a problem).

61. 438 U.S. 265 (1978) (plurality opinion).

62. *Id.* at 277-78. Bakke also alleged that the special admissions program was invalid under Title VI of the Civil Rights Act of 1964. *Id.* at 270. The special admissions program was based on whether an applicant checked a box for minority group consideration on the admissions application. The applicant would then be referred to a special admissions committee and was not compared to general applicants. *Id.* at 274-75.

plying strict scrutiny to the Davis admissions program.⁶³ Although Justice Powell found that the goal of achieving a diverse student body was a sufficiently compelling interest warranting the consideration of race,⁶⁴ he concluded that the special admissions program was not necessary to attain that goal.⁶⁵ While Justice Powell agreed with Justices Brennan, White, Marshall, and Blackmun that race may be taken into account in an admissions program as one factor,⁶⁶ he expressed concern that reserving a fixed number of seats would preclude applicants from being treated as individuals in the admissions process.⁶⁷

Justice Powell's opinion in *Bakke* reflects the view that the Equal Protection Clause protects individuals by allowing the government to adopt racial preferences, but only for the purpose of remedying particularized unlawful discrimination.⁶⁸ Justice Powell stated:

[This Court has] never approved a [racial] classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. . . . Without such findings . . . it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another.⁶⁹

Justice Powell's approach to racial classifications was not completely colorblind; he would have upheld racial classifications that furthered a legitimate and substantial government interest.⁷⁰ For Justice Powell, a racial preference designed solely to remedy "societal discrimination" did not advance a constitutionally legitimate government purpose.⁷¹ The Court in *Bakke* established that strict scrutiny would be applied to reverse discrimination based on race, but did not identify which legitimate government interests it might find sufficiently compelling to justify discrimination.

The Court revisited the government interest issue in *Wygant v. Jackson Board of Education*.⁷² *Wygant* involved a labor agreement designed to preserve an affirmative hiring policy to increase the number of minor-

63. *Id.* at 305.

64. *Id.* at 311-12.

65. *Id.* at 315-20.

66. *Id.* at 296 n.36.

67. *Id.* at 318.

68. See Robert J. Delahunty, *Perspectives on Within-Group Scoring*, 33 J. VOCATIONAL BEHAV. 463, 464 (1988). Delahunty was an attorney in the Appellate Section, Civil Rights Division, U.S. Department of Justice. *Id.* at 463.

69. 438 U.S. at 307-09 (Powell, J.).

70. *Id.* at 307. Powell identifies at least two constitutionally permissible racial classification goals: eliminating or ameliorating the disabling effects of identified discrimination, *id.*, and attaining a diverse student body. *Id.* at 312.

71. 438 U.S. at 310.

72. 476 U.S. 267 (1986) (plurality opinion).

ity teachers in a school system. A provision of the labor agreement provided that if layoffs became necessary, teachers with the most seniority would be retained, except where it would result in minority teachers being laid off in a greater percentage than the current percentage of minority teachers employed at the time of the layoff. The effect of this provision was that minority teachers with less seniority were retained while white teachers with more seniority were laid off.⁷³ A plurality led by Justice Powell concluded that in the context of affirmative action, societal discrimination alone was not sufficient to justify the use of a racial classification.⁷⁴ The plurality required that the school district put forward sufficient evidence to conclude that there had been prior discrimination by the school district itself.⁷⁵

Through *Bakke* and *Wygant*, the Court firmly established that an affirmative action plan must be directed at remedying specific prior discrimination to survive strict scrutiny. When the U.S.E.S. implemented race norming, however, it was not combatting specific instances of past discrimination.⁷⁶ The referral program's goal was to ensure that referrals of minorities were in proportion to the number of minorities in the registrant pool, thereby helping to foster a racially balanced workforce.⁷⁷ Absent evidence of past discrimination against individual minority applicants, the goal of achieving a racially balanced workforce was likely based on the desire to ameliorate societal discrimination. Yet without a showing of specific discrimination or some other constitutionally permissible purpose, the Supreme Court has never found the pursuit of racial balance for its own sake to be a constitutionally valid purpose.⁷⁸

Under *Bakke* and *Wygant*, the City of Chicago would similarly have to establish that it was combatting specific instances of past discrimination in order to justify its prior use of race norming if white police officers who took the 1988 promotion exam challenged prior promotions based on race-normed test results. Even if the city could establish this past discrimination, white officers would most likely prevail because race norming would not be found by the Court to be a legitimate means to remedy past discrimination.

73. *Id.* at 270.

74. *Id.* at 276 ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy."). Justice Powell was joined by Chief Justice Burger and Justices Rehnquist and O'Connor in this part of the opinion.

75. *Id.* at 277.

76. This was the position taken by the D.O.J. Delahunty, *supra* note 68, at 465. The D.O.J.'s analysis of the constitutionality of race norming was written before *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) (plurality opinion) and *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547 (1990) were decided. See *infra* notes 97-108 and accompanying text.

77. Delahunty, *supra* note 68, at 465.

78. See, e.g., *Bakke*, 438 U.S. at 307 (Powell, J.) ("Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids."); *Wygant*, 476 U.S. at 276 (plurality opinion).

In addition to noting that ameliorating societal discrimination was not a compelling government interest, Justice Powell concluded that strict scrutiny should be applied to race-conscious measures.⁷⁹ When there is a compelling state interest to justify a race-conscious measure, the means chosen to achieve this purpose must be narrowly tailored.⁸⁰ This narrow means-end relationship requires that the race-conscious approach be minimally intrusive and not unduly burden innocent parties.⁸¹ A race-conscious remedial measure is acceptable where the burden shouldered by innocent—usually non-minority—parties is relatively light, but is unacceptable if it imposes a heavy or intrusive burden on innocent parties.⁸² In articulating this distinction, Justice Powell differentiated between the identifiable, intrusive injury imposed by the layoffs in *Wygant* and valid hiring practices where the burden is diffused among society generally.⁸³

For the white Chicago police officers, race norming would be considered preferential treatment that heavily burdens innocent parties whose scores are not converted.⁸⁴ Even with valid hiring goals in place, the burden of race norming would not be diffused throughout society generally; rather, identifiable police officers waiting for promotion would be burdened by this practice.⁸⁵ Additionally, white police officers could allege that race norming is not narrowly tailored to the city's purpose. Race norming would violate *Bakke* by "shield[ing] registrants in the preferred groups from comparison with registrants from other

79. *Wygant*, 476 U.S. at 280 (Powell, J.).

80. *Id.* at 279-80.

81. *Id.* at 281.

82. *See id.* at 280-83. Justice Powell was joined by Chief Justice Burger and Justice Rehnquist in this part of the opinion. As noted in *Wygant*, this view has been upheld in *Fullilove v. Klutznick*, 448 U.S. 448, 484 (1980); *Franks v. Bowman*, 424 U.S. 747, 777 (1976); and *Steelworkers v. Weber*, 443 U.S. 193, 208 (1979). *Wygant*, 476 U.S. at 281-82.

83. 476 U.S. at 282-83. Professor Michel Rosenfeld has argued that this distinction is not well grounded:

Preferential treatment in hiring does not have primarily a diffuse effect on society at large, but rather definite sharply defined negative consequences for a small number of individuals: the applicants who would have succeeded in their objective but for the preferential treatment accorded to certain other applicants. . . . [T]he injury to innocent third parties attributable to preferential hiring seems as sharply concentrated on a small number of individuals as is that stemming from preferential layoffs.

MICHEL ROSENFELD, *AFFIRMATIVE ACTION AND JUSTICE: A PHILOSOPHICAL AND CONSTITUTIONAL INQUIRY* 181-82 (1991).

However, even if Professor Rosenfeld's analysis is accurate, it does not adequately account for the difficulty of determining which specific individuals were harmed by preferential hiring. In *Wygant*, the individuals affected by the layoffs could be specifically identified.

84. *See Wygant*, 476 U.S. at 280-83.

85. If a case were brought challenging the race-norming of the GATB, this argument would probably fail. The burden from race-norming the GATB would be broadly diffused amongst society given the large number of applicants referred to many different job categories.

backgrounds.”⁸⁶

The city may have other alternatives that arguably would be less burdensome on innocent parties, such as “banding,”⁸⁷ eliminating exam-based promotions,⁸⁸ or considering race as only one factor in a decision.⁸⁹ Alternatively the U.S.E.S. could provide remedial training to low scorers or allow low scorers to retake the test.⁹⁰

After *Bakke* and *Wygant*, the question remained whether there was another compelling interest, aside from remedying identifiable past discrimination, that would enable racial preferences to survive strict scrutiny.⁹¹ In the case of state and local government programs, the Court answered this question in the negative in *City of Richmond v. J.A. Croson Co.*⁹² *Croson* involved a Richmond, Virginia city ordinance that required city construction contracts held by non-minority owned prime contractors to set aside at least thirty percent of the work for minority subcontractors.⁹³ Justice O'Connor's plurality opinion stated that under the Equal Protection Clause, racial classifications are subject to a strict scrutiny standard not dependent on the race of those burdened or benefitted by the classification.⁹⁴

Applied to the example of the Chicago police officers, *Croson* shifts the burden of proof to the City of Chicago to adequately justify its remedial program. In order to prove a compelling interest in remedying past discrimination, the city must show strong and specific evidence of past discrimination by the police department itself.⁹⁵ For the state employment agencies that race-normed GATB results, this burden of proof

86. See Delahunty, *supra* note 68, at 467. This was the position taken by the Reagan administration. *Id.* at 463. See also *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 316-19 (1978) (plurality opinion) (“[R]ace or ethnic background may be deemed a ‘plus’ in a particular applicant’s file, [but it is impermissible to] insulate the individual from comparison with all other candidates.”).

87. *Bridgeport Guardians v. City of Bridgeport*, 735 F. Supp. 1126, 1136-37 (D. Conn. 1990), *aff’d*, 933 F.2d 1140 (2d Cir. 1991). “Banding” is a technique that groups together a range of test scores which are statistically without significant difference and which then provides for employee selection from a band range, allowing for the consideration of additional factors such as race, gender, work experience and dependability. See *infra* notes 197-200 and accompanying text.

88. This is a possibility currently under consideration by the City of Chicago. Goering, *supra* note 58, at 3.

89. See, e.g., *Bakke*, 438 U.S. at 316-17 (discussing Harvard admissions plan).

90. See Delahunty, *supra* note 68, at 467 n.10.

91. See, e.g., *Bakke*, 438 U.S. at 311-12 (attaining a diverse student body was a permissible purpose).

92. 488 U.S. 469, 493-94 (1989) (plurality opinion). “Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.” *Id.* at 493 (O’Connor, J.).

93. *Croson*, 488 U.S. at 477.

94. *Id.* at 493-94.

95. *Id.* at 504.

would likely be insurmountable; given the large number of applicants referred to many different job categories, it would be a daunting—perhaps impossible—task to prove past discrimination within specific job categories.

2. *Race Norming's Constitutionality Under Intermediate Scrutiny*

The Court in *Croson* made a distinction between federal and state race-conscious policies, stating that federal race-conscious decisions should receive more deference than those instituted by state or local governments.⁹⁶ Justice O'Connor stated: "Section 1 of the Fourteenth Amendment is an explicit *constraint* on state power, and the States must undertake any remedial efforts in accordance with that provision,"⁹⁷ whereas section 5 of the Fourteenth Amendment is a "positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."⁹⁸ Subsequently, the Court, led by Justice Brennan, applied only intermediate scrutiny to a federal race-conscious policy in *Metro Broadcasting v. F.C.C.*⁹⁹ The policies at issue in *Metro Broadcasting* were the Federal Communications Commission's (F.C.C.) minority preference policies awarding enhancements for minority ownership and permitting "distress sale" radio and television stations to be transferred only to minority-controlled firms.¹⁰⁰

In *Metro Broadcasting*, the Court held that a congressionally mandated racial preference does not violate equal protection as long as there is only a slight burden on non-minorities and there is a substantial relationship to achieving an important governmental interest.¹⁰¹ The Court considered promoting broadcast diversity to be a legitimate government interest that justified minority preference policies.¹⁰²

Upon delineating an intermediate scrutiny standard of review, Justice Brennan reiterated the Court's holding in *Fullilove v. Klutznick*¹⁰³

96. *Id.* at 490-91.

97. *Id.* at 490.

98. *Id.* (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)).

99. 497 U.S. 547, 634, *reh'g denied*, 497 U.S. 1050 (1990).

100. *Metro Broadcasting*, 497 U.S. at 552. The "enhancement" awarded is to minority applicants for new radio or television broadcast licenses. Upon considering new applicants, in addition to analyzing factors including proposed program service, past broadcast record, and efficient use of the frequency, the F.C.C. awards a plus to minority owners who actively participate in daily operations. Additionally, the F.C.C.'s general "distress sale" policy is that a licensee in danger of losing a broadcast license cannot assign or transfer the license until the F.C.C. conducts a hearing. The F.C.C.'s minority preference policy for distress sale licenses allows such a license to be assigned to an F.C.C.-approved minority enterprise. *Id.* at 557.

101. *Id.* at 596-97.

102. *Id.* at 567.

103. 448 U.S. 448 (1980). At issue in *Fullilove* was a congressionally mandated set-aside program.

and distinguished *Metro Broadcasting* from *Croson*. Brennan noted that "much of the language and reasoning in *Croson* reaffirmed the lesson of *Fullilove* that race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments."¹⁰⁴ Brennan also noted that Congress' power to employ a race-conscious measure rests not only on section 5 of the Fourteenth Amendment but also on Congress' power under the Commerce Clause, the Spending Clause, and the Civil War Amendments.¹⁰⁵

The intermediate scrutiny standard of review in *Metro Broadcasting* would not apply to the City of Chicago in its defense against white challengers because the city's actions have no federal involvement or mandate. This issue is less clear in the case of race-norming the GATB. Race norming was advocated by a federal agency—the United States Employment Service—but implemented by independent state employment agencies.¹⁰⁶ If the Court found state employment agencies independently responsible for race-norming the GATB, race norming would fail under *Croson* as noted above. If the Court found the U.S.E.S. responsible for race-norming the GATB, then it would analyze race norming under intermediate scrutiny as expressed in *Metro Broadcasting*. The U.S.E.S., as a federal agency, would have an opportunity to present an important government interest beyond remedying societal discrimination. The 1972 D.O.L. referral policy, which explicitly stated that "referrals of tested minority applicants should be in proportion to their presence in the applicant pool,"¹⁰⁷ would likely be interpreted as evidence that race norming was an attempt to remedy societal discrimination; without some other important government interest, race norming would be invalidated even under intermediate scrutiny.

In the example of Chicago police promotions, white officers challenging past race norming would have prevailed based on the above analysis. A non-minority challenge brought against race norming of the GATB would also prevail. If the GATB were now to be utilized as a referral tool without race norming or other race-conscious measures, it would have a disparate impact on minority referrals to public and private employers. The issue becomes whether a minority test-taker's challenge to the disparate impact of the GATB would fail on equal protection grounds.

3. *The Constitutionality of the GATB's Use Without Race Norming*

The disparate impact of the GATB on minority test-takers is com-

104. *Metro Broadcasting*, 497 U.S. at 565.

105. *Id.* at 563-64 & n.11.

106. *See supra* note 23, and accompanying text.

107. FAIRNESS, *supra* note 23, at 21-22.

parable to that of the employment test at issue in *Washington v. Davis*.¹⁰⁸ At issue in *Davis* was a written employment test for entry-level police officer positions in the District of Columbia Metropolitan Police Department.¹⁰⁹ The test was designed to measure verbal "ability, vocabulary, reading and comprehension."¹¹⁰ Black applicants failed the test four times as frequently as white applicants.¹¹¹ The Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment is not violated unless an intent to discriminate can be shown.¹¹² Disproportionate racial impact alone does not render an employment test unconstitutional because disproportionate racial impact is not sufficient, by itself, to prove a discriminatory purpose.¹¹³

Because disproportionate impact alone is not sufficient to invalidate use of a test, the decisive issue in *Davis* became whether or not the test was a valid indicator of job performance.¹¹⁴ The Court was satisfied that there was a "positive relationship"¹¹⁵ between performance on the test and actual performance as a police officer.¹¹⁶ Not only was the test found to be neutral on its face and rationally related to "a purpose the Government [was] constitutionally empowered to pursue,"¹¹⁷ but the Court also found the affirmative efforts by the Metropolitan Police Department "to recruit black officers," and "the changing racial composition of the recruit classes and of the force in general" negated any inference of racial discrimination.¹¹⁸

Under the *Davis* analysis, the use of the GATB without race-normalizing test scores would most likely be upheld under an equal protection analysis.¹¹⁹ If the test results of the GATB were presented in rank order,¹²⁰ there would be a disproportionate number of minorities adversely affected by the use of the test.¹²¹ Yet the GATB is discriminatory only in

108. 426 U.S. 229 (1976).

109. *Id.* at 232.

110. *Id.* at 235 (quoting *Davis v. Washington*, 348 F. Supp. 15, 16 (D.C. Cir. 1972)).

111. *Id.* at 237.

112. *Id.* at 240 ("[T]he invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.").

113. *Davis*, 426 U.S. at 242 ("Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.").

114. *Davis*, 426 U.S. at 247.

115. *Id.* at 250.

116. *Id.*

117. *Id.* at 246.

118. *Id.*

119. Once an employment test is deemed valid by the Court, the constitutional analysis would then follow strict or intermediate scrutiny as outlined above.

120. Rank ordering of test scores would simply be top-down listing by raw scores of all test-takers combined.

121. FAIRNESS, *supra* note 23, at 21.

its impact;¹²² there is no “racially motivated government actor”¹²³ that would make the test invalid.¹²⁴ The test has been found to have modest validities¹²⁵ when correlated with job performance.¹²⁶ The N.R.C. determined that GATB scores do not systematically underestimate minority job performance.¹²⁷ Additionally, the fact that the U.S.E.S. is now making other affirmative efforts to attain a racially balanced workforce¹²⁸ would weigh in favor of the GATB’s constitutionality. The Employment Services’ use of the test is likely to be constitutionally permissible under this equal protection analysis. Similarly, if no intent to discriminate is shown, under *Washington v. Davis*, the minority police officers in Chicago would have to prove either that the promotion exam results do not correlate with job performance or that the exam is racially biased on its face in order to prevail.

B. Title VII Applied to Race Norming and the GATB

Both minority and non-minority plaintiffs could challenge the discriminatory impact of race norming or of an employment test under Title VII of the 1964 Civil Rights Act.¹²⁹ Since non-minority plaintiffs would

122. See *id.* at 115 (stating that while there appears to be no bias in item content, there is minimal evidence on which to decide whether the items in the GATB are biased against minorities; additionally, the test could have an overall bias).

123. See *TRIBE, infra* note 171, § 16-20 (detailing the doctrine of discriminatory purpose and *Washington v. Davis*).

124. On the contrary, it is evident that the D.O.L. is sensitive to the potential disparate impact; within-group score adjustments was its initial response to combat the problem. *FAIRNESS, supra* note 23, at 21 (One policy sought to be furthered by race norming was “the promotion of federal equal employment opportunity and affirmative action goals.”).

125. These modest validities are mainly derived from supervisor ratings of job performance. See *FAIRNESS, supra* note 23, at 169.

126. While the Court in *Davis* found that modest validities were acceptable, it is this issue which could be successfully challenged under a Title VII analysis. See *infra* part II.B.2.

127. See *FAIRNESS, supra* note 23, at 188. This conclusion is uncertain at best because it is based on supervisor ratings of performance. The N.R.C. could not adequately factor out the inherent bias in supervisor performance evaluations. See *id.* at 185-87.

128. For example, the D.O.L. is advising that results from the GATB should be used in conjunction with other selection criteria such as education, training, experience, and personal interviews. It is likely that many states will no longer use the test for referral at all, but will instead use it as a tool for assessment and counseling. See *Holmes, supra* note 10, at 47.

129. 42 U.S.C. §§ 2000e-1 to 2000e-17 (1964). Section 703(b) states:

[i]t shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, . . . or national origin, or to classify or refer for employment any individual on the basis of his race, color, . . . or national origin.

42 U.S.C. § 2000e-2(b). Section 703(j) states that an employer or employment agency is not required

to grant preferential treatment to any individual or to any group because of the race, color, . . . 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, . . . or national origin . . . referred or classified for employment by any

most likely prevail on a constitutional challenge to the practice of race-norming employment test results, they would also prevail under a Title VII analysis. The only avenue available to minority plaintiffs, however, would be to challenge use of the GATB without race-conscious measures on a discriminatory impact theory.

1. *Race Norming's Validity Under Title VII*

Although an employment test that can be shown to have a disparate impact on minority hiring may not be held unconstitutional under a Fourteenth Amendment equal protection claim, Title VII of the 1964 Civil Rights Act may invalidate the test despite the absence of discriminatory intent.¹³⁰ Even if the test itself were invalidated, however, the practice of race-norming test results would not be an allowable remedy to correct the invalid test. In cases in which the Court has found disparate impact, the tests in controversy have usually been "addressed to achieving the statutory objective of eliminating discriminatory selection procedures, not at securing the substantive outcome of group parity in the workforce."¹³¹

As with the constitutional analysis, the issue in a Title VII analysis is whether Title VII was designed to protect individual or group rights. In *Connecticut v. Teal*,¹³² an employer sought to offset the adverse impact of a written test on minority job applicants by including additional selection devices in order to achieve racial balance at the position of supervisor.¹³³ The *Teal* decision emphasized that Title VII's objective is "the protection of the individual employee, rather than the protection of the minority group as a whole."¹³⁴ Thus, attempting to achieve a racially balanced workforce could not justify an employer's race-conscious measures.¹³⁵ The race-norming approach would therefore fail under the *Teal* Title VII analysis because race norming acts as a device to ensure bottom-line racial balance.¹³⁶

employment agency . . . in comparison with the total number or percentage of persons of such race, color, . . . or national origin . . . in the available work force in any community. . . .

42 U.S.C. § 2000e-2(j).

130. *Davis*, 426 U.S. at 246-47.

131. Delahunty, *supra* note 68, at 468.

132. 457 U.S. 440 (1982).

133. *Id.* at 444 (selection devices included evaluations of past work performance, supervisor recommendations, and seniority).

134. *Id.* at 453-54.

135. *Id.* at 456. The Court reiterated this position in *Local 28, Sheet Metal Workers, Int'l Ass'n v. EEOC*, 478 U.S. 421, 475 (1986) (plurality opinion) ("[R]ace-conscious affirmative measures [may] not be involved simply to create a racially balanced work force.").

136. *See* Delahunty, *supra* note 68, at 470-71.

2. GATB's Validity Under Title VII

Although the court in *Washington v. Davis* required proof of discriminatory intent to strike a hiring practice on constitutional grounds, it also concluded that Title VII could invalidate a test without a showing of discriminatory intent.¹³⁷ The factors to be examined under Title VII would be the same as under equal protection analysis, but the *Davis* Court observed that under Title VII the review of these factors would be more rigorous than under equal protection analysis.¹³⁸ This rigorous review would be dictated by standards of review already in practice at the Equal Employment Opportunity Commission (E.E.O.C.).¹³⁹ The E.E.O.C., which administers Title VII on behalf of the federal government, relies on standards developed by the American Psychological Association to accurately validate employment tests and the tests' relationship to job performance.¹⁴⁰ These standards require an employment test to meet a higher standard than the "rational relationship to a legitimate purpose" mandated by the Supreme Court's interpretation of equal protection.¹⁴¹

A Title VII analysis of the GATB as a job referral tool without additional race-conscious measures being employed could invalidate use of the test. Although the N.R.C. found "modest" validities for the GATB,¹⁴² this finding can be challenged on at least three grounds.

First, the modest validities observed by the N.R.C. were based on supervisor ratings of job performance.¹⁴³ Supervisor ratings are an "observed rating" of job performance, determined by a supervisor under work conditions.¹⁴⁴ Psychological literature has demonstrated that supervisor ratings tend to be imperfect indicators of job performance.¹⁴⁵ The N.R.C. found evidence that "supervisors tend to rate employees of their own race higher than they rate employees of another race,"¹⁴⁶ and the supervisors in these studies were primarily white.¹⁴⁷ Because the precise magnitude of the tendency to underrate employees of another race is

137. 426 U.S. at 246-47.

138. *Id.* at 247. *Washington v. Davis* was not decided under Title VII because the case was brought before the 1972 amendments to Title VII were made applicable to public employers. See FAIRNESS, *supra* note 23, at 44.

139. *Davis*, 426 U.S. at 247 n.13.

140. *Id.*

141. *Id.* at 247.

142. FAIRNESS, *supra* note 23, at 169.

143. *Id.* Validities are also based on success in training programs, but supervisor ratings were the primary performance measure used. *Id.* at 6.

144. *Id.* at 128-29. An "observed rating" can be contrasted with a "true rating" of a worker, which would be measured by an exhaustive study of that worker's job performance. *Id.*

145. *Id.* at 185.

146. FAIRNESS, *supra* note 23, at 188.

147. *Id.* at 6.

unknown,¹⁴⁸ this subjective factor weakens the overall conclusion that there is a modest correlation between the GATB scores and subsequent job performance.

The second weakness in the GATB validity claims is the problem of "speededness" of the test. The time limits on the GATB subtests are extremely short.¹⁴⁹ There is evidence that a test which measures depth of a certain ability for one racial group may only be measuring a speed ability for another group.¹⁵⁰ This difference is best demonstrated by the example of form matching:

[F]orm matching[] requires examinees to pair elements of two large sets of variously shaped two-dimensional line drawings. A total of 60 items is to be completed in 6 minutes. Within this time, examinees must not only find pairs of line drawings that are identical in size and shape, but must then find and darken the correct answer bubble . . . from a set of 10 answer bubbles with labels consisting of single or double capitalized letters (e.g., GG). The labeling of physically corresponding answer bubbles differs from one item to the next. Since the subtest is tightly timed, identification of the correct answer bubble from the relatively long list presented on the answer sheet might become a significant component of the skill assessed. . . . [T]he subtest measures not only form perception, but also the speed of list processing and skill in decoding complex answer sheet formats. *The latter skill is dependent on previous experience with tests.*¹⁵¹

The extent of previous experience with tests differs for members of different racial or ethnic groups, with minority examinees being the least experienced with standardized tests.¹⁵² The speed component of the test makes it probable that the test does not assess the abilities of members of different racial or ethnic groups in the same way.¹⁵³ The N.R.C. concluded that the "speededness" of the test could have an effect on the predictive validity of the GATB across racial or ethnic groups.¹⁵⁴

Finally, and most significantly, there is the problem of "selection errors."¹⁵⁵ The term "selection errors" refers to the concepts of false-acceptance and false-rejection based on test results. An example of false-acceptance is a test-taker who scores high on a test but does not perform successfully at work. Conversely, false-rejection occurs when a test-taker who can perform successfully at work is screened out of job referral be-

148. *Id.* at 188.

149. *Id.* at 103.

150. *Id.* at 105-06.

151. FAIRNESS, *supra* at 106 (emphasis added).

152. *Id.*

153. *Id.* at 105.

154. *Id.* at 115.

155. *See id.* at 6-8.

cause of a low score.¹⁵⁶ While high GATB scores have modest validities for predicting successful job performance,¹⁵⁷ low GATB scores do not correlate with poor job performance. Low scores are not reliable predictors of job success or failure. In focusing on selection error, the authors of the N.R.C. report highlighted a fundamental aspect of testing fairness: "Do workers of equal job proficiency in the several groups have the same chance of selection?"¹⁵⁸ A fundamental flaw of the GATB is that minorities who could perform well on the job but who score in the lower ranges on the test are screened out in disproportionate numbers because minority groups have lower average test scores.¹⁵⁹

The problems of potential bias in supervisor ratings, the speed component of the GATB favoring white applicants over minority applicants, and selection errors screening out a disproportionate number of minorities would support a claim that use of the GATB is an invalid employment practice under Title VII.¹⁶⁰

Minority police officers in Chicago may be able to make a similar Title VII claim regarding the 1988 promotional exam; however, this appears premature in mid-1993 given that Chicago is already studying ways to combat discriminatory impact of promotional procedures.¹⁶¹

III. Proposals for Race-Conscious Measures

A. Constitutional Support for Race-Conscious Measures

Although the Court has narrowed its equal protection approach to affirmative action through *Wygant* and *Croson*, it has not completely rejected race-conscious policies. The Court's support for preferential treatment began with *Brown v. Board of Education*.¹⁶² In the context of affirmative action, *Brown* stands for the proposition that the Equal Protection Clause is meant to protect group rights.¹⁶³ The basis for this argument is derived from examining the remedy in *Brown*. Although Linda Brown¹⁶⁴ herself was to receive the individual remedy of attendance at an integrated school, the dismantling of a dual school system

156. *Id.* at 255-58.

157. *Id.* at 169.

158. *Id.* at 255.

159. See FAIRNESS, *supra* note 23, at 255-58. Focusing on the right of each individual to receive meritocratic treatment, Professor Mark Kelman questions "the propriety of using screening devices with racially disparate impact in screening workers who are in fact of equal quality." Mark Kelman, *The Problem of False Negatives*, 27:3 Soc'Y at 21, 23 (1990).

160. See Jan H. Blits & Linda S. Gottfredson, *Equality or Lasting Inequality?*; Mary L. Tenopyr, *Fairness in Employment Testing*, 27:3 Soc'Y at 4, 17 (1990) for critiques of the FAIRNESS report.

161. See Goering, *supra* note 58, at 3.

162. 347 U.S. 483 (1954) (*Brown I*).

163. See Marshall, *supra* note 55, at 1007-08.

164. Linda Brown was the named plaintiff in the case.

conferred constitutional benefits on everyone in the system; desegregation was a group remedy.¹⁶⁵

The distinction between group rights and individual rights becomes paramount when attempting to reconcile racial preferences with the notion of a colorblind constitution.¹⁶⁶ The colorblind constitutional theory posits that all individuals should be treated equally under the law.¹⁶⁷ This doctrine reflects the philosophical underpinnings of the meritocratic ideal, according to which individual talent is the only fair criterion to determine the allocation of scarce social resources.¹⁶⁸

Justice O'Connor articulated this meritocratic vision in her *Metro Broadcasting* dissent: "Racial classifications, whether providing benefits to or burdening particular racial or ethnic groups, may stigmatize those groups singled out for different treatment and may create considerable tension with the Nation's widely shared commitment to evaluating individuals upon their individual merit."¹⁶⁹ According to Justice O'Connor, the prohibition of the use of racial classifications is a central constitutional norm.¹⁷⁰ After *Croson* and *Metro Broadcasting*, it appeared that at least five Justices believe colorblindness, in a state action context, should be the animating vision for antidiscrimination law.¹⁷¹

165. *Id.* at 1007-10. Marshall points out that the burdens of desegregation were borne by state institutions, not individuals. *Id.* at 1008. He then goes on to say, however, that for the purposes of constitutional analysis, it should not matter whether it is an institution or an individual who bears the burden of affirmative action. *Id.* at 1009-10. While Marshall is correct that the question of who bears the burden should not be the primary concern in an equal protection analysis, he fails to account for the current public backlash against racial preferences. As stated by another commentator, it is doubtful that "racial preferences and quotas can ever be made acceptable to the vast majority of the American people." Lino A. Graglia, *Title VII of the Civil Rights Act of 1964: From Prohibiting to Requiring Racial Discrimination in Employment*, 14 HARV. J.L. & PUB. POL'Y 68, 76 (1991).

166. The elder Justice Harlan was the first to state that "[o]ur Constitution is color-blind." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). This quote has been the foundation of the colorblind doctrine, yet, as noted by Professor Tribe, Justice Harlan was referring only to the concept that the Fourteenth Amendment prevents the law from enshrining and perpetuating white supremacy. Laurence H. Tribe, *In What Vision of the Constitution Must the Law be Color-blind?*, 20 J. MARSHALL L. REV. 201, 203 (1986) [hereinafter Tribe, *Vision*].

167. All the justices seem to share the idea that the ultimate fulfillment of constitutional equality would be evidenced by a truly colorblind society, but they divide on what types of race-conscious remedies are legitimate. ROSENFELD, *supra* note 83, at 206-07 (discussing *Croson*).

168. See FAIRNESS, *supra* note 23, at 35.

169. *Metro Broadcasting*, 497 U.S. at 604 (O'Connor, J., dissenting).

170. See T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1077 (1991).

171. *Id.* The Justices who appeared to favor a colorblind approach after *Croson* and *Metro Broadcasting* were Justices O'Connor, Scalia, Kennedy, White, and Chief Justice Rehnquist. *Id.* at 1077 n.82; *Croson*, 488 U.S. at 493-94. See also Tamar Fruchtman, Comment, *City of Richmond v. J.A. Croson Co.: Charting a Course Through the Supreme Court's Affirmative Action Decisions*, 17 HASTINGS CONST. L.Q. 699, 715-20 (1990) (discussing the Justices' views

Yet, the Court has consistently refused to categorically embrace a colorblind approach.¹⁷² Constitutional prohibitions against racial preferences have not amounted to strict prohibitions against remedies that take account of race.¹⁷³

Additionally, preferential treatment outside of the affirmative action context is not novel. Preferential treatment is granted to homeowners in the form of an income tax write-off of mortgage interest; veterans receive preferential treatment in several areas; and even water rights and agricultural subsidies are forms of preference.¹⁷⁴ As noted by Professor Brest:

[I]t is frustrating and painful, even if we are not stigmatized or the objects of prejudice, to be classified and disadvantaged based on characteristics beyond our control. Yet there are many areas besides race and sex and the traditional suspect-type classifications where this happens to us all the time and we are willing to accept it.¹⁷⁵

The Supreme Court has treated racial preferences more leniently under Title VII than under the Equal Protection Clause.¹⁷⁶ Yet the language of the Equal Protection Clause is more abstract and open-ended than the specific prohibitions presented by Title VII.¹⁷⁷ While the Equal Protection Clause could allow for more flexibility, the Justices have hemmed themselves in with the colorblind doctrine. Race norming was designed to remedy the adverse impact of a testing procedure that is arguably not a good enough predictor of job performance. "If the Court perceives a need to remedy employment discrimination that outweighs the potential for 'trammeling' the interests of non-minorities, the remedy is permissible."¹⁷⁸

on affirmative action). Justice Thomas's record before his appointment to the Court indicates that he too would favor a colorblind approach to affirmative action. Even with Justice White's imminent retirement there are still five Justices who would most likely take a colorblind approach.

172. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, §§ 16-20, 16-21 (2d ed. 1988). While the Court finds that colorblindness should be an *animating* vision, this does not mean that it will be a categorical approach to affirmative action in the future.

173. George Rutherglen & Daniel R. Ortiz, *Affirmative Action Under the Constitution and Title VII: From Confusion to Convergence*, 35 *UCLA L. REV.* 467, 517 (1988).

174. See FAIRNESS, *supra* note 23, at 37-38 (citing Abraham Edel, *Preferential Consideration and Justice*, in *SOCIAL JUSTICE AND PREFERENTIAL TREATMENT: WOMEN AND RACIAL MINORITIES IN EDUCATION AND BUSINESS* 111-133 (William T. Blackstone & Robert D. Heslep, eds. 1977)).

175. Paul Brest, *Affirmative Action and the Constitution: Three Theories*, 72 *IOWA L. REV.* 281, 284 (1987) (discussing three general constitutional theories for analyzing racial classifications: original intent, protection of discrete and insular minorities, and colorblind doctrine).

176. See Rutherglen & Ortiz, *supra* note 173, at 483-90.

177. *Id.* Rutherglen & Ortiz propose that the Supreme Court bring uniformity to its affirmative action decisions by converging the Title VII and constitutional standards for analyzing racial preferences. *Id.* at 517-18.

178. J. Hoult Verkerke, Note, *Compensating Victims of Preferential Employment Discrimination Remedies*, 98 *YALE L.J.* 1479, 1479-80 (1989).

One constitutional justification for a racial preference that may burden an innocent non-minority is Professor Tribe's "antibusjugation principle."¹⁷⁹ According to the antibusjugation principle, government actions should be judged by their *impact* on members of protected groups, not on the basis of the motives of identifiable bad actors. The problems of inequality operate at the systemic level and cannot be changed simply by legislating against discrimination.¹⁸⁰

Finally, the Court has approved racial preferences in the Title VII context. The assertion that Title VII was devised to protect individual, not group, rights¹⁸¹ is arguably apparent from the language of Title VII explicitly protecting an individual from discrimination.¹⁸² Although Title VII may have been originally written to protect individual rights,¹⁸³ its definition of discrimination is necessarily group-centered: in order to determine if there has been discrimination, the individual's membership in a group must be taken into account.¹⁸⁴

The principle method of protecting individual rights under Title VII has been to challenge employment practices that show a pattern of discrimination or have discriminatory impact on minorities.¹⁸⁵ Title VII proscribes both overt discrimination and practices that are facially neutral but have a discriminatory effect.¹⁸⁶ Underrepresentation of minorities is ascribed to discrimination unless the employer can show otherwise.¹⁸⁷ Therefore, if an individual challenging an employment practice can prove disparate impact, that individual's remedy is necessarily based on her membership in a minority group.

In the absence of direct evidence of past discrimination, voluntary affirmative action is also acceptable under Title VII.¹⁸⁸ Private¹⁸⁹ and public¹⁹⁰ employers may adopt race-conscious hiring or promotion plans as part of a voluntary affirmative action program to address a "conspicuous . . . imbalance in traditionally segregated job categories."¹⁹¹ The

179. Tribe, *Vision*, *supra* note 166, at 202.

180. FAIRNESS, *supra* note 23, at 36.

181. See, e.g., Delahunty, *supra* note 68, at 468.

182. 42 U.S.C. § 2000e-2(b) ("[u]nlawful . . . to discriminate against, any individual").

183. See FAIRNESS, *supra* note 23, at 40.

184. This is true whether or not that individual is a member of a minority or non-minority group.

185. See FAIRNESS, *supra* note 23, at 40-41.

186. See 1991 Civil Rights Act, *supra* note 2. The 1991 Civil Rights Act restored antidiscrimination law to the state articulated in *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971).

187. See FAIRNESS, *supra* note 23, at 41. *Griggs* proscribed the use of any selection procedure that was "fair in form, but discriminatory in operation." *Griggs*, 401 U.S. at 431.

188. See FAIRNESS, *supra* note 23, at 49-50.

189. See *United Steel Workers of America v. Weber*, 443 U.S. 193, 208 (1979).

190. See *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 630 (1987).

191. FAIRNESS, *supra* note 23, at 49 (quoting the Lawyers' Committee for Civil Rights Under Law).

Supreme Court has sanctioned voluntary affirmative action because, given the Nation's concern over correcting past discrimination, it would not make sense to prohibit "all . . . race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy."¹⁹²

Race norming would not be valid under equal protection or under Title VII,¹⁹³ but other score adjustment mechanisms designed to reduce or eliminate adverse racial impact of employment selection procedures and designed to avoid violation of Title VII have been upheld.¹⁹⁴ Cases lending support for racial preferences, combined with the Court's determination that race-conscious measures are appropriate under specific circumstances, indicate that there may be a constitutional method for utilizing race-conscious measures in conjunction with employment tests.

B. Proposals for Valid Race-Conscious Plans

1. *Compelling or Substantial Government Interest*

A race-conscious hiring plan must pass either strict or intermediate scrutiny, depending on whether the plan is promulgated by a state or federal agency, respectively.¹⁹⁵ In Chicago's case, therefore, the city would first have to show specific evidence of past discrimination against minority police officers. If the city meets this burden, it could institute a race-conscious hiring plan as long as this plan does not unduly burden white officers.

Use of the GATB demands a different solution. In its previous application with state employment agencies implementing the actual exam, race norming would fail under strict scrutiny. Yet, because the GATB is sponsored by the U.S.E.S., a federal agency, Congress could legislate in favor of creating a diverse workforce and against an exam that eliminates capable workers from consideration. This would place race-conscious measures used in conjunction with the GATB under intermediate scrutiny.

192. *Id.* at 47 (quoting *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 516 (1986)).

193. *See supra* parts II.A.1., II.A.2., and II.B.1.

194. *Kirkland v. New York State Dep't of Correctional Serv.*, 628 F.2d 796, 798-99 (2d Cir. 1980), *cert denied*, 450 U.S. 980 (1981); *Kirkland v. New York State Dep't of Correctional Serv.*, 711 F.2d 1117, 1126-27 (2d Cir. 1983). The Ninth and D.C. Circuits, however, have not followed the Second Circuit in upholding this type of remedy. *See San Francisco Police Officers Ass'n v. City and County of San Francisco*, 812 F.2d 1125, 1131 (9th Cir. 1987), *vacated as moot*, 842 F.2d 1126 (9th Cir. 1988); *Hammon v. Barry*, 813 F.2d 412, 431-32 (D.C. Cir. 1987), *cert denied*, 486 U.S. 1036 (1988).

195. *See City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 493-94 (1989) (plurality opinion); *Metro Broadcasting v. F.C.C.*, 497 U.S. 547, 603 (1990).

2. *Less Burdensome Race-Conscious Alternatives*

Whether a race-conscious measure must meet a compelling or only a substantial government interest, it still must not be unduly burdensome.

One D.O.L. suggestion is to evaluate an applicant based on exam results plus other referral tools.¹⁹⁶ It is not clear what these other referral tools might be, but this suggestion is in line with the Harvard Admissions Plan, cited favorably by Justice Powell in *Bakke*.¹⁹⁷ The goal for employment would be the same as that for admissions: race would be considered as a factor in overall evaluation.

Finally, there is one race-conscious measure that has already been applied to employment exams and has survived scrutiny at the federal appellate level.¹⁹⁸ This race-conscious measure is called "banding", and it first gained approval in *Bridgeport Guardians v. City of Bridgeport*.¹⁹⁹ The banding technique selects a range of scores with differences that are not statistically significant and then provides for promotions from a band range, considering additional factors such as race or ethnicity, gender, work experience, and dependability.²⁰⁰ The court in *Bridgeport Guardians* specifically disapproved of race norming and distinguished banding from it. The merit in banding is its simple ability to recognize and accommodate the fact that several candidates within a general range will perform well on the job even though they score differently on an exam.

The Ninth Circuit recently upheld banding in *San Francisco Police Officers Ass'n v. City and County of San Francisco*,²⁰¹ citing *Bridgeport Guardians* with approval and again distinguishing between banding and race norming.

Conclusion

Even if the current weakly predictive general ability job tests were relatively culturally unbiased, this does not mean we should happily embrace their use. As posited by Professor Kelman, they may fail to comport with the demands of liberal, individualistic meritocracy, and this failure should be of particular concern when these nonmeritocratic tests burden members of historically oppressed groups.²⁰²

196. See *Termination*, *supra* note 26, at A10.

197. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 316-17 (1978) (plurality opinion).

198. *Bridgeport Guardians v. City of Bridgeport*, 735 F. Supp. 1126, 1136-37 (D. Conn. 1990); *San Francisco Police Officers Ass'n v. City and County of San Francisco*, 979 F.2d 721, 728 (9th Cir. 1992).

199. 735 F. Supp. 1126, 1136-37 (D. Conn. 1990), *aff'd*, 933 F.2d 1140 (2d Cir. 1991).

200. *Bridgeport Guardians*, 735 F. Supp. at 1129.

201. *San Francisco Police Officers Ass'n v. City and County of San Francisco*, 979 F.2d 721, 728 (9th Cir. 1992).

202. See generally Mark Kelman, *Concepts of Discrimination in "General Ability" Job Testing*, 104 Harv. L. Rev. 1158 (1991).

If we try to remedy these failures, the question that arises is whether the approach should be color-blind or color-conscious. Justice Blackmun's dissent in *Bakke* is still a powerful and viable statement in favor of race-conscious measures: "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently."²⁰³ While colorblindness might be an ultimate philosophical ideal, "a remedial regime predicated on colorblindness will have little influence at [the] deep level of social and legal consciousness [of race] because it cannot adequately challenge white attitudes or recognize a role for black self-definition."²⁰⁴

The goal of affirmative action is to ensure equal employment opportunity to every person. The use of the GATB should only be continued if race-conscious measures such as banding are used in conjunction with the test to ensure that minorities are not unfairly selected out of the job market.

203. 438 U.S. 265, 407 (Blackmun, J., dissenting).

204. Aleinikoff, *supra* note 170, at 1062.

