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SURVIVING TITLE VII: DEFENDING MUNICIPAL RESIDENCY REQUIREMENTS IN MINORITY COMMUNITIES

Erika L. Wood*

I. INTRODUCTION

Numerous New Jersey municipalities have enacted local ordinances that require an individual to be a town resident in order to apply for a municipal position. Like much of the nation,1 northern New Jersey is comprised of many de facto segregated communities, with towns having either a predominantly White or predominantly Black population.2

* 1999 J.D. Candidate, Rutgers School of Law-Newark. I wish to thank Professor Jonathan Hyman for his insight and advice throughout the writing of this article. This effort is especially dedicated to my grandparents, George and Margaret Playdon, whose love, confidence and encouragement was a constant source of strength from the very beginning of my education, and carried me through to the end, even after their departure.

1. See generally ANDREW HACKER, TWO NATIONS 3 (1992) ("[B]lacks must endure a segregation that is far from freely chosen. America may be seen as two separate nations... the separation is pervasive and penetrating. As a social and human division, it surpasses all others... ").

2. For Example, according to the 1990 Census, Kearny, New Jersey has a total population of 34,874, 90% of which is White and 1% of which is Black. See U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, 1990 CENSUS OF POPULATIONS, GENERAL POPULATION CHARACTERISTICS, NEW JERSEY, tbl. 79 [hereinafter 1990 CENSUS]. Kearny neighbors Newark, with a total population of 275,221, 60% of which is Black and 28% of which is White. See id. East Orange, New Jersey has a total population of 73,552, 90% of which is Black and 7% of which is White. See id. East Orange neighbors Bloomfield Township with a total population of 45,061, 90% of which is White and 4% of which is Black. See id.; see also RUSSELL S. HARRISON, ECOLOGICAL CHANGE AMONG URBAN, SUBURBAN AND RURAL MUNICIPALITIES: BLACK SUBURBANIZATION AND RESIDENTIAL SEGREGATION IN NEW JERSEY 8-9 (1982) (demonstrating that segregation grew among New Jersey municipalities during the 1980s). Mr. Harrison argues that "New Jersey... is a state with extreme 'white flight' among urban centers, racial stratification among suburbs and residential segregation overall... Indeed, racial polarization has grown in most counties." Id. at 9. In addition, nearly 73% of New Jersey school children attend de facto segregated schools. See HACKER, supra note 1, at 163.
Local residency requirements therefore frequently create racially segregated municipal work forces.

Over the last ten years, local branches of the National Association for the Advancement of Colored People (NAACP) have sued various, predominantly White, northern New Jersey townships. These suits alleged that certain residency ordinances discriminated on the basis of race, by preventing Black non-residents from attaining municipal jobs, thereby resulting in a disparate impact on the surrounding Black labor pool.

This article will explore whether residency requirements enacted in segregated municipalities are per se discriminatory, or if such an ordinance in a minority community could survive a Title VII challenge under an affirmative action justification. While residency requirements often result in continued de facto segregation of communities, they can also provide an important tool to address historical discrimination and social unrest in minority communities. Different issues arise when considering the validity of a residency ordinance in a minority community, as opposed to a racially mixed or White community. For example, there is the historical and ongoing search for strength and stability within the community; the need for secure, long-term employment; and the importance for a minority community to have a police force, board of education and city hall to battle against traditional discrimination and under-representation in these forums.

The City of Newark provides a unique example of these factors and of the positive effects a residency ordinance can have on a minority community, demonstrating the importance of protecting some ordinances from Title VII challenges. New-

Jersey City, Elizabeth and South Orange are northern New Jersey towns which appear to be the exceptions to this trend of de facto segregation. See id. Jersey City is 48% White and 30% Black; Elizabeth is 65% White and 20% Black; and South Orange is 76% White and 18% Black. See 1990 Census, supra.

3. The NAACP was founded in 1909 to achieve equal rights through the democratic process and to eliminate racial prejudice by removing racial discrimination in housing, employment, voting, schools, the courts, transportation and recreation. See Encyclopedia of Associations vol. 1., pt. 2 (Christine Maurer & Tara Sheets, eds. 33rd ed. 1998). Currently there are 1,802 local NAACP chapters around the country. See id.
ark's residency ordinance will therefore be examined in the context of that city's troubled sociopolitical history.

II. MUNICIPAL RESIDENCY REQUIREMENTS IN NEW JERSEY

In 1978, the New Jersey state legislature adopted the Act Concerning Residence Requirements for Municipal and County Employees. This Act permits municipalities to “require [that] . . . all officers and employees employed by the local unit . . . be bona fide residents therein.” The Act further permits a municipality “to limit the eligibility of applicants for positions and employment in the classified service of such local unit to residents of that local unit.” In other words, in order

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6. Id. It should be emphasized that the state statute does not require towns to enact a residence requirement, it simply permits them to do so.

7. N.J. STAT. ANN. § 40A:9-1.4 (West 1993). Hiring municipal employees is done in accordance with New Jersey's Civil Service Act. See N.J. STAT. ANN. § 11A:1-1 et seq. (West Supp. 1998). New Jersey has two divisions of civil service jobs: competitive and noncompetitive. See N.J. STAT. ANN. § 11A:3-2 (West 1993). Civil Service regulations require that candidates for competitive positions, including police and fire department jobs, apply through the New Jersey Department of Personnel. For these jobs, the New Jersey Department of Personnel administers examinations and circulates a list of eligible candidates based on the results of the examination. See N.J. ADMIN. CODE tit. 4A, § 4-1.1, 4-4.2 (1997 Supp.). The New Jersey Department of Personnel ranks the candidates on the list, called a certification, in order of their test scores. See N.J. STAT. ANN. § 11A:4-8 (West 1993); see also N.J. ADMIN. CODE tit. 4A, § 4-4.1 (1997 Supp.). The New Jersey Department of Personnel then selects an appropriate number of candidates from the master list in accordance with the residence requirements of the municipality, and then forwards the certification to the municipality. See N.J. ADMIN. CODE tit. 4A, § 4-3.2 (1997 Supp.). The New Jersey Department of Personnel then notifies eligible candidates that they have been certified and instructs them to inform the municipality if they are interested in the job. See id. at § 4-4.2(b). If a candidate indicates interest, the municipality commences its own screening process to ensure the candidate meets the age, citizenship, health and character standards established by state law and is otherwise suited to serve. Candidates for non-competitive entry-level positions, such as laborer and clerk typist, are hired directly by the municipality. See N.J. STAT. ANN. § 11A:3-5 (West 1993). Municipalities with
to even apply for a position in a town with a residency require-
ment, one must reside in that town at the time of filing an
application.\textsuperscript{8}

Because many towns in northern New Jersey are predomi-
nantly White or predominantly Black, residency ordinances
often create a racial disparity between the municipal work
force and the surrounding labor pool. This disparity gives rise
to a "disparate impact" employment discrimination claim
under Title VII.

\section*{III. TITLE VII CHALLENGES}

\subsection*{A. Introduction: Disparate Impact Theory of Discrimination}

Title VII of the Civil Rights Act of 1964 (Title VII)\textsuperscript{9}
prohibits discriminatory employment practices based on race, color,
religion, sex or national origin.\textsuperscript{10} Title VII forbids intentional-
discriminatory employment practices as well as practices

\begin{itemize}
\item Residency requirements may limit their hiring to town residents only. \textit{See}
\item The New Jersey law forbids residency requirements for uniformed
positions. \textit{See} \textit{N.J. Stat. Ann.} \textsection{40A:14-122.1} (West 1993) (police officers);
\textit{N.J. Stat. Ann.} \textsection{40A:14-9.1} (West 1993) (firefighters). However, while a
municipality cannot require its police and fire personnel to live within its
borders, it can give priority to its own residents who apply for these uni-
(codified as amended at 42 U.S.C.A. \textsection{2000e to 2000e-17}). The 1964 Act
\textsection{2000e to 2000e-17}).
\item \textit{See id.} Title VII provides in pertinent part:
\begin{itemize}
\item \textit{It shall be unlawful employment practice for an employer:}
\begin{itemize}
\item (1) to fail or refuse to hire or to discharge any individual, or other-
wise to discriminate against any individual with respect to his com-
pensation, term, conditions, or privileges of employment, because
of such individual's race, color, religion, sex or national origin; or
\item (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.
\end{itemize}
\end{itemize}
\end{itemize}
that are facially neutral but discriminatory in operation.\textsuperscript{11} Courts have developed two theories of employer liability under Title VII: "disparate treatment" and "disparate impact."\textsuperscript{12} Disparate impact analysis is applied when "practices that are fair in form, but discriminatory in operation"\textsuperscript{13} are at issue. It is this latter theory that provided the basis for the NAACP's challenges to municipal residency requirements in northern New Jersey.

The proper analysis to determine disparate impact discrimination was codified into Title VII through the 1991 Civil Rights Act ("1991 Act").\textsuperscript{14} In order to establish a prima facie

\begin{footnotesize}
\begin{enumerate}
\item See Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971). The Griggs Court specifically stated that, "Under [Title VII], practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." Id.

Note that the Supreme Court has explicitly held that Title VII protects both Black and White employees against discrimination. In McDonald v. Santa Fe Trail Transp. Co. the Court held that "Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they Negroes and [respondent] white." McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280 (1976).

\item See, e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (addressing claim made by black civil rights activists that employment discharge was racially motivated, created a disparate impact and thereby violated Title VII); see also Griggs, 401 U.S. at 436 (analyzing black employee's disparate impact Title VII challenge to employer's requirement of high school education or passing of intelligence tests as prerequisite for employment).

\item Griggs, 401 U.S. at 431.

\item See 42 U.S.C.A. § 2000e-2(k) (West 1994). The disparate impact section provides:

\begin{enumerate}
\item An unlawful employment practice based on disparate impact is established under this subchapter only if –

\begin{enumerate}
\item a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

\item the complaining party makes the demonstration . . . [that] an alternative employment practice [exists] and the respondent refuses to adopt such alternative employment practice.

For a general discussion comparing the Title VII disparate impact analysis to prior Supreme Courts analyses, see Rosemary Alito, Disparate Impact
\end{enumerate}
\end{enumerate}
\end{footnotesize}
case of disparate impact discrimination, a plaintiff is required to demonstrate that the application of a facially neutral standard resulted in a discriminatory hiring pattern.\textsuperscript{15} Generally, statistical evidence is presented in order to reveal such a pattern of disparate impact discrimination.\textsuperscript{16} Plaintiffs must present a comparison between the racial composition of those qualified persons in the relevant labor market, and that of those in the jobs at issue.\textsuperscript{17}

Under the 1991 Act, a plaintiff may make a case of disparate impact discrimination in one of two ways. First, the plaintiff may prove a disparate impact.\textsuperscript{18} Alternatively, the plaintiff can prove that an alternative employment practice, which would create a less disparate impact, is available, and the employer refuses to adopt it.\textsuperscript{19}

In the first approach, the plaintiff proves disparate impact discrimination if: (1) the plaintiff "demonstrates"\textsuperscript{20} that the defendant uses a particular employment practice that causes a disparate impact; and (2) the defendant fails to demonstrate that the challenged practice is job-related for the position in question and consistent with business necessity.\textsuperscript{21} However, if the plaintiff fails to prove causation; that is, the defendant can show that a specific practice is \textit{not} the cause of the disparate
impact, then the defendant is not required to prove that such a practice is required by business necessity.\footnote{22}

Under the second approach, the plaintiff establishes an unlawful employment practice based on disparate impact if the plaintiff can demonstrate that an alternative employment practice, which would create less of a disparity, exists; and that the defendant refuses to adopt the alternative.\footnote{23} This approach appears to be a codification of the U.S. Supreme Court's analysis in \textit{Albermarle Paper Company v. Moody}.\footnote{24} In \textit{Albermarle} the Supreme Court reasoned that if an employer meets its burden of proving that its practice is "job related" then the burden shifts to the plaintiff to show that an alternative practice, which does not have a similarly undesirable racial effect, would serve the employer's legitimate interest in having an "efficient and trustworthy" workforce.\footnote{25} Such a showing would be evidence that the employer was using its practice merely as a "pretext" for discrimination.\footnote{26} The Supreme

\footnote{22. See § 2000e-2(k)(1)(B)(ii).}

\footnote{23. See § 2000e-2(k)(1)(A)(ii). This section refers to subsection (C) which states that the demonstration of an alternative employment practice "shall be in accordance with the law as it existed on June 4, 1989 . . . ." § 2000e-2(k)(1)(C). The Supreme Court's analysis in \textit{Wards Cove Packing Co. v. Atonio}, 490 U.S. 642 (1989), which was decided on June 5, 1989, is therefore explicitly overruled by this section of the 1991 Act. In this respect, Congress was careful to tell courts which law they should not apply, but it gave little guidance on the law which courts should apply. \textit{See generally}, Alito, supra note 14, at 1025-27 (discussing the body of Supreme Court case law regarding alternative employment practices and business necessity).}

\footnote{24. 422 U.S. 405, 425 (1975). This case was a class action for injunctive relief and back-pay brought by Black employees against their employer. \textit{See id.} at 408. Respondents alleged that Albermarle's seniority system and program of employment testing resulted in a disparate impact on Black employees and therefore violated Title VII. \textit{See id.} at 408-09. The District Court for the Eastern District of North Carolina found that Black employees had been "locked" in lower paying job classifications, but refused to order back-pay for losses sustained by the Black employees under the discriminatory system. \textit{See id.} at 410. The Fourth Circuit Court of Appeals reversed the District Court's denial of back-pay. \textit{See id.} at 411-12. The Supreme Court affirmed the Court of Appeals. \textit{See id.} at 435-36.}

\footnote{25. \textit{See id.} at 425 (quoting McDonnell Douglas Corp., 411 U.S. at 802).}

\footnote{26. \textit{See id.}}
Court's analysis in *Albermarle* was reiterated and not changed in subsequent cases.\(^{27}\)

**B. The Lead Case: NAACP v. Harrison\(^ {28}\)**

In 1989, several New Jersey branches of the NAACP\(^ {29}\) instituted a Title VII suit against the Township of Harrison,\(^ {30}\) alleging that Harrison's enactment and enforcement of its residency requirement\(^ {31}\) unfairly disadvantaged Blacks.\(^ {32}\) The U.S. District Court for the District of New Jersey, after a bench trial, ruled that Harrison's residency ordinance had a substantial


\[^{29}\] The local branches were: Newark, Paterson, Passaic, Jersey City, and the New Jersey State Conference. *See Harrison*, 749 F. Supp. at 1327.

\[^{30}\] Harrison is a small, industrial community located in Hudson County, closely aligned with immediately adjacent Essex County to the west. *See Harrison*, 749 F. Supp. at 1331. The total population of Harrison was 4,417 in 1990. *See 1990 Census*, *supra* note 2. Of this total population, less than one percent was Black and ninety-six percent was White. *See id.; see also infra* notes 34-36 and accompanying text. The district court observed that the town "could very well be considered an extension of the City of Newark which it abuts." *Harrison*, 749 F. Supp. at 1331.

\[^{31}\] In 1982 Harrison adopted Ordinance 747 entitled "An Ordinance requiring certain officers and employees to be residents of the Town of Harrison." *See id.* at 1330. The Ordinance provided that "all officers and employees of the Town must be residents of the Town, and that no person shall be an eligible applicant for any position with the Town who is not a resident of the Town." *Id.* (quoting Ordinance 747).

\[^{32}\] See *id.* at 1328. The district court originally dismissed the NAACP's complaint, finding that the plaintiffs lacked standing because they failed to allege harm suffered by their individual members. *See id.* The district court denied the plaintiffs an opportunity to cure the complaint. *See id.* at 1329 n.1. The United States Court of Appeals for the Third Circuit upheld the dismissal but reversed the denial of plaintiffs' motion to amend their complaint. *See NAACP v. Harrison*, 907 F.2d 1408, 1416-17 (3d Cir. 1990). While the appeal was pending in the Third Circuit, the NAACP filed a second complaint advancing identical claims and seeking relief. *See Harrison*, 749 F. Supp. at 1328. These two actions were then consolidated and the NAACP filed an amended complaint alleging that individual members of their organization were denied employment by the town of Harrison because of the residency requirement. *See id.* at 1329 n.1.
and adverse impact on Blacks. The district court found that the ordinance was, in substantial part, responsible for a “marked disparity between the pool of qualified black applicants for municipal jobs in Harrison and the actual black representation among Harrison’s employees.”

For example, the court noted that at the time of the decision Harrison’s workforce consisted of fifty-one police officers, fifty-eight firefighters and eighty non-uniformed employees, not a single one of whom was Black. The district court focused on the fact that the population of the Town of Harrison was less than one percent Black. This fact, coupled with the reality that no one other than a Harrison resident had ever been considered for municipal employment, resulted in the outcome that Harrison had never employed a Black individual in a municipal position.

The court contrasted the figure of zero Black municipal employees in Harrison against two relevant factors. First, statistics showed that twenty-two percent of the private work force in Harrison was Black. The court interpreted this fig-

33. See id. at 1340. Note that Harrison was decided before the 1991 Civil Rights Act amended Title VII to include an explanation of the burden of proof in disparate impact cases. See 42 U.S.C.A. § 2000e-2(k); see also supra note 14 and accompanying text. Both the district court and the Third Circuit therefore relied on the Supreme Court’s analysis pertaining to the allocation of the burden of proof in Wards Cove rather than the amended Title VII.

34. Harrison, 749 F. Supp. at 1337.

35. See id. at 1331.

36. See id. (“Only .2% of Harrison’s population is black.”).

37. See id. at 1337-39.

38. In disparate impact cases, plaintiffs generally present Equal Employment Opportunity (EEO) reports to substantiate figures representing the racial compositions of the private and municipal workforces. See 42 U.S.C.A. § 2000e-8(c) (West 1994). These reports are filed annually with the United States Equal Employment Opportunity Commission (EEOC). See id. EEO-1 reports reflect the racial composition of a town’s private workforce, while EEO-4 reports reflect the racial composition of the municipal workforce. See id. It should be noted that only private employers who employ more than 100 employees are required to file EEO-1 reports. See id. EEO reports are confidential and are made available to parties only after a lawsuit has been filed. See § 2000e-8(e).

39. See Harrison, 749 F. Supp. at 1331. One exception was noted by the court: a non-resident Black woman was hired by the Town to fill a highly-skilled teaching position. See id. at 1329.
ure to mean that Blacks in the local area were willing and able to travel to Harrison to work.\textsuperscript{40} Second, the court analyzed the "relevant labor market," the geographical areas from which Harrison drew employees.\textsuperscript{41} The court determined that the relevant labor market consisted of Harrison's own county as well as the three surrounding counties.\textsuperscript{42} According to the Census figures cited by the court, a total of 214,747 Blacks lived in these four counties in 1990.\textsuperscript{43} The City of Newark alone, which directly borders Harrison, had a population which was sixty percent Black at the time of the case.\textsuperscript{44} The court concluded that this evidence "overwhelmingly established the existence of [a substantial racial] disparity" and that the plaintiffs had succeeded in establishing the first prong of a prima facie case of disparate impact discrimination.\textsuperscript{45}

Harrison offered several justifications for its residency requirement. First, the Town argued, in the case of uniformed personnel, there was a need for quick response in emergency situations.\textsuperscript{46} Second, municipal residency fostered loyalty and served to ensure that uniformed officers knew the community well.\textsuperscript{47} Third, opening the eligibility lists to non-residents would increase the number of job applicants, making it expensive and time-consuming for the Town to conduct pre-employment investigations.\textsuperscript{48} In the context of non-uniformed employees, the Town argued that the residency requirement fostered loyalty and reduced tardiness and absenteeism.\textsuperscript{49}

The district court concluded that the town's business justifications were "insubstantial" and that there were "available alternative methods of achieving Harrison's objectives."\textsuperscript{50} The

\textsuperscript{40} See id. at 1331.
\textsuperscript{41} See id. at 1338.
\textsuperscript{42} The counties surrounding Harrison are: Bergen County, Essex County and Union County. Harrison is located in Hudson County.
\textsuperscript{43} See Harrison, 749 F. Supp. at 1338.
\textsuperscript{44} See id.
\textsuperscript{45} See id. at 1340.
\textsuperscript{46} See id. at 1341.
\textsuperscript{47} See id.
\textsuperscript{48} See id.
\textsuperscript{49} See id.
\textsuperscript{50} Id. at 1342.
court then entered a decree prohibiting Harrison from relying further on the ordinance, and requiring the town to take affirmative steps to recruit municipal employees from the surrounding labor market.\footnote{Harrison, 940 F.2d at 797. The consent decree issued by the district court ordered Harrison to cease following or enforcing its residency requirement with respect to the recruitment and hiring of municipal employees. See id. at 805. It further required that Harrison seek in good faith to recruit and employ qualified Black applicants in numbers which reflected their availability in the relevant labor market. See id. at 805-06. The decree was to terminate after five years, as long as the Town could show "substantial compliance with and fulfillment of the purpose of the decree." Id. at 806.} \footnote{See id. at 797.} \footnote{See id. at 795.} Harrison appealed to the Third Circuit.\footnote{See id. at 797.}

The Third Circuit reviewed the district court's factual findings and legal reasoning and, not finding them to be in error, affirmed the district court's decision.\footnote{See id. at 795.} In doing so, the Third Circuit established an innovative application of Title VII disparate impact theory to municipal residency requirements.\footnote{For a succinct history and discussion of the legal precedents examined by the Third Circuit in the Harrison case, see Steven C. Mannion, Note, 23 SETON HALL L. REV. 323 (1992).}

The Third Circuit considered Harrison's proffered business justifications for its residency requirement and, in doing so, interpreted and clarified prior U.S. Supreme Court precedents which were somewhat vague and inconclusive.\footnote{But see James C. King, Note, NAACP v. Town of Harrison: Applying Title VII Disparate Impact Analysis to Municipal Residency Requirements, 37 VILL. L. REV. 409, 433-37 (1992) (arguing that the Third Circuit misconstrued the nature of the employer's burden at the business justification stage of a disparate impact claim, resulting in a holding which does not provide sufficient guidance to courts faced with similar claims).} The Third Circuit framed the relevant issue as, "whether . . . it is sufficient for purposes of [Harrison's] burden of production that the Town has articulated an admittedly rational basis for adhering to the resident-only ordinance, or whether something more is required."\footnote{Harrison, 940 F.2d at 803.} The court concluded that the defendant's burden required more than a mere articulation of a rational basis for the challenged practice. The court stated the rule:
[The] burden, in our view, is met only when the employer is able to adduce some proof that the device serves identified legitimate and substantive business goals... The defendant, therefore, has some burden of presenting objective evidence, factually showing a nexus between the selection device and a particular employment goal.57

The Third Circuit then affirmed the district court's rejection of Harrison's business justifications because the Town presented no objective evidence demonstrating a nexus between its residency ordinance and any specific employment goal.58 The district court's decision to strike down Harrison's residency requirement was affirmed and the town was ordered to comply with the district court's consent decree.59

IV. TITLE VII AND AFFIRMATIVE ACTION

A. Introduction

Because Title VII prohibits racial discrimination in the workplace, White workers have attempted to use the law to challenge employers' affirmative action programs, arguing that such programs favor minorities and discriminate against Whites on the basis of race. It is this argument which members of a White community are likely to employ in challenging a residency requirement in a minority community, relying on Harrison as legal precedent. However, the Supreme Court has interpreted Title VII to include an affirmative action exception.

57. *Id.* at 804. The 1991 Act somewhat clarifies the burdens of both plaintiffs and defendants concerning business Justifications. *See supra* note 14 and accompanying text. Although the language of the 1991 Act is still unclear, it is possible that the defendant's burden to prove business necessity is now somewhat more relaxed. *See* Alito, *supra* note 14, at 1031-32 (arguing that "Congress . . . required only that a challenged practice be consistent with business necessity. Congress did not require that the practice be compelled by business necessity.").

58. *See id.* at 805 (quoting the district court's conclusion that "[t]hese so-called 'business reasons' are too nebulous and insubstantial to justify practices which have had a significant discriminatory effect [and] which have prevented the Town from ever employing a black person.").

59. *See supra* note 51 and accompanying text (discussing the district court's consent decree).
At first glance the literal language of Title VII seems to prohibit any and all "discrimination" on the basis of race.\textsuperscript{60} Two issues then arise: what did the legislature mean by "discrimination," and what was the legislature's goal in passing Title VII. The word "discrimination" is nowhere defined in the statute. Instead, it has been left to the judiciary to interpret and define. In doing so, the courts have necessarily had to determine the legislature's purpose and intent in passing Title VII.

B. Affirmative Action Exception: United Steel Workers v. Weber

The first case to present an opportunity to interpret the legislative intent behind Title VII was \textit{United Steel Workers v. Weber},\textsuperscript{61} decided in 1979.\textsuperscript{62} The Supreme Court, in an opinion written by Justice Brennan, held that Title VII's prohibitions against racial discrimination did not condemn all voluntary, race-conscious affirmative action plans.\textsuperscript{63}

The affirmative action plan at issue in \textit{Weber} was included in a collective bargaining agreement between Kaiser Aluminum & Chemical Corporation and the United Steelworkers of America.\textsuperscript{64} The plan was aimed at eliminating the imbalance that existed in the Kaiser plant's almost exclusively White craft workforce.\textsuperscript{65} Blacks had been historically excluded from craft unions, and as a result there were few skilled Black craft work-

\begin{footnotesize}
\begin{enumerate}
\item See supra note 10 (quoting pertinent language of Title VII).
\item 443 U.S. 193 (1979). United Steel Workers of America and Kaiser Aluminum & Chemical Corporation were both petitioners in the case.
\item Brian Weber was a White plant worker who was excluded from the training program even though he was more senior than several of the Black workers selected. Weber sued in the United States District Court for the Eastern District of Louisiana, alleging that Kaiser's plan violated Title VII. See id. at 198-99.
\item See id. at 208. It should be noted that the \textit{Weber} Court limited its holding to "private, voluntary, race-conscious affirmative action plans." Id. (emphasis added). The exception has since been extended to public affirmative action plans as well. See Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 641-42 (1987) (holding that an affirmative action plan instituted by a county agency did not violate Title VII). For further analysis of \textit{Johnson} see discussion infra Part IV.B.2.
\item See \textit{Weber}, 443 U.S. at 198.
\item See id.
\end{enumerate}
\end{footnotesize}
Kaiser decided to institute an in-house training program to train craft workers, rather than recruiting from the outside. Plant workers were to be selected for placement in the training program on the basis of seniority, with fifty percent of the new trainees to be filled by Black workers.

In concluding that the Weber plan did not violate Title VII, the Court carefully analyzed the purpose of the Act and Congress' intent in passing it. After discussing at length the Congressional Record surrounding the passage of Title VII, the Court determined that Congress' primary concern in enacting the prohibition against racial discrimination was "the plight of the Negro in our economy." According to the Court, Congress was concerned that the primary goal of the Civil Rights Act, the integration of Blacks into the mainstream of American society, could not be achieved unless the trend of unemployment was reversed. This would not be possible until Blacks were able to secure jobs "which have a future." Given this clear legislative intent, the Court concluded that to interpret Title VII as forbidding all race-conscious affirmative action "would bring about an end completely at variance with the purpose of the statute."

66. See id.
67. See id. at 199.
68. See id.
69. See id. at 201 ("The prohibition against racial discrimination in §§ 703(a) and (d) of Title VII must ... be read against the background of the legislative history of Title VII and the historical context from which the Act arose.").
70. See id. at 202-03 (quoting the remarks of Senator Humphrey, 110 Cong. Rec. 6548 (1964)). In its decision the Court also quoted Senator Clark: "The rate of Negro unemployment has gone up consistently as compared with white unemployment for the past 15 years. This is a social malaise and a social situation which we should not tolerate. That is one of the principal reasons why the bill should pass." Id. at 202 (citing 110 Cong. Rec. 7220 (1964)).
71. See id. at 202.
72. See id. at 202-03 (quoting Sen. Clark, 110 Cong. Rec. 7204 (1964)).
73. Id. at 202 (quoting United States v. Public Utilities Comm'n, 345 U.S. 295, 315 (1953)).

Note that in passing the Civil Rights Act of 1991, which amended Title VII, Congress expressly limited the legislative history, thereby doing little to assist courts in interpreting the purpose and intent of Title VII. See 137
The Court then declined to "define in detail the line of demarcation between permissible and impermissible affirmative action plans." It held only that the Kaiser plan was permissible. In so holding, the Court did establish, in very broad terms, some guiding principles for deciding the permissibility of affirmative action programs under Title VII.

First, the Court noted that the purposes of the Kaiser plan "mirror[ed] those of [Title VII]" in that both were structured to "open employment opportunities for Negroes in occupations which have been traditionally closed to them." Second, the Court explained that the Kaiser plan did not "unnecessarily trammel the interests of the white employees." That is, the Kaiser plan did not require the discharge of White workers, nor did it create an absolute bar to the advancement of White employees. Lastly, the Court thought it important that the Kaiser plan was a temporary measure, not intended to maintain racial balance but simply to eliminate a "manifest racial imbalance."

C. Picking Up Where Weber Left Off: Johnson v. Transportation Agency, Santa Clara County, California

Nine years after Weber, Justice Brennan authored a second opinion regarding the affirmative action exception to Title VII. In Johnson v. Transportation Agency, Santa Clara, Califor-
nia.80 Justice Brennan expanded on his findings in Weber, offering a more detailed test to determine whether an affirmative action program was permissible under Title VII.

The Court again upheld the employer's affirmative action plan, this time holding that Respondent's plan was consistent with Title VII. Pursuant to the plan, the race and gender of employees was considered as one factor in making promotions to skilled job categories where minorities and women had traditionally been underrepresented.81 The Court held that "[t]he Agency's plan represents a moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the Agency's workforce . . . ."82

The Court articulated a three-step approach to cases alleging employment discrimination under Title VII. First, plaintiff bears the burden of proving that an employer's plan violates Title VII. Plaintiff meets this burden by establishing a prima facie case that race or sex has been taken into account in an employer's employment decision.83 Second, the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision, such as the existence of an affirmative action

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80. 480 U.S. 616 (1987). Santa Clara County Transportation Agency voluntarily adopted an affirmative action plan in 1978 designed to hire and promote minorities and women within the Agency. Id. The plan provided that in making promotions to positions within a traditionally segregated job classification in which women had been significantly underrepresented, the Agency was authorized to consider the sex of any qualified applicant as one factor. See id. at 622. In filling a vacancy for the position of road dispatcher the Agency passed over Petitioner Paul Johnson and promoted a female employee to fill the vacancy. See id. at 624. The position was one of 238 such positions, of which none were held by women. See id. at 621. Johnson sued in Federal District Court for the Northern District of California alleging that the Agency's affirmative action plan violated Title VII. See id. at 625. The district court found that the plan was impermissible under Weber's criterion that the plan be temporary. See id. The court of appeals reversed, pointing out that the plan repeatedly expressed a goal of "[attaining] rather than maintain[ing], a work force mirroring the labor force in the County." Id. at 626.

81. See id. at 621.

82. Id. at 642.

83. See id. at 626.
Third, the burden shifts back to the plaintiff to prove that the employer's justification is pretextual and therefore the plan is invalid. In this way the Court effectively built an exception for affirmative action plans into Title VII's legal analysis.

In establishing the legality of the Agency's affirmative action plan, the Court turned to its decision in *Weber* for guidance. First, the Court adopted the view offered by Justice Blackmun in his concurring opinion in *Weber*, that an employer seeking to justify the adoption of an affirmative action plan need not point to its own prior discriminatory practices, but only to a "conspicuous imbalance in traditionally segregated job categories." Next, the Court proceeded to further explain the term "manifest imbalance" which it had coined in *Weber* to describe a situation which would justify an employer in taking into account an individual's race or sex when deciding whether to hire or promote that individual. The Court explained, "in determining whether an imbalance exists that would justify taking sex or race into account, a comparison of the percentage of minorities or women in the employer's work force with the percentage in the area labor market or general population is appropriate in analyzing jobs that require no special expertise . . . ."

However, where a job requires special training, the Court noted that the comparison should be with those in the labor force who possess the relevant qualifications.

The Court then explained that the requirement that the "manifest imbalance" relate to a "traditionally segregated job category" assured that (1) sex or race would be taken into account in a manner consistent with Title VII's purpose of elimi-
nating the effects of employment discrimination; and (2) the interests of those employees not benefiting from the plan would not be unduly infringed. In concluding that the plan designed by the Transportation Agency was permissible under Title VII and the guidelines first expressed in Weber, the Court stated that the Agency's plan was, "... fully consistent with Title VII, for it embodie[d] the contribution that voluntary employer action can make in eliminating the vestiges of discrimination in the workplace."

V. CAN A MUNICIPAL RESIDENCY REQUIREMENT, WHICH RESULTS IN A DISPARATE IMPACT, SURVIVE A TITLE VII CHALLENGE?

A. Introduction

Given the number of successful challenges to local residency requirements brought by the NAACP in northern New Jersey, one must wonder why the organization continues to make these challenges on a town-by-town basis, rather than challenging the state law which permits municipalities to adopt such ordinances. A single suit against the state would surely save time and money, while at the same time creating the potential for a more sweeping resolution.

Perhaps the answer is that not all residency requirements in New Jersey violate Title VII. Many communities in New Jersey are racially mixed, therefore the residency requirement creates

89. Johnson, 480 U.S. at 632. The Court also rejected an assertion made by Justice O'Connor in her concurring opinion that a "manifest imbalance" be such that it would support a prima facie case against the employer. See id. at 649 (O'Connor, J. concurring). Justice Brennan reasoned that such a showing was not required because the Court did not regard as identical the constraints of Title VII and the Constitution on voluntarily adopted affirmative action plans. See id. at 631. Justice Brennan argued, "[a]pplication of the 'prima facie' standard in Title VII cases would be inconsistent with Weber's focus on statistical imbalance, and could inappropriately create a significant disincentive for employers to adopt an affirmative action plan." Id.

90. Id. at 642.

91. See N.J. STAT. ANN. 40A:9-1.3 (West 1993); see also supra notes 5-7 and accompanying text (discussing the New Jersey residency statute).
no discriminatory impact. However, as a result of de facto racial segregation in northern New Jersey, there are towns inhabited by populations which are predominantly minority. A residency requirement in such a community could in fact create a disparate impact on surrounding White communities.

However, new concerns arise when considering the importance of a residency requirement in a minority community. There is the opportunity for minorities to obtain jobs from which they have been historically excluded; the importance of minority communities to police and manage themselves; the need to foster strength and loyalty to the community from within; and the priority of making employment opportunities available to populations where high unemployment has been a constant drain on the spirit and economy of the community. These are similar concerns to those which prompted the passage of Title VII over thirty years ago, and which have justified numerous affirmative action programs in our society. The question then arises whether a residency requirement, similar if not identical to the one struck down in Harrison, could survive a disparate impact Title VII challenge, if the town which enacted the ordinance was predominantly Black and the individuals being excluded were predominantly White. That

92. For example, according to the 1990 Census, East Orange, New Jersey is ninety percent Black; Irvington, New Jersey is seventy percent Black; and Newark, New Jersey is sixty percent Black. See 1990 Census, supra note 2.

93. See, e.g., Trainor v. Newark, 368 A.2d 381, 384 (N.J. Super. Ct. 1976). In a challenge to Newark's residency requirement by nonresident city employees the court listed the governmental purposes supporting the ordinance as:

[Promotion of ethnic balance in the community; reduction in high unemployment rates of inner-city minority groups; improvement of relations between such groups and city employees; enhancement of the quality of employee performance by greater personal knowledge of the city's conditions and by a feeling of greater personal stake in the city's progress . . . and the general economic benefits flowing from local expenditure of employees' salaries.

Id.

94. See supra notes 69-73 and accompanying text (discussing the legislative intent behind Title VII).

95. 940 F.2d at 795; see also supra note 31 (quoting Harrison residency ordinance).
is, what might happen if the facts and circumstances of Harrison were reversed?

B. In Theory

In order to survive a Title VII challenge under an affirmative action exception, a residency ordinance must first and foremost satisfy the two-prong Weber test: the purpose of the ordinance must be consistent with the purpose of Title VII96 and the ordinance cannot "unnecessarily trammel" the interests of White employees.97

A strong argument can be made that a residency requirement in a minority community is consistent with the legislative intent in passing Title VII, as articulated in Weber. The goal of the Civil Rights Act was to integrate Blacks into the mainstream of American society. The Supreme Court understood that this could not be achieved unless the trend of unemployment was reversed and Blacks were able to secure jobs "which have a future."98 Assuring that Blacks can attain jobs in their own municipal workforce, especially in the police and fire departments from which they have been historically excluded, "mirrors [the purposes] of Title VII."99

The second Weber prong would also be satisfied in that such an ordinance in a Black community would not "unnecessarily trammel"100 the interests of Whites. The ordinance would not require the discharge of White employees, nor would it create an absolute bar to their advancement.101 Whites would not be prohibited from applying for municipal positions, they would simply have to become town residents before applying.102

In addition to its two-prong test, the Court articulated a third concern in Weber: that the affirmative action plan is a temporary measure which is not intended to maintain racial

97. See id. at 208.
98. See id. at 202-03.
99. Id. at 208.
100. Id.
101. See id.
102. But see infra note 106 (discussing the role of motive and effect in an Equal Protection analysis).
balance but simply to eliminate a "manifest racial imbalance."\textsuperscript{103} While a residency ordinance in a Black community would arguably be aimed at eliminating a racial imbalance in the municipal workforce, proving that the ordinance is merely a temporary measure may be problematic.

A residency ordinance in a Black community could also pass the three-step burden shifting analysis articulated in \textit{Johnson}.\textsuperscript{104} First, the plaintiff challenging the ordinance under \textit{Title VII} would have to prove that race had been taken into account in enacting the ordinance.\textsuperscript{105} It is doubtful that a plaintiff would get over this first hurdle since the ordinance is not based on race but rather on residency.\textsuperscript{106} However, a plaintiff may be able to prove the ordinance resulted in a ra-

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\textsuperscript{103} Weber, 443 U.S. at 208.

\textsuperscript{104} See supra notes 83-85 and accompanying text.

\textsuperscript{105} See id. at 626.

\textsuperscript{106} This distinction may not withstand a challenge under the Equal Protection Clause of the Fourteenth Amendment. In cases which allege racial discrimination under the Equal Protection Clause, the U.S. Supreme Court has continually held that regulations which make no racial classifications and are therefore fair on their face, will still be unconstitutional if they are discriminatory in motive or effect. This analysis involves two distinct situations.

First, a statute fair on its face may be administered in a way that results in racial discrimination. \textit{See, e.g., Yick Wo v. Hopkins}, 118 U.S. 356, 373-74 (1886). The Court in \textit{Yick Wo} held:

\begin{quote}
Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances . . . the denial of equal justice is still within the prohibition of the Constitution.\textit{Id.}
\end{quote}


Second, a statute which does not on its face make a racial classification, may in fact have a disproportionate impact on a minority group. This argument is similar to the \textit{Title VII} disparate impact argument. \textit{See supra} note 14 and accompanying text. Under this analysis the disparate impact must be traced to a discriminatory purpose. \textit{See, e.g., Washington v. Davis}, 426 U.S. 229, 244-45 (1976); Hernandez v. New York, 500 U.S. 352, 363 (1991); McClesky, 481 U.S. at 292; Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 264-65 (1977).
cially discriminatory disparate impact on surrounding communities, as was the case in *Harrison*.

Assuming a plaintiff succeeded in satisfying this first step, the town would have to show that there was a "manifest imbalance" in its municipal work force which justified taking race into account when enacting the residency ordinance. The manifest imbalance must relate to a traditionally segregated job category.\(^{107}\) This factor brings to light the importance of defending residency ordinances on a case-by-case basis. For example, municipal employment in many (but not all) New Jersey towns, particularly in the police department, fire department and schools, has long been dominated by Whites, even in those towns with substantial minority populations.\(^{108}\)

Next the burden shifts back to the plaintiff to show that the town's justification is merely a pretext for discrimination, thereby invalidating it as an affirmative action plan.\(^{109}\) The plaintiff must be given the opportunity "to demonstrate by competent evidence that the preemptively valid reasons . . . were in fact a cover up for a racially discriminatory [practice]."\(^{110}\) The fact that the ordinance would be based on residency, not race, coupled with the substantial concerns behind the enactment of such an ordinance, would make it difficult for the plaintiff to prove pretext.

1. **Affirmative Action Theory Tested: NAACP v. North Bergen**

In 1995 the NAACP filed suit against the Township of North Bergen, New Jersey, alleging that North Bergen's residency requirement resulted in a disparate impact on neighboring Black

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communities, thereby violating Title VII. North Bergen defended its ordinance on affirmative action grounds, arguing that the residency requirement benefited the town’s growing Hispanic population.

The town asserted that its ordinance served to: (1) ensure that the town’s municipal workforce mirrored North Bergen’s demographic composition; and (2) remedy inequities throughout the county and the state traditionally experienced by Hispanics in the workforce. In support of its argument the town offered statistics which showed that Hispanics in Hudson County and New Jersey experienced a higher unemployment rate and received lower wages than Whites.

The district court held that North Bergen’s evidence was “clearly insufficient to justify an affirmative action policy.” The court listed three reasons why the town’s evidence was lacking. First, North Bergen’s figures did not even suggest, let alone prove, that the economic disparities were the product of discrimination. Absent a history of discrimination, the court reasoned, an affirmative action policy was impermissible.

Second, the court said that even if the town’s statistics did reflect a history of discrimination, such a history must be identified within the governmental unit involved.

112. See id. at 16. According to the 1990 Census, North Bergen’s total population is 48,414. See 1990 CENSUS, supra note 2. Eighty-four percent of North Bergen’s population is White and two percent is Black. See id. Forty percent of North Bergen’s population identifies itself as being of Hispanic origin (Hispanics can be of any race). See id.
113. See North Bergen, No. 95-248, slip op. at 16.
114. See id. at 16-17.
115. Id. at 17.
116. See id.
117. See id.
118. See id. The court relied on Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) in rejecting the town’s affirmative action argument. See North Bergen, No. 95-248, slip op. at 17. While Wygant was originally brought under both Title VII and the Equal Protection Clause, the Supreme Court only ruled on the Equal Protection issues. See Wygant, 476 U.S. at 284 (stating “[t]here is no issue here of the interpretation and application of Title VII . . . accordingly, we have only the constitutional issue to resolve.”)
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Gen’s statistics reflected only county and state figures without focusing on a history of discrimination against Hispanics in the township.\textsuperscript{119}

Third, the court reasoned, even if the town had successfully proven a history of discrimination against Hispanics in North Bergen, it did not choose a means “specifically and narrowly framed” to effect a remedy.\textsuperscript{120} The court reasoned, “[c]learly, if the township’s genuine concern was to benefit its Hispanic residents . . . it could begin to remedy that discrimination without enforcing the blanket exclusion of African Americans that currently results from its residency requirements.”\textsuperscript{121}

North Bergen’s failed attempt to defend its residency ordinance on affirmative action grounds should not discourage the use of such an argument in the future. First, the town did not properly frame its argument and did not provide the necessary evidence to support it. Second, in rejecting North Bergen’s affirmative action argument, the court relied on\textit{Wygant v. Jackson Board of Education}.\textsuperscript{122} The Court’s reliance on\textit{Wygant} was misplaced since the Supreme Court’s analysis in\textit{Wygant} was based on the Equal Protection Clause, not Title VII.\textsuperscript{123} The two approaches are distinct.\textsuperscript{124} The court in\textit{North Bergen} did not once cite\textit{Weber} or\textit{Johnson} which would have provided it with a proper framework for analyzing North Bergen’s affirmative action argument.

(O’Connor, J., concurring). The district court’s reliance on\textit{Wygant}, rather then on\textit{Weber} and\textit{Johnson}, was misplaced.

\textsuperscript{119} See\textit{North Bergen}, No. 95-248, slip op. at 17-18 (emphasis in original).

\textsuperscript{120} See\textit{id.} at 18 (citing\textit{Wygant}, 476 U.S. at 280).

\textsuperscript{121} Id.

\textsuperscript{122} 476 U.S. 267 (1986).

\textsuperscript{123} See supra note 118 (discussing the Supreme Court’s Equal Protection analysis in\textit{Wygant}).

C. Theory into Practice: A Case Study of Newark, New Jersey

Newark is the largest city in northern New Jersey. It spans twenty-four square miles and is located approximately ten miles west of New York City.\(^{125}\) The current population of Newark is estimated to be 258,715.\(^{126}\) Newark is one of the few major cities in the northeast with a predominantly Black population.\(^{127}\) Newark also has a residency ordinance which remains in effect today.\(^{128}\) A majority of the NAACP members in *NAACP v. Harrison* were residents of Newark who sought municipal employment in the neighboring Township of Harrison, New Jersey.\(^{129}\) The question remains whether residents of Harrison, or another neighboring White community,

\(^{125}\) See New Jersey Municipal Data Book 346 (Edith R. Homer ed., 1997) [hereinafter Municipal Data].

\(^{126}\) See id.

\(^{127}\) In 1990 Newark had a total population of 275,221. See 1990 Census, *supra* note 2. Sixty percent of Newark’s population was Black and twenty-eight percent was White. *See id.*; see also Hacker, *supra* note 1, at 229 (ranking Newark as having the seventh largest urban Black population in the country).

\(^{128}\) See Newark, N.J., Rev. Ordinances § 2:14-1 (1977 Supp.). Newark’s residency ordinance provides:

> All officers and employees of the city who shall hereafter become employees of the city are hereby required as a condition of their continued employment to have their place of abode in the city and to be bona fide residents therein, except as otherwise provided by the charter.

*Id.*

The residency ordinance was originally adopted in 1932 and revised in 1951. See Newark v. PBA Local 3, 639 A.2d 333, 334 (N.J. Super. Ct. App. Div. 1994). Due to substantial litigation seeking to void the residency requirement, a public referendum was held in 1976. See *id.* at 335. A majority of the voters decided to make the residency requirement prospective from November 2, 1976, the date of the referendum. *See id.* This referendum added language to the ordinance which allowed a city employee to live outside the city limits if certain special circumstances existed. *See id.* For example, the ordinance provides that a city employee is not required to live in Newark if his health or the nature of his employment require he live elsewhere, or if he possesses a special talent or technique necessary for the operation of government which is not found among Newark residents. See Newark, N.J., Rev. Ordinances § 2:14-1 (1977 Supp.).

could bring a Title VII challenge against Newark's ordinance based on the principles established in Harrison.\footnote{Over the last forty years Newark's ordinance has survived several legal challenges. See Newark Council No. 21 v. James, 723 A.2d 127 (N.J. Super. Ct. App. Div. 1999) (holding that Newark should not be estopped from enforcing its residency requirement because it did not have a studied policy of non-enforcement); Newark v. PBA Local 3, 639 A.2d 333 (N.J. Super. Ct. App. Div. 1994) (holding that Newark's residency requirement preempts any right to collective negotiations of police officers); Trainor v. Newark, 368 A.2d 381 (N.J. Super. Ct. 1976) (holding that Newark's residency requirement did not result in invidious discrimination and therefore did not violate the Equal Protection Clause); Abrahams v. Civil Serv. Comm'n, 319 A.2d 483 (N.J. 1974) (holding that Newark's residency requirement did not violate plaintiffs' right to travel under the Equal Protection Clause); Kennedy v. Newark, 148 A.2d 473 (N.J. 1959) (holding that the government's police power gave it the authority to impose Newark's residency requirement). At the time of writing, there is no record of a Title VII challenge to Newark's residency ordinance.}

1. \textit{A Brief History of Newark}

In 1950 Newark's population was eighty-three percent White and only seventeen percent minority. Between 1960 and 1967 more than 60,000 White residents moved out of the city and into nearby suburbs. At the same time Whites were leaving, Blacks from the southern United States were moving to northern cities in rapid numbers. Between 1920 and 1970, 100,000 rural Black families migrated to Newark.\footnote{The author does not contend that a plaintiff could make the necessary showings to demonstrate that Newark's residency ordinance results in a disparate impact on surrounding White communities. The statistics and analyses necessary to make such a showing are too extensive to detail in this article. In addition, the EEO-1 and EEO-4 data required to show a disparate impact, see supra note 38, are confidential and only become available to parties once a lawsuit has been filed. See 42 U.S.C.A. § 2000e-8(e) (West 1994). Therefore, this article assumes the proper statistical showing could be made, and focuses on other relevant factors which a court may consider in its analysis.}

Although Newark's population was changing in the mid-sixties, political power in the city - in the mayor's office, city council, police department and school system - remained in

\footnote{See \textit{Ron Porambo, No Cause For Indictment: An Autopsy of Newark} 5 (1971).}
the hands of Whites. In 1967 Newark was fifty-two percent Black, yet the city’s police force was ninety percent White. There was only one Black elected official. Newark’s White mayor, Hugh J. Addonizio, had an uneasy relationship with Black residents, many of whom felt he was interested in them only at election time.

Among Black Newark residents in the 1960’s there was a pervasive feeling that City Hall was corrupt, granting political favors and promotions to White insiders. There were frequent complaints that the city did not provide basic services, such as street cleaning and garbage removal, to Black neighborhoods.

The relationship between the Newark police and the Black community was perhaps one of the most critical factors contributing to the tension in Newark in the late 1960’s. When asked in 1968 their opinion about the police, forty-nine percent of Newark Blacks said they thought the police were too

133. See id.
134. See Governor’s Select Commission on Civil Disorder, Report for Action 16 (1968) [hereinafter Report for Action]. In August 1967, Governor Richard J. Hughes formed the Governor’s Select Commission on Civil Disorder (Commission) to “examine the causes, the incidents and the remedies for the civil disorders which have afflicted New Jersey.” Id. at v. The Commission devoted special attention to Newark since it was there that the most serious disorder occurred and since Newark’s problems were the most complex. See id. The Commission visited the sites of all disorders which occurred in 1967, heard 106 witnesses, developed a 5,000 page transcript and held more than 700 staff interviews. See id. The report was released in February, 1968. See id. The first part of the report dealt with the problems that “cause[ed] tension, frustration and bitterness in many of our cities.” Id. The second part of the report described and analyzed the disorders that broke out in 1967. See id. The last part of the report listed the Commission’s recommendations. See id. at vi.
135. See id. at 16.
136. See id. at 20.
137. See id. at 16-17.
138. See id. at 22. The Commission wrote, “[t]estimony and investigation have shown that relations between the police and the nonwhite community may well be the simple most decisive factor for peace or strife in [Newark] . . . . The polarization of views on this issue between whites and Negroes is glaring.” Id.
brutal.\textsuperscript{139} In contrast, only five percent of Newark Whites shared this view.\textsuperscript{140} In 1966 the Newark Police Department received seventy complaints against its officers from Newark citizens.\textsuperscript{141} Only three of these incidents resulted in internal Police Department trials.\textsuperscript{142} Of these three trials, only one resulted in a guilty verdict.\textsuperscript{143}

In addition to the political imbalance and tensions between residents and the local police, Newark was one of the poorest cities in the northeast.\textsuperscript{144} In 1967 the Black unemployment rate in Newark was twelve percent.\textsuperscript{145} More than 41,000 housing units, or thirty-three percent, were substandard.\textsuperscript{146} Newark had proportionally the highest crime rate and the highest rates of maternal mortality and tuberculosis in the nation.\textsuperscript{147} It had the second highest birth rate and the highest rate of infant mortality.\textsuperscript{148}

2. \textit{Urban Rebellion: July, 1967}

Political tension, coupled with anger at the police and frustration created by inner-city poverty, erupted on July, 12, 1967 when the residents of Newark rebelled.\textsuperscript{149} The Newark distur-

\begin{itemize}
\item \textsuperscript{139} See \textit{id.} The Commission quotes a statement signed by more than fifty Newark residents issued shortly after the 1967 civil disorder. The statement declares: "A large segment of the Negro people are convinced that the single continuously lawless element operating in the community is the police force itself, and its callous disregard for human rights." \textit{Id.} at 32.
\item \textsuperscript{140} See \textit{id.} at 22.
\item \textsuperscript{141} See \textit{id.} at 30.
\item \textsuperscript{142} See \textit{id.}
\item \textsuperscript{143} See \textit{id.}
\item \textsuperscript{144} See Smothers, \textit{supra} note 132 ("[Newark] is a city in the clutches of poverty, a city sliding ever downward, one that many say is in worse shape now than it was on July 12, 1967, the night the riots began.").
\item \textsuperscript{145} See Dale Russakoff, \textit{Newark Can't Forget Summer of '67}, WASH. \textit{Post}, July 13, 1997 at A3.
\item \textsuperscript{146} See Porambo, \textit{supra} note 131, at 5. In 1970, 3,159 living units had no hot water, 7,097 had no flush toilets and 28,795 had no built-in heating. \textit{See id.}
\item \textsuperscript{147} See \textit{id.} at 7-8.
\item \textsuperscript{148} See \textit{id.} at 8.
\item \textsuperscript{149} See Smothers, \textit{supra} note 132; Tom Hayden, a well known 1960's community activist was in Newark during the civil disturbance and published his own account of the events. \textit{See Tom Hayden, Rebellioin in Newark} (1967).
\end{itemize}
bance lasted five days and resulted in twenty-six deaths, 1,600 arrests and the destruction of most of the downtown area.  

While the underlying causes of the disturbances are numerous and complex, it is well documented that the spark which ignited the rebellion was an incident between two White police officers and a Black taxi driver named John Smith. On Wednesday, July 12, 1967 at 9:00 P.M. Smith was charged with resisting arrest after a minor traffic violation. According to Smith, he was badly beaten by the officers at the scene of the arrest and in the patrol car. Black residents of a public housing project across the street from the Fourth Precinct saw Smith being dragged into the station house. Word spread quickly and soon 250 people had gathered at the police station. The crowd’s anger spread swiftly throughout Newark.

On Friday, July 14, the New Jersey State Police and the National Guard were summoned to Newark. On Saturday, the fourteen square mile area of the disorder was sealed off and controlled by police forces. By Sunday the disturbance finally began to subside. The National Guard was removed on Monday and all schools and businesses reopened on Tuesday, July 18, 1967. Newark began its road to recovery.

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150. See Report for Action, supra note 134, at 129 & 140.
151. See id. at 104; see also Smothers, supra note 132; Porambo, supra note 131, at 100-01, 105.
152. See Report for Action, supra note 134, at 105.
153. See id. at 106. Not surprisingly the accounts of the arresting officers differ greatly from Smith’s account. See id. at 105. The police officers testified that Smith insulted and cursed them when they requested to see his license and registration, and then punched one of them in the face. See id. The officers also claimed that Smith fought with them in the patrol car on the way to the station house and then, upon arrival, refused to walk from the car to the station. See id.
154. See Smothers, supra note 132.
156. See id.
157. See id. at 115.
158. See id. at 119.
159. See id. at 123.
160. See id. at 124.
These are just some of the events and circumstances which make up the recent history of Newark. The city is still in recovery, still nursing the wounds of thirty years ago, still struggling to overcome racial divisions and crippling poverty. Residents continue to leave in startling numbers. It is estimated that between 1990 and 1994 over 16,000 people moved out of Newark. All of this history, these facts, events and circumstances, must be considered when evaluating whether Newark's residency requirement can be defended on affirmative action grounds.

3. In Defense of Newark's Residency Requirement

In order to defend its residency requirement on an affirmative action theory, Newark must meet the criteria established by Weber and Johnson by showing: (1) that there was past discrimination in Newark's municipal workforce; (2) that the purpose of Newark's ordinance was to remedy this past discrimination; (3) that the ordinance does not "unnecessarily trammel" the interests of White employees; and (4) that the ordinance is a temporary measure which is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance in Newark's municipal workforce.

There is little question that there was past discrimination in Newark's municipal workforce. Up until 1970 there was only one Black elected official.

161. See MUNICIPAL DATA, supra note 125, at 346.

162. While Newark's ordinance was originally enacted in 1932, see supra note 128, there is some evidence that it was rarely enforced between 1959, when it was revised, and 1970. See Abrahams v. Civil Service Comm'n, 319 A.2d 483, 490 (N.J. 1974). It appears that there was renewed interest in enforcing the ordinance around 1970. See id. In addition, there is no record of litigation concerning the residency requirement between 1959 and 1972. See supra note 130. Conversely, between 1972 and 1976 three decisions were published upholding Newark's residency ordinance. See supra note 130. Thus, although perhaps the ordinance was not originally enacted to remedy past discrimination, it appears that it began to be enforced to remedy such discrimination. Cf. REPORT FOR ACTION, supra note 134, at 163 (recommending in 1968 that all Newark municipal employees reside in Newark).

163. In 1970 Newark elected Kenneth Gibson mayor. See Russakoff, supra note 145. Gibson was the first Black mayor in the northeastern United States. See id.
Black population, city hall, the school board and the police department were all presided over and dominated by Whites. Furthermore, statistics show that throughout the 1960’s, 49.7% of Newark’s Black males, and 52.8% of Black females in Newark, worked outside of the city limits. Conversely, only 38.3% of Newark White males, and 21.8% of White females in Newark, had to leave the city each day to work.

In 1972 a three-judge panel of the United States District Court for the District of New Jersey decided a class action challenge to New Jersey’s statute permitting municipal residency requirements. The court upheld the constitutionality of the statute. In doing so, the court discussed at length a municipality’s interests in implementing a residency ordinance. The court wrote:

The truly important interests to be realized by the residency requirement demand recognition by the Court of the modern pattern of urban disruption and dissipation prevalent today. Rioting and looting have occurred in major New Jersey cities, such as Newark. A substantial number who have studied the problem attribute much of this lawlessness to a deeply rooted disrespect for an absentee police force which governs by day and resides afar at night. According to the proponents of this view, a policy of requiring fire department and police force residency would tend to increase the presently low degree of community cooperation uniformly observed by law enforcement officials.

The court continued, “[a]side from convenience, local residence avoids the impression that the police come from the outside world to impose law and order on the poor and minority groups and also avoids the risk of police isolation from the needs, morals and customs of the community.”

164. See REPORT FOR ACTION, supra note 134, at 66-67.
165. See id.
166. See Krzewinski v. Kugler, 338 F. Supp. 492, 495 (D.N.J. 1972); see also supra notes 5-7 and accompanying text (discussing New Jersey’s residency statute).
167. See Krzewinski, 338 F. Supp. at 495.
168. Id. at 499-500 (citations omitted).
169. Id. at 500.
Two years later, the New Jersey Supreme Court upheld Newark’s residency requirement. In discussing the policy interests involved, the court wrote, "[w]e have particular reference to the interest of a city like Newark in promoting employment of its residents, rates of unemployment therein substantially exceeding general levels." The past exclusion of Blacks from Newark’s municipal workforce, and the importance of the residency requirement in remedying this discrimination, have thus been recognized repeatedly by both state and federal courts in New Jersey. There is strong evidence, therefore, that the purpose of the residency ordinance in Newark "mirrors [that] of Title VII," satisfying the first prong of Weber and the “manifest imbalance” requirement of Johnson.

Newark’s residency ordinance also satisfies Weber’s second prong. The ordinance does not “unnecessarily trammel” the interests of Whites because it is based on one’s residency and not one’s race. Whites are not prohibited from applying for municipal positions in Newark, they simply must live in Newark in order to do so. Newark’s ordinance does not require the discharge of White employees, nor does it create an absolute bar to the advancement of White employees. The ordinance in this respect, does not violate Title VII.

The temporariness requirement articulated by the Court in both Weber and Johnson, could be an obstacle to an affirmative action defense of Newark’s residency ordinance. There is evidence that the Court did not intend to require every affirmative action plan to contain an explicit end date in order to be valid. Instead, the temporariness requirement is met as long as the plan’s ultimate goal is attaining a balanced composition

170. See Abrahams, 319 A.2d at 489.
171. Id.
173. But see discussion supra note 120.
in the workforce.\textsuperscript{175} An affirmative action plan in force for a long period of time is "temporary" as long as the manifest imbalance it is aimed at eliminating persists.\textsuperscript{176} In order to meet this requirement, therefore, Newark would have to show that a "manifest imbalance" still exists within its municipal workforce.

While the official statistics used to make this determination are not currently available,\textsuperscript{177} there are some additional factors which are important. By some calculations, the Newark police force is now forty-three percent Black and forty-one percent Hispanic.\textsuperscript{178} Therefore, while in 1967 the police department was ninety percent White,\textsuperscript{179} it may now be nearly ninety percent minority.

However, poverty and unemployment continue to plague Newark. Recent statistics show that twenty-five percent of Newark residents live at or below the poverty level.\textsuperscript{180} According to the 1990 Census, Newark was second in the nation in the percentage of people on public assistance.\textsuperscript{181} It ranked third in the rate of infant mortality.\textsuperscript{182} In 1967 the Black unemployment rate was twelve percent; it was thirteen percent in 1997.\textsuperscript{183}

The question, therefore, is whether these grim statistics are sufficient, indeed are they even relevant, to justify a continuing affirmative action plan; or does such a justification depend solely on the representation of minorities in the workforce. Though it is an interesting question, proving that a nexus exists

\textsuperscript{175} See Engels, \textit{supra} note 174, at 809.
\textsuperscript{176} In \textit{Johnson}, the Court was careful to note that an explicit end date is not required in an affirmative action plan that considers race or sex as only one factor. \textit{See Johnson}, 480 U.S. at 639-40. Such a provision may be required, however, where the plan sets aside a specific number of positions for minority job applicants. \textit{See id.; see also} Engels, \textit{supra} note 171, at 809.
\textsuperscript{177} See \textit{supra} note 130.
\textsuperscript{178} See Russakoff, \textit{supra} note 145; \textit{but see} Hacker, \textit{supra} note 1, at 236 (stating that in 1992, 25.4\% of Newark's police force was Black, constituting a .44 ratio to the city's Black population).
\textsuperscript{179} See Smothers, \textit{supra} note 132.
\textsuperscript{180} See Municipal Data, \textit{supra} note 125, at 346.
\textsuperscript{181} See Russakoff, \textit{supra} note 145 (citing the 1990 Census).
\textsuperscript{182} See \textit{id}.
\textsuperscript{183} See \textit{id}.
between current poverty and past municipal discrimination is a difficult task. The Supreme Court has repeatedly held that affirmative action plans which seek to remedy "society wide" discrimination are invalid.184

VI. CONCLUSION

During a routine drug arrest in Newark on June 7, 1997, one month short of the thirtieth anniversary of the uprising, a Newark police officer shot to death a thirty-one-year-old pregnant woman less than one mile from the station house where the riots started in 1967.186 Just as happened thirty years before, angry crowds gathered at the scene.187 This time, however, the officer involved was Black, as were many of the other officers who arrived to control the scene.188 By the time the demonstrators descended on City Hall to protest, the officer had already been suspended.189 By the end of June, the mayor announced a group of measures to improve police-community relations.190

This incident illustrates the importance of ensuring that a minority community is managed and policed by its own residents. By ameliorating racial discrimination and gross imbalance in the municipal workforce of a minority community, residency requirements not only provide minorities with jobs "which have a future," but also assure that the government is able to fulfill its ultimate role: to maintain peace and order within the community.

The determination whether a residency requirement is discriminatory must assure that the purpose and goals of Title VII are upheld. It would be an anomaly to hold that a residency requirement, which has worked to remedy discrimina-

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185. See, e.g., id.; see also Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986) ("[T]his Court never has held that societal discrimination alone is sufficient to justify [an affirmative action program]").
186. See Smothers, supra note 132.
187. See id.
188. See id.
189. See id.
190. See id.
tion in the municipal workforce, violates Title VII. Justice Brennan referred to Title VII as a "catalyst to cause employers . . . to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." 191 It would be ironic indeed if a residency ordinance, which resulted in putting Blacks into positions of power within their own communities, was found to violate a law which was "intended to improve the lot of those . . . excluded from the American dream for so long."192

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192. Id.