FRANCHISE SELECTION AND RETENTION: DISCRIMINATION CLAIMS AND AFFIRMATIVE ACTION PROGRAMS

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I. INTRODUCTION

A. Franchising Growth and Regulation

Franchising is, among other things, a system of marketing and distribution whereby a small independent businessperson (the franchisee) is granted the right to market the goods and services of another (the franchisor) in

accordance with established standards and practices.[1] In franchising's ideal state, "the franchisor obtains new sources of expansion capital, new distribution markets, and self-motivated vendors of its products, while the franchisee acquires the products, expertise, stability, and marketing savvy usually reserved only for larger enterprises."[2] By owning a franchise, as opposed to starting a small business, franchisees may substantially reduce the risk incurred by building an enterprise from the ground up, while gaining significant experience in their field through the assistance provided to them by the franchisor.[3] In addition, franchisees usually gain better name and product recognition.[4]

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1. The essence of this definition has been adopted in a number of states. *See, e.g.*, CONN. GEN. STAT. ANN. § 42–133e(b) (West 1992); N.J. STAT. ANN. § 56:10–3 (West 1989); WASH. REV. CODE ANN. § 19.100.010 (West Supp. 1998); *see also* CHARLES L. VAUGHN, FRANCHISING: ITS NATURE, SCOPE, ADVANTAGES, AND DEVELOPMENT 1–2 (2d rev. ed. 1979); BLACK'S LAW DICTIONARY 658 (6th ed. 1990) ("A franchise has evolved into an elaborate agreement under which the franchisee undertakes to conduct a business or sell a product or service in accordance with methods and procedures prescribed by the franchisor, and the franchisor undertakes to assist the franchisee through advertising, promotion and other advisory services.").

2. David J. Kaufmann, *Franchising: Business Strategies and Legal Compliance*, *in* FRANCHISING 1988: BUSINESS STRATEGIES & COMPLIANCE 11, 15 (PLI Com. L. & Practice Course Handbook Series No. 445, 1988); *see* NORMAN D. AXELRAD & LEWIS G. RUDNICK, FRANCHISING: A PLANNING AND SALES COMPLIANCE GUIDE 7–11 (1987) (stating the many benefits and drawbacks in franchising for the franchisor); ROBERT M. DIAS & STANLEY I. GURNICK, FRANCHISING: THE INVESTOR'S COMPLETE HANDBOOK 21–22 (1969) (listing numerous advantages and disadvantages of franchising, from the franchisee's viewpoint); RAYMOND J. MUNNA, FRANCHISE SELECTION: SEPARATING FACT FROM FICTION 45–51 (1987) (listing and describing the many advantages and disadvantages of franchising for the franchisee); VAUGHN, *supra* note 1, at 61–77 (discussing the advantages and disadvantages of franchising for both franchisors and franchisees); BRYCE WEBSTER, THE INSIDER'S GUIDE TO FRANCHISING 10–17 (1986) (providing prospective franchisees with an explanation of franchising's advantages as well as its "fables," which obscure significant pitfalls); PHILIP F. ZEIDMAN ET AL., FRANCHISING: REGULATION OF BUYING AND SELLING A FRANCHISE, 34 C.P.S. (BNA), at A–2 to A–3 (1983) (providing both good and bad aspects of franchising).

3. Franchisees receive training, financial assistance, and business expertise in exchange for an up-front fee and a percentage of gross income. *See* Robert W. Emerson, *Franchising and the Collective Rights of Franchisees*, 43 VAND. L. REV. 1503, 1506 n.1, 1508–09 (1990).

4. *See* Julie Bennett, *Franchises Set to Open at N.Y.C. Inner-city Sites*, FRANCHISE TIMES, Aug. 1, 1997, at 4; David Flaum, *Franchise Pros & Cons*, COM.–APPEAL (Memphis), May 4, 1997, at C4; Mike Malley, *Getting the Most Value Out of Franchising*, HOTEL & MOTEL MGMT., May 5, 1997, at 31; Bob Mook, *Choosing the Right Franchise: Find a 'Turnkey' Operation that Fits*, DENVER BUS. J., Aug. 29, 1997, at A17; Walter Pocock, *Going Into Business for Yourself? Consider Your Options Carefully*, ARIZ. REPUBLIC, Apr. 22, 1997, at E3; Shelia M. Poole, *Buying a Proven Concept One Way to Build Business*, ATLANTA J.–CONST., Aug. 24, 1997, at Q2 (quoting Carlotta Roberts, director of the Small Business Development Center at Kennesaw State University); Marcia

Some commentators have called franchising "the most successful marketing concept ever created."[5] If sheer growth indicates success, such a statement may not be hyperbole. Franchising has taken an increasing share of domestic and international business. Over half a million franchises operate in the United States, and they now account for about a trillion dollars in annual retail sales, with franchised outlets responsible for well over a third of total U.S. retail sales.[6] The number of franchises and business format franchisors, as well as the percentage of total retail sales, have grown rapidly, far outpacing the economy as a whole in the last few decades.[7] In addition to this continued increase in market share, the number of persons working for franchised outlets has skyrocketed from an estimated three and a half million in 1975, to about seven million in the early 1990s, to a predicted figure of ten million by the year 2000.[8]

Franchising's "success" and resulting rapid growth have caused problems. Franchise business developments continue to outpace any attempts at

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H. Pounds, *What's the Best Franchise? It's Up to You*, CALGARY HERALD, Mar. 31, 1997, at C3; *The Rush to Enlist Blacks in Fast Food Franchises*, BUS. WK., June 25, 1984, at 54.

5. Janean Huber, *Coming to Terms—Making the Franchise Partnership Work*, ENTREPRENEUR, Apr. 1993, at 106, 106; *accord* COMMISSION OF THE EUROPEAN COMMUNITIES, FIFTEENTH REPORT ON COMPETITION POLICY ¶ 25, at 40 (1986) (listing the following three positive effects from franchising: (1) enabling small retail outlets to compete with large distribution firms; (2) letting the franchisor establish a uniform distribution network without building its own retail outlets; and (3) helping new competitors enter the market and thus increase interbrand competition); David Hess, Comment, *The Iowa Franchise Act: Towards Protecting Reasonable Expectations of Franchisees and Franchisors*, 80 IOWA L. REV. 333, 339 (1995) ("[F]ranchising may create a worker who is more dedicated than an ordinarily employed manager."); *see also* William B. Cherkasky, *Introduction to Franchising and the International Franchise Association*, *in* THE FRANCHISING HANDBOOK 1, 4 (Andrew J. Sherman ed., 1993) (noting a "franchise explosion [penetrating] all areas of business...and [helping] reshape consumer habits and expectations worldwide").

6. U.S. DEP'T OF COMMERCE MINORITY BUS. DEV. AGENCY, FRANCHISE OPPORTUNITIES HANDBOOK at vii (1995); *see* Carolyn M. Brown, *All Talk, No Action*, BLACK ENTERPRISE, Sept. 1995, at 60 (stating that more than 3500 franchise companies operate more than 550,000 outlets in 65 different industries, with more than eight million employees of franchises; reporting International Franchise Association figures that there were $970 billion in sales by franchised businesses in 1994, up 12.9% from 1993, and with sales expected to increase by 15% in 1995); Robert W. Emerson, *Franchising Covenants Against Competition*, 80 IOWA L. REV. 1049, 1050 n.4 (1995) (citing numerous sources concerning the rapid growth of franchising in both the 1980s and the early 1990s).

7. U.S. DEP'T OF COMMERCE MINORITY BUS. DEV. AGENCY, *supra* note 6, at vii; Emerson, *supra* note 6, at 1050 n.4.

8. David J. Kaufmann, *Statistics Refute Franchising Abuses*, N.Y.L.J., July 22, 1993, at 3 (citing a 1993 Small Business Administration report); *see also* David Segal, *In Hopes of a Chain Reaction; at the Franchise Expo, Images of Rich Rewards Vie with a Harder Reality*, WASH. POST, Apr. 30, 1997, at C11 (noting that in the United States more than eight-million people are employed by franchise establishments, that one out of 12 businesses is a franchise establishment, and that, on average, a new franchise commences every eight minutes of each business day).

developing a well-structured, orderly approach to the legal issues associated with franchising. Court decisions, administrative regulations, and legislation have failed to provide even the most basic element for nationwide legal standards: a uniformly accepted definition of franchising.[9]

Most states consider a franchise to exist whenever a franchisee, in return for paying a franchise fee, is granted the right to sell goods or services under a marketing plan prescribed by the franchisor.[10] The marketing plan must be substantially related to the franchisor's trademark, service mark, or other commercial symbol.[11] A minority of states apply a slightly variant definition, substituting for the marketing plan requirement a "community of interest" between the franchisor and the franchisee in the marketing of goods or services.[12]

While there is a federal rule requiring information disclosures,[13] the only federal substantive laws that presently govern the franchisor-franchisee

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9. *See* HAROLD BROWN, FRANCHISING REALITIES AND REMEDIES § 1.01[1], at 1–2 (rev. ed. 1996); ROBERT W. EMERSON, WHAT IS A FRANCHISE? ESSENTIAL FRANCHISE LAW IN THE FIFTY STATES AND IN THE TERRITORIES 1–3 (1997); ZEIDMAN ET AL., *supra* note 2, at A–31.

10. In *Susser v. Carvel Corp.*, 206 F. Supp. 636, 640 (S.D.N.Y. 1962), *aff'd*, 332 F.2d 505 (2d Cir. 1964), district court Judge Archie O. Dawson, Jr., wrote, "[T]he cornerstone of a franchise system must be the trademark or trade name of a product. It is this uniformity of product and control of its quality and distribution which causes the public to turn to franchise stores for the product." States with "marketing plan or system" definitions include California, Illinois, Indiana, Maryland, Michigan, North Dakota, Oregon, Rhode Island, Virginia, and Wisconsin. CAL. CORP. CODE § 31005 (West Supp. 1998); 815 ILL. COMP. STAT. ANN. 705/3 (West Supp. 1997); IND. CODE ANN. § 23–2–2.5–1(a) (Michie 1995); MD. CODE ANN. BUS. REG. § 14–201 (1992); MICH. COMP. LAWS ANN. § 445.1502 (West 1995); N.D. CENT. CODE § 51–19–02 (1989 & Supp. 1997); OR. REV. STAT. § 650.005(4) (1997); R.I. GEN. LAWS § 19–28.1–3(g) (Supp. 1997); VA. CODE ANN. § 13.1–559(b) (Michie 1993); WIS. STAT. ANN. § 553.03(4) (West Supp. 1997).

11. *See* Yamaha Parts Distribs., Inc. v. Ehrman, 316 So. 2d 557, 559–60 (Fla. 1975) ("The right of a manufacturer to maintain the integrity of his trade name in the marketplace is a valuable right which a disreputable franchisee can quickly destroy."). For general information on trademarks in the franchising context, see Bert A. Collison, *Trademarks—The Cornerstone of a Franchise System*, 24 SW. L.J. 247 (1970).

12. Community of interest definitions are employed by a number of states, such as Connecticut, Hawaii, Minnesota, New Jersey, South Dakota, and Washington. *See, e.g.*, CONN. GEN. STAT. ANN. § 42–133e(b) (West 1992); HAWAII REV. STAT. § 482E–2 (1993); MINN. STAT. § 80C.01(4) (1994); N.J. STAT. ANN. § 56:10–3 (West 1989); S.D. CODIFIED LAWS § 37–5A–1 (Michie 1994); WASH. REV. CODE ANN. §§ 19.100.010(4), 252.1 (West Supp. 1998).

13. Federal regulation commenced in October 1979, when—following ten years of study—the Federal Trade Commission's Franchise Rule ("FTC Rule" or "FTC Franchise Rule"), "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures," 16 C.F.R. § 436 (1997), went into effect. Pursuant to this rule, which was promulgated on December 21, 1978, franchisors must make a full presale disclosure by prospectus based on a format set forth in the Federal Trade Commission's Compliance Guide. Failure to register in a given state means that the franchisor cannot

relationship directly are those regulating gasoline service stations[14] and automobile dealerships.[15] Many federal franchise relationship bills have died without even a

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legally offer or sell franchises there, and illegal offers or sales give rise to stiff civil and criminal liability for both the franchisor itself, and all persons controlling the franchisor. 15 U.S.C. § 45(m) (1994). There are no private enforcement rights under the FTC statute or the FTC Rule. Mon–Shore Management, Inc., v. Family Media, [1985–1986 Transfer Binder] Bus. Franchise Guide (CCH) ¶ 8494 (S.D.N.Y. Dec. 23, 1985); Freedman v. Meldy's, Inc., 587 F. Supp. 658 (E.D. Pa. 1984); Perricone v. Success Motivation Inst., Inc., 1037 Antitrust & Trade Reg. Rep. (BNA) A–21 (S.D.N.Y. 1981); Chelson v. Oregonian Publishing Co., 1981–1 Trade Cas. (CCH) ¶ 64,031 (D. Or. 1981). *But see Morgan* v. Air Brook Limousine, 510 A.2d 1197 (N.J. Super. Ct. Law Div. 1986) (noting that a state may find violation of the FTC Rule to be actionable by private parties suing under state law, such as consumer protection or franchise statutes).

The FTC Rule must be considered in relation to the several state acts governing almost the identical subject matter. Although the Federal Trade Commission ("FTC") staff has asserted the power to supersede state statutes, the FTC Rule expressly forgoes such preemption, thus allowing state regulation to continue. 15 U.S.C. § 45 (1994); *see* Trade Regulation Rule, 54 Fed. Reg. 7041 (1989). The preemption provision presently states that the FTC Rule has no effect on state or local laws or regulations "except to the extent that those laws or regulations are inconsistent with any provision of [the Rule], and then only to the extent of the inconsistency." 16 C.F.R. § 436.3 note 2 (1997). Furthermore, there is no such inconsistency "if the protection such [state or local] law or regulation affords any prospective franchisee is equal to or greater than that provided by [the Rule]." *Id.*; *see also* Final Guides to the Franchising and Business Opportunity Ventures Trade Regulation Rule, 44 Fed. Reg. 49,966 (1979) (stating that most states regulating franchise disclosures follow the Uniform Franchise Offering Circular Guidelines, approved by the Midwest Securities Commissioners' Association (now the North American Securities Administrators' Association)).

A proposal to amend the FTC Rule, first made on February 16, 1989, Trade Regulation Rule, 54 Fed. Reg. at 7041–7045, showed that the entire thrust of the proposal was FTC and state disclosure requirements—in particular, earnings claims—and, to a lesser extent, state registration laws. *See also* H. Bret Lowell, *The Preemption Mirage*, FRANCHISE L.J., Spring 1989, at 1, 23 (concluding that the FTC's notice of proposed rulemaking "does not appear to contemplate preemption of relationship laws"). The proposed amendment was not adopted.

Presently, the FTC is considering revisions in its rule to account for the rule's overall costs and benefits and also the current effects on the rule of changes in technology, economic conditions, and industry practices. Trade Regulation Rule on Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, 62 Fed. Reg. 9115 (1997). Among the new considerations are increasing sales of franchises and business opportunities via the Internet. *Id.* Two commentators have suggested that the FTC prescribe a disclosure format for each franchisor's Web site. Byron E. Fox & Henry C. Su, *The FTC Is Considering Revisions to Its Franchise Rule that Would Specify When Franchisors Must Furnish Disclosure Statements for Meetings on the Internet*, NAT'L L.J., May 5, 1997, at B4.

14. Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801–2806, 2821–2824, 2841 (1994) (originally enacted at Pub. L. No. 95–297, 92 Stat. 322 (1978)).

15. Automobile Dealer Suits Against Manufacturers Act, 15 U.S.C. §§ 1221–1225 (1994) (originally enacted at Pub. L. 1026, 70 Stat. 1125 (1956)).

committee vote,[16] and the Federal Trade Commission ("FTC") has never modified the information disclosure rule it promulgated in 1978.[17] However, many states do comprehensively regulate franchises, often by codifying a "good cause" standard for the franchisor's dealings with its franchisees.[18] This approach requires franchisors to make an affirmative showing of "good cause" before terminating or otherwise adversely affecting a franchise. It constitutes a profranchisee step beyond simply incorporating into the common law of contracts the implied covenant of good faith and fair dealing. Even if there is an express contractual provision about termination—one that trumps any implied covenant[19]—a court

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16. For example, in 1993–1994, a proposed Federal Fair Franchise Practices Act, H.R. 2593, 103d Cong. (1993), was not even brought to the House or Senate floor for a vote. With the November 1994 election of a Republican Congress, and the subsequent removal of an advocate for franchisees, John J. LaFalce (D-N.Y.), as chairman of the House Small Business Committee, the chances for enactment lessened considerably. While another, similar bill was introduced in the 104th Congress with the support of franchisees and other small businesses, BROWN, *supra* note 9, at § 7.13[7], even some of the bill's strongest proponents admitted that it might be "too complicated to engender legislative support." *Id.* (discussing the proposed Federal Fair Franchise Practice Act, H.R. 1717, 104th Cong. (1995)). This bill never came up for a vote, and the enactment of any such bill in the 105th Congress (1997–98) appears extremely unlikely.

17. *See supra* note 13.

18. *See* ARK. CODE ANN. § 4–72–204 (Michie 1996); CAL. BUS. & PROF. CODE §§ 20,020–20,026 (West 1997); CAL. CORP. CODE §§ 31,101, 31,119, 31,125 (West Supp. 1998); CONN. GEN. STAT. ANN. § 42–133(f) (West 1992); DEL. CODE ANN. tit. 6, §§ 2551–2552 (1993); D.C. CODE ANN. §§ 29–1201 to 29–1203 (1996); HAW. REV. STAT. § 482E–6(2)(H) (1993); Illinois Franchise Disclosure Act of 1987, 815 ILL. COMP. STAT. ANN. 705/19 (West 1993); IND. CODE ANN. § 23–2–2.7–1(7) (Michie 1995); IOWA CODE ANN. §§ 523H.1 to 523H.17 (West Supp. 1997); MICH. COMP. LAWS § 445.1527(c) (1993); MINN. STAT. ANN. §§ 80C.14 to 80C.15 (West 1996 & Supp. 1998); NEB. REV. STAT. § 87–404 (1994); N.J. STAT. ANN. § 56:10–5 (West 1989); P.R. LAWS ANN. tit. 10, §§ 278–278b (1997); S.D. CODIFIED LAWS § 37–5A–51 (Michie 1994); TENN. CODE ANN. § 47–25–1503 (1995); V.I. CODE ANN. tit. 12A, § 132 (1982); VA. CODE ANN. § 13.1–564 (Michie 1993); WASH. REV. CODE ANN. § 19.100.180(2)(j) (West Supp. 1998); WIS. STAT. ANN. § 135.03 (West 1989) ("Fair Dealership Law"); *see also infra* notes 25–33 and accompanying text (discussing state "good cause" requirements). For a discussion of the specific requirements of each of these laws, see GLADYS GLICKMAN, FRANCHISING § 3.03[1] (1992) (a chart of state laws). For extensive commentary on the "good cause" standard, see Tracey A. Nicastro, Note, *How the Cookie Crumbles: The Good Cause Requirement for Terminating a Franchise Agreement*, 28 VAL. U. L. REV. 785 (1994).

19. McDonald's Corp. v. Watson, 69 F.3d 36, 43 (5th Cir. 1995) (applying Illinois law); Petereit v. S.B. Thomas, Inc., 63 F.3d 1169, 1184–85 (2d Cir. 1995) (citing several cases), *cert. denied*, 517 U.S. 1119 (1996); Devery Implement Co. v. J.I. Case Co., 944 F.2d 724, 728 (10th Cir. 1991); Davis v. Sears, Roebuck and Co., 873 F.2d 888, 894 (6th Cir. 1989); Hubbard Chevrolet Co. v. General Motors Corp., 873 F.2d 873, 878 (5th Cir. 1989); Corenswet, Inc. v. Amana Refrigeration, Inc., 594 F.2d 129, 138 (5th Cir. 1979); *see also* UNIF. FRANCHISE & BUSINESS OPPORTUNITIES ACT § 201 cmt. 1, 7A U.L.A. 118 (Supp. 1993) (stating that a franchise agreement "imposes on the parties a duty of good

looking for "good cause" must examine whether the franchisor had sufficient cause to terminate a franchise.[20]

B. The Franchisor-Franchisee Relationship and Statutory Law

Despite franchising's general acclaim, the franchise *relationship* often has become adversarial.[21] Indeed, while the word, "franchise," is derived from the Old French word, *franchir*, meaning to "free from servitude,"[22] some critics have concluded that franchising is a modern form of long-term indentured servitude.[23]

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faith in its performance and enforcement," but limiting the duty to those instances in which it would not "add to or override substantive provisions of a [franchise] contract").

20. *See, e.g.*, P & W Supply Co. v. E.I. DuPont de Nemours & Co., 747 F. Supp. 1262, 1267 (N.D. Ill. 1990) (concluding that an implied covenant effectively overturns the express language of a contract that allows termination without good cause); Dayan v. McDonald's Corp., 466 N.E.2d 958 (Ill. App. Ct. 1984) (finding good cause for termination because franchisee failed to maintain quality, service, and cleanliness standards); Shell Oil Co. v. Marinello, 307 A.2d 598, 602 (N.J. 1973) (concluding that the franchisor's bargaining power was so disproportionate that to allow termination without good cause would violate public policy; finding no evidence of good cause for Shell's termination of its dealer, Marinello). Some general concepts in this area are found in the cases cited *infra* note 45.

21. Jeffrey A. Tannenbaum, *LaFalce Gains Allies in House to Halt Franchise Abuse*, WALL ST. J., July 9, 1993, at B2 [hereinafter Tannenbaum, *LaFalce Gains Allies*] (quoting Steven V. Fellingham, Chief Executive Officer of a leading franchisor, the Carvel Corporation—"franchisors and franchisees have been stopping each other from growing and improving their profitability"); *see also* Jeffrey A. Tannenbaum, *Big Board Premiere, Rewrite of Rules Draw Attention*, WALL ST. J., Dec. 11, 1992, at B2 ("The International Franchise Association, a trade group for franchisors, says it will form a franchise council aimed at increasing understanding between franchisors and franchisees."); Tannenbaum, *LaFalce Gains Allies*, *supra* (reporting the announcement of the main franchisor lobbying organization, the International Franchise Association, that it would, for the first time, add two franchisees to its governing board).

22. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 721 (3d ed. 1992) (from old French, "franc" or "franche," meaning "free from servitude"); THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH 537 (9th ed. 1995) (same); RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 528 (1995) (same); WEBSTER'S NEW WORLD COLLEGE DICTIONARY 535 (3d ed. 1996) (same).

23. *Minority Franchising: Is Discrimination a Factor? Hearing Before the House Comm. on Small Business*, 103d Cong. 9 (1993) (statement of Rep. Kweisi Mfume (D-Md.), concluding that, "in many respects [minority franchisees are subject to] the old master-slave relationship all over again").

Many commentators have opined about the disadvantageous position of franchisees generally, whether those franchisees are ethnic minorities or not. *See* STAN LUXENBERG, ROADSIDE EMPIRES: HOW THE CHAINS FRANCHISED AMERICA 262–63 (1985) (stating that because "the franchise contract is usually drawn up by the parent, the terms are usually one-sided"); MUNNA, *supra* note 2, at 116 (stating that typical franchise agreements "are not designed for human relations...[but] are more appropriate in a museum of torture devices, as guillotines or impaling tools"); Ernest A. Braun, *Policy Issues of Franchising*, 14 SW. U. L. REV. 156, 226 (1984) (suggesting that the franchisor's superiority as "the

Because franchisors usually have the upper hand, and in recognition of the typical franchisor's superior bargaining power, some statutes and case law seek to intervene in the relationship and protect the franchisee by imposing upon franchisors an obligation of good faith, including a duty not to terminate franchises except for "good cause."[24]

A number of states limit the application of a "good cause" standard to terminations,[25] while others apply it to both terminations and refusals to renew.[26] Restricting termination to "good cause" is generally designed to prevent franchisors from engaging in "opportunistic behavior prior to the end of the contract term."[27] Although the standards underlying "good cause" vary among the

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institutional ruler of the franchise system" is indisputable); Harold Brown, *A Fair Dealership Law—Proposed Findings and Purpose*, N.Y.L.J., Mar. 28, 1991, at 3 (citing several cases for the proposition that the franchise agreement is an adhesion contract that only offers the franchisee onerous terms on a "take-it-or-leave-it" basis).

24. *See* Emerson, *supra* note 3, at 1509–11.

25. CAL. BUS. & PROF. CODE § 20,020 (West 1997); Illinois Franchise Disclosure Act of 1987, 815 ILL. COMP. STAT. ANN. 705/19 (West 1993); MICH. COMP. LAWS § 445.1520(c) (1996); VA. CODE ANN. § 13.1–562(A) (Michie 1996) (using the term "reasonable cause"); WASH. REV. CODE ANN. § 19.100.080(2) (West Supp. 1998). The California restrictions on nonrenewal, however, resemble some elements of "good cause," but the term is not expressly used in the nonrenewal context. CAL. BUS. & PROF. CODE § 20,025 (West 1997).

26. ARK. CODE ANN. § 4–72–204(a) (Michie 1996); CONN. GEN. STAT. ANN. § 42–133f (West 1992); D.C. CODE ANN. § 29–1203 (1996); HAW. REV. STAT. § 482E–6(2)(H) (1992); IND. CODE ANN. § 23–2–2.7–1(7)–(8) (Michie 1995); IOWA CODE ANN. §§ 523H.7 to 523H.8 (West Supp. 1997) (although "good cause" is not literally required in every nonrenewal situation, *id.* § 523H.8); MINN. STAT. ANN. §§ 80C.14 subd.3(b), subd.4 (West Supp. 1998) (although "good cause" is not literally required in every nonrenewal situation, *id.* § 80C.14(4)); NEB. REV. STAT. § 87–404 (1994); N.J. STAT. ANN. § 56:10–5 (West 1989); P.R. LAWS ANN. tit. 10, § 278a (1997) (applies to "distributors"); TENN. CODE ANN. §§ 47–25–1503(a), 47–25–1505 (1995) (applies only to wholesale liquor franchises); V.I. CODE ANN. tit. 12A, § 132 (1982); WIS. STAT. ANN. § 135.03 (1996) (applies to dealerships, which effectively also cover franchises). Although South Dakota has no statute on franchising generally, a federal court ruling has afforded some temporary protection for distributors from either termination or nonrenewal. Cambee's Furniture, Inc. v. Doughboy Recreational, Inc., 825 F.2d 167 (8th Cir. 1987).

For more on this subject, see generally EMERSON, *supra* note 9; Thomas M. Pitegoff, *Franchise Relationship Laws: A Minefield for Franchisors*, 45 BUS. LAW. 289 (1989).

27. Rajiv P. Dant et al., *Ownership Redirection in Franchised Channels*, 11 J. PUB. POL'Y & MARKETING 33, 33–44 (1992) (further discussing an "ownership redirection hypothesis," which postulates that powerful franchisors will reacquire the most profitable outlets and leave only the marginal units to franchisees).

Opposition to opportunism also may lie at the heart of the "good faith" concept, which combines with "fair dealing" to constitute an implied covenant extending to all aspects of the franchise relationship, not just terminations or nonrenewals. *See* Jones Distrib. Co. v. White Consol. Indus., 943 F. Supp. 1445, 1466 (N.D. Iowa 1996) (quoting Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting, 908 F.2d 1351, 1357–58 (7th Cir. 1990), which states, inter alia, "'Good faith' is a compact reference to an implied

states,[28] definitions generally cite "good cause" as the failure of a franchisee to comply with any applicable law or with any lawful provision of the franchise agreement, after being given the opportunity to cure that defect.[29] The cure period may be as short as five or ten days,[30] or as long as two months or more,[31] with it often in the middle, at thirty days.[32] Franchisors object to "good cause" requirements as impediments on their right to contract freely, arguing that trademark licenses in particular must be guarded through strict quality control.[33]

C. Discrimination and Affirmative Action Issues

This Article reviews case law and statutes concerning franchisors' alleged discrimination against franchisees. It considers both franchise terminations and instances in which a potential franchisee was not chosen. The Article analyzes

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undertaking not to take opportunistic advantage in a way that could not have been contemplated at the time of drafting, and which therefore was not resolved explicitly by the parties.").

28. To complicate matters further, the type of conduct constituting a breach of the duty to use "good cause" is difficult to define because "neither courts nor commentators have articulated an operational standard that distinguishes good faith performance from bad faith performance." Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 369 (1980).

29. *See infra* notes 31–33.

30. *See, e.g.*, CAL. BUS. & PROF. CODE §§ 20,021(e), (j) (West 1997). For repeated violations, see, for example, ARK. CODE ANN. § 4–72–204 (Mitchie 1996); 815 ILL. COMP. STAT. ANN. 705/19(c)(4) (1993); for nonpayment of fees, see, for example, WIS. STAT. ANN. § 135.03 (West 1989).

31. *See, e.g.*, D.C. CODE ANN. § 29–1203 (stating that the franchisee has a 60-day period to cure any cause for termination or nonrenewal); IOWA CODE ANN. § 523H.7 (providing anywhere from a 30-day to 90-day period of time to cure a default, depending on the particular type of default); MINN. STAT. ANN. § 80C.14 subd.3 (West Supp. 1998) (stating a 60-day period to correct the problems given as grounds for termination); WASH. REV. CODE ANN. § 19.100.180(2)(j) (West Supp. 1998) (providing for a 30-day cure period, but permitting an extension if the defect is impossible to cure within that period, so long as reasonable attempts were made to start curing it); WIS. STAT. ANN. § 135.04 (West 1989) (providing for a 60-day cure period).

32. *See, e.g.*, CAL. BUS. & PROF. CODE § 20,021(h) (West 1997); 815 ILL. COMP. STAT. ANN. 705/19(b) (1993); TENN. CODE ANN. § 47–25–1503(a) (1995) (concerning wholesale liquor franchises); *see also* AXELRAD & RUDNICK, *supra* note 2, at 243–47 (describing termination provisions of several states, which include granting franchisees a maximum of 30 days in which to cure a defect); Robert W. Emerson, *Franchise Contract Clauses and the Franchisor's Duty of Care Toward Its Franchisees*, 72 N.C. L. REV. 905, 971 (1994) (survey results indicating that the median grace period in franchise contract provisions giving a defaulting franchisee time to cure is 30 days, but with often shorter periods, such as 5, 7, 10, or 15 days, to pay an overdue fee, royalty, or other charge owed to the franchisor).

33. Pitegoff, *supra* note 26, at 309. *See generally* David Gurnick, *Intellectual Property in Franchising: A Survey of Today's Domestic Issues*, 20 OKLA. CITY U. L. REV. 347 (1995); Ann Hurwitz, *Co-branding: Managing Franchise Brand Associations*, 20 OKLA. CITY U. L. REV. 373 (1995).

statistics concerning the percentages of minority-owned franchises, and it discusses the use of set-asides and the affirmative action framework in other nations, particularly Canada.

This Article then examines franchisor-orchestrated affirmative action programs designed to increase the number of minority-owned franchises. It proposes private systems to counter the redlining of franchises and the poor servicing of redlined communities. These franchisor-implemented systems would better assist new and existing "high risk" franchises: ones located in markets or communities where businesses face higher costs and lower rates of return, often due to such factors as the low per capita income of potential customers and high crime rates. Under the proposal presented here, extraordinary disclosures—beyond those required by the federal rules[34]—would be made to prospective "high risk" franchisees. Other assistance could be furnished to economically disadvantaged, prospective, or existing franchisees, regardless of their race, gender, or ethnicity, and despite the fact that they may not operate in a high risk location/market.

II. DISCRIMINATION CLAIMS

A. Theories: Implied Covenants and "Good Cause"

The arguments challenging a franchise termination as wrongful fall into three basic claims: statutory violations, breach of contract, and fraud.[35] The most commonly alleged facts are that the termination: (1) was without "good cause;"[36] (2) resulted from a conspiracy among the franchisor and others to restrain market competition; (3) breached an express term in the franchise agreement; (4) concerned a franchise that the franchisor fraudulently induced the franchisee into buying; (5) breached the implied or oral representations of (or contract modifications by) the franchisor; and (6) violated an implied covenant of good faith and fair dealing, either because it was for illegitimate, ulterior purposes or because it treated the franchisee in a discriminatory manner.[37]

Occasionally, a franchisee challenges a franchisor's practices, including the agreement the franchisor drafted, by introducing a discrimination claim that centers around termination, renewal, or transfer of the franchise.[38] In addition,

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34. The FTC's Franchise Rule, "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures," is at 16 C.F.R. § 436 (1997). For more on the rule, see *supra* note 13.

35. William N. Berkowitz, *Defeating Requests for Preliminary Injunctive Relief in Franchise Termination Cases*, 14 FRANCHISE L.J. 57, 73 (1995).

36. *See supra* notes 18–20, 25–33 and accompanying text.

37. Berkowitz, *supra* note 35, at 73.

38. *See, e.g.*, L–O Distribs., Inc. v. Speed Queen Co., 611 F. Supp. 1569 (D. Minn. 1985) (upholding as nondiscriminatory a franchise termination); Burke v. Superior Ct. of Sacramento County, 128 Cal. App. 3d 661, 663–64 (1982) (upholding as nondiscriminatory the franchisor's refusal to approve a franchise transfer); *see also*

other franchise litigation, although typically focused on breach of contract,[39] antitrust law,[40] intellectual property,[41] or other "core" issues, also may involve allegations of discrimination.

Claims of discrimination usually arise because of (1) differences in contractual rights and duties from one franchise to another in the same franchised system;[42] (2) an allegedly unfair decision-making process in the selection of new franchisees;[43] or (3) uneven enforcement of franchise requirements, especially the imposition of sanctions such as franchise termination or nonrenewal.[44] In a discrimination claim, a franchisee may allege that the franchisor violated federal or state civil rights statutes, state statutes specifically covering business franchises, or implied covenants of good faith and fair dealing. This last cause of action has become especially valuable for franchisees because, in response to the growing number of conflicts between franchisors and franchisees, many courts have

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Deutchland Enters. v. Burger King Corp., 957 F.2d 449 (7th Cir. 1992) (finding that the fact public corporations were allowed to own competing restaurants, as well as other fact patterns, did not evince discrimination in the franchisor's enforcement of a "no competing restaurants" clause against a franchisee). Both *Burke* and *L–O Distributors* are discussed more comprehensively *infra* notes 53–62 and accompanying text.

39. *See, e.g.*, Precision Enters. v. Precision Tune, Inc., Bus. Franchise Guide (CCH) ¶ 10,472 (W.D. Wash. Oct. 4, 1993) (enforcing a franchisee's covenant against competition); McDonald's Corp. v. Robert A. Makin, Inc., 653 F. Supp. 401 (W.D.N.Y. 1986) (franchisee nonpayment of royalties); Dayan v. McDonald's Corp., 466 N.E.2d 958, 975 (Ill. App. Ct. 1984) (finding that the franchisor had good cause to terminate regardless of contractual specificity inasmuch as the franchisee had failed to maintain quality, service, and cleanliness standards).

40. Hall v. Burger King Corp., 912 F. Supp. 1509 (S.D. Fla. 1995); Eastman Kodak Co. v. Siegel, 150 N.Y.S.2d 99 (Sup. Ct. 1956), *aff'd as modified*, 151 N.Y.S.2d 859 (App. Div. 1956); *see also* American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230 (3d Cir. 1975); Tober Foreign Motors, Inc. v. Reiter Oldsmobile, Inc., 381 N.E.2d 908 (Mass. 1978).

41. *See, e.g.*, Jiagbogu v. Popeye's Famous Fried Chicken Corp., Civ. A. No. 94–766, 1994 WL 396302 (E.D. La. July 22, 1994) (A terminated franchisee alleged that the franchisor defrauded the franchisee, breached various contract obligations to the franchisee, and discriminated against the franchisee on the basis of race; the court found that, regardless of whether the franchisee's claims might ultimately be upheld, the exfranchisee must stop infringing the franchisor's trademarks, and so a preliminary injunction against infringement was granted.).

42. Franchisors often treat franchisees differently when negotiating changes to franchise agreements. Such disparate treatment could result in disfavored franchisees filing discrimination claims. *See also* Kilday v. Econo–Travel Motor Hotel Corp., 516 F. Supp. 162 (E.D. Tenn. 1981) (holding that a uniform franchise agreement does not entitle franchisees to have franchise provisions enforced uniformly).

43. *See, e.g.*, Hall v. Burger King Corp., 1992–2 Trade Cas. (CCH) ¶ 70,042 (S.D. Fla. Oct. 26, 1992), *available in* 1992 WL 372354; Brown v. American Honda Motor Co., No. C–85–1582A, 1986 WL 15491 (N.D. Ga. Mar. 28, 1986), *aff'd*, 939 F.2d 946 (11th Cir. 1991).

44. *See Kilday*, 516 F. Supp. 162 (described *supra* note 42).

extended an implied covenant of good faith and fair dealing to the franchise relationship.[45]

"Good cause" statutes also may be involved.[46] The "good cause" requirements in franchising have developed to compel franchisors to treat their franchisees equally and fairly.[47] If a franchisor terminates one franchise while allowing another to continue, despite the same violation in each case, the terminated franchise can claim lack of "good cause" for termination. Similarly, if a franchisor denies an applicant a franchise, yet awards that franchise to a second applicant with lesser qualifications, the first applicant can claim unequal or unfair

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45. *See generally* Harold Brown & Jerry Cohen, *Franchise Equities*, 63 MASS. L. REV. 109 (1978); Harold Brown, *Franchising: The Duty to Perform in Good Faith and Fair Dealing*, FRANCHISE L.J., Spring 1982, at 17; W. Michael Garner, *The Implied Covenant of Good Faith in Franchising: A Model for Discretion*, 20 OKLA. CITY U. L. REV. 305 (1995); David J. Kaufmann, *The Implied Covenant of Good Faith and Fair Dealing*, N.Y.L.J., Aug. 26, 1993, at 3; T. Mark McLaughlin & Caryn Jacobs, *Termination of Franchises: Application of the Implied Covenant of Good Faith and Fair Dealing*, FRANCHISE L.J., Summer 1987, at 1; Rochelle Buchsbaum Spandorf et al., *Implications of the Covenant of Good Faith: Its Extension to Franchising*, FRANCHISE L.J., Fall 1985, at 3; Elizabeth A. Dennis, Note, *Uniform Commercial Code—2–302—Unilateral Right of Termination for Cause Determinable Solely by Franchisor Unconscionable*, 55 TEX. L. REV. 541 (1977). Several cases recognized a covenant. *See, e.g.*, Dunkin' Donuts of Am. v. Minerva, Inc., 956 F.2d 1566, 1569–70 (11th Cir. 1992); Wright–Moore Corp. v. Ricoh Corp., 908 F.2d 128 (7th Cir. 1990); Entre Computer Ctrs., Inc. v. FMG of Kansas City, Inc., 819 F.2d 1279 (4th Cir. 1987), *overruled on other grounds by* Busby v. Crown Supply, Inc., 896 F.2d 833 (4th Cir. 1990); Larese v. Creamland Dairies, Inc., 767 F.2d 716 (10th Cir. 1985); Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 728 (7th Cir. 1979); Day v. Avery, 548 F.2d 1018 (D.C. Cir. 1976); Lokewill, Inc. v. United States Shoe Corp., 547 F.2d 1024 (8th Cir. 1976); Alpha Distrib. Co. of Cal. v. Jack Daniel's Distillery, 454 F.2d 442 (9th Cir. 1972); Milsen & Co. v. Southland Corp., 454 F.2d 363 (7th Cir. 1971); B.P.G. Autoland Jeep–Eagle v. Chrysler Credit Corp., 799 F. Supp. 1250, 1256 (D. Mass. 1992); Burger King Corp. v. Weaver, 798 F. Supp. 684 (S.D. Fla. 1992); Amos v. UNOCAL, 633 F. Supp. 1027 (D. Or. 1987); Walker v. Kentucky Fried Chicken Corp., 515 F. Supp. 612 (S.D. Cal. 1981), *rev'd on other grounds*, 728 F.2d 1215 (9th Cir. 1984); Snyder v. Howard Johnson's Motor Lodge, Inc., 412 F. Supp. 724 (S.D. Ill. 1976); Junikki Imports, Inc. v. Toyota Motor Co., 335 F. Supp. 593 (N.D. Ill. 1971); Gibbs v. Bardahl Oil Co., 331 S.W.2d 614 (Mo. 1960); Bronken's Good Time Co. v. J.W. Brown & Assocs., 661 P.2d 861 (Mont. 1983); Shell Oil Co. v. Marinello, 307 A.2d 598 (N.J. 1973); Atlantic Richfield Co. v. Razumic, 390 A.2d 736 (Pa. 1978); Martino v. McDonald's Corp., 304 N.W.2d 780 (Wis. 1981).

This concept is further discussed in Robert W. Emerson, *Franchise Terminations: Legal Rights and Practical Effects when Franchisees Claim the Franchisor Discriminates*, 36 AM. BUS. L.J. (forthcoming 1998).

46. *See supra* notes 18–20, 25–33 and accompanying text.

47. Applying the principles of good faith, courts have concluded that a franchisor cannot terminate without good cause. This conclusion reflects "judicial concern over longstanding abuse in franchise relationships, particularly contract provisions giving the franchisor broad unilateral powers of termination at will." Dayan v. McDonald's Corp., 466 N.E.2d 958, 992 (Ill. App. Ct. 1984).

treatment. Indeed, a franchisor's failure to treat all franchisees or potential franchisees equally, when no reasonable, discernible basis appears for distinguishing between those favored and those disfavored, may well result in a violation of the "good cause" requirement.[48] Such a violation is the basis of a discrimination claim.

There may be a direct link between disparate treatment and unfair treatment, but not necessarily. Accordingly, a finding of unequal treatment—discrimination—is not the only way a franchisee can prove a franchisor's failure to use "good cause." Even if a franchisor's policies are not *unequal* and therefore not discriminatory, a franchisee may assert that they are nevertheless *unfair*, and thus still constitute a breach of the duty to use "good cause." Therefore, failure to use "good cause" can occur as a result of either unequal (discriminatory) or unfair treatment.

B. Representative Cases

In *Wright–Moore Corp. v. Ricoh Corp.*,[49] a franchisee claimed that its franchisor unfairly discriminated against it, in violation of Indiana Code section 23–2–2.7–2(5), in that the franchisor offered at least one other terminated franchisee a new franchise but made no such offer to the terminated plaintiff-franchisee.[50] Upholding the trial judge's grant of summary judgment for the franchisor, the court determined, "proof of discrimination requires a showing of arbitrary disparate treatment among similarly situated individuals or entities."[51] Indeed, state statutes are probably limited to prohibiting discrimination only between franchises within the same state.[52]

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48. *See, e.g.*, Canada Dry Corp. v. Nehi Beverage Co., 723 F.2d 512 (7th Cir. 1983); Implement Serv., Inc. v. Tecumseh Prods. Co., 726 F. Supp. 1171 (S.D. Ind. 1989).

49. 908 F.2d 128 (7th Cir. 1990).

50. *Id.* at 139.

51. *Id.* (quoting *Canada Dry Corp.*, 723 F.2d at 521). Note, however, that this requirement of a similarly situated party does not carry over to all areas of law where discrimination is prohibited. For example, a minority employee terminated because of his minority status is discriminated against even if there is no similarly situated person. Indeed, the franchisee in *Wright–Moore* admitted that it was the only true national distributor, and, therefore, that there was no similarly situated "franchisee." *Wright–Moore*, 908 F.2d at 139.

52. Two noted franchise lawyers state:

> In enforcing these anti-discrimination provisions, the states are concerned primarily with discrimination between two in-state [f]ranchisees. Thus, while technically a state could look to a franchise sale [or termination] in another state as a basis for finding discrimination, there may be constitutional and other infirmities in using such extraterritorial comparisons.

AXELRAD & RUDNICK, *supra* note 2, at 144. However, in *Wisconsin Music Network, Inc. v. Muzak Ltd. Partnership*, 822 F. Supp. 1332, 1336–37 (E.D. Wis. 1992), *aff'd*, 5 F.3d 218 (7th Cir. 1993), the court evaluated whether the franchisor complied with Wisconsin's antidiscrimination provision by considering whether the franchisor treated the franchisee-

As in the federal case of *L–O Distributors, Inc. v. Speed Queen Co.*, where the district court rejected a dealer's discrimination claim because all dealers were required to comply with a clear policy and the plaintiff had not done so,[53] a California court in *Burke v. Superior Court of Sacramento County* also denied a dealer's claim of discrimination on the facts, finding that the distributor treated all of its dealerships equally.[54] In *Burke*, a dealer arranged for a party to purchase its dealership, but the distributor refused to approve the sale because it had a policy of recommending only one franchise candidate at a time, and had already begun negotiations with a potential minority buyer. Ultimately, the minority candidate refused to purchase the dealership, and the dealer was forced to go out of business as a result.[55]

The dealer claimed that the distributor's refusal to approve his arranged sale to a white person was based on a discriminatory policy and constituted a restraint of trade in violation of the California Business and Professional Code.[56] The court noted that when the distributor had formulated its policy of only considering one party at a time, the race of the candidate was not contemplated.[57] Consequently, because the policy applied to all dealers, the court found that it was not discriminatory and, therefore, rejected the dealer's claim.[58]

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plaintiff, a Wisconsin corporation, similarly as to another franchisee that was based in Washington, D.C. The defendant, a music-service licensor, did not discriminate against one of its licensees by requiring it to sign a new licensing agreement or else not be renewed; there was no discrimination in violation of the Wisconsin Fair Dealership Law because (1) those licensees not forced to sign the new agreement were differently situated than the plaintiff-licensee, and (2) the one similarly situated licensee also was required to sign the new agreement or not be renewed.

53. L–O Distribs., Inc. v. Speed Queen Co., 611 F. Supp. 1569, 1580–81 (D. Minn. 1985) (holding that poor sales performance in violation of an understanding between a supplier and a distributor has been held to constitute good cause for termination and did not violate the Wisconsin Fair Dealership Law, WIS. STAT. § 135.02(a), which bars discriminatory terms for one dealer as compared to those "imposed on other similarly situated dealers either by their terms or in the manner of their enforcement"); *see also infra* notes 139–46 and accompanying text (discussing discrimination in franchisee selection).

54. Burke v. Superior Ct. of Sacramento County, 128 Cal. App. 3d 661 (1982).

55. *See id.* at 664.

56. *Id.* (citing CAL. BUS. & PROF. CODE §§ 16720(c), 16721 (West 1977)).

57. *Burke*, 128 Cal. App. 3d at 666.

58. The court granted the defendant, General Motors ("GM"), a partial summary judgment and held: (1) GM's minority recruitment policy did not indicate a racially based exclusion, which is a prerequisite to finding a violation of the California statute providing that no person shall be kept from a business transaction on the basis of any written policy requiring racial discrimination; and (2) No restriction of trade or commerce led to Burke's alleged injuries from GM's refusal to approve the sale of his dealership; instead, any such harm resulted from GM's alleged wrongful act of racial exclusion, and thus partial summary judgment on that discrimination claim meant that this claim of an improper combination (restraint of trade) by GM and its recruited candidates to affect the sales price of dealership assets must fail. *Id.* at 665–67.

In both *L–O Distributors* and *Burke*, dealers brought discrimination claims against their distributors instead of focusing on the distributor's breach of its duty to use "good cause."[59] In so doing, the dealers effectively forced the courts to base their holdings exclusively on the issue of equal treatment: if a court could find that the distributor had treated all of its dealers equally, the dealer's claim would fail.[60] By focusing only on discrimination, the dealers failed to assert a potentially powerful claim against the distributor: unfair treatment.

As previously discussed, a failure to use "good cause" can be proven by establishing either unequal treatment or unfair treatment.[61] Thus, although a distributor may have treated its dealers equally, a dealer may still be able to maintain a claim of failure to use "good cause" if it can demonstrate that such treatment, albeit equal, was unfair. For example, the plaintiff in *Burke* could have alleged that the franchisor's policy of considering one candidate at a time was unfair, as it forced Burke to go out of business even though he had arranged for someone to purchase his dealership.[62] Accordingly, although the policy was applied equally to all franchisees and thus was not discriminatory, it is still arguable that the policy was unfair, thus constituting a failure by the franchisor to use "good cause" or to abide by the implied covenant of good faith and fair dealing.

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59. Of course, "good cause" may not be an issue when, as in *Burke*, it is the sale or prospective sale of a franchise at issue rather than termination or nonrenewal. Still, broadly construed, the distributor's actions could be considered a constructive termination. Moreover, regardless of whether "good cause" is at issue, good faith *always* matters. *See, e.g.*, UNIF. FRANCHISE & BUSINESS OPPORTUNITIES ACT § 201 cmt. 1, 7A U.L.A. 118 (Supp. 1993) (described *supra* note 19); *supra* note 45 and accompanying text.

60. Although a franchisor's motives may vary, so long as there is "good cause" for its actions (e.g., termination), it is doubtful that it will have breached an implied covenant of good faith. *See Dayan v. McDonald's Corp.*, 466 N.E.2d 958, 992 (Ill. App. Ct. 1984); *see also* Barnes v. Burger King Corp., 932 F. Supp. 1420, 1438 (S.D. Fla. 1996) (holding that, without any evidence that Burger King acted in bad faith, defendant Burger King was entitled to a summary judgment on its motion to deny the plaintiff-franchisee's claim of an implied covenant of good faith and fair dealing); *cf.* Beraha v. Baxter Health Care Corp., 956 F.2d 1436, 1443–45 (7th Cir. 1992) (noting that the duty of good faith and fair dealing imposes no duty "to be nice or to behave decently," but requires the reasonable, appropriately motivated exercise of discretion, without arbitrariness or caprice, and consistent with the contracting parties' reasonable expectations); Burger King Corp. v. Austin, 805 F. Supp. 1007, 1013 (S.D. Fla. 1992) (citing the same principles stated in *Beraha* and *Dayan*).

61. *See supra* pp. 13–14 and notes 46–48.

62. Instead, the franchisee-plaintiff in *Burke* alleged that GM's minority recruitment policy, operating within a policy of recommending franchise candidates one at a time, constituted—as practiced—racial discrimination against the white franchisee (who was trying to sell his franchise to another, nonminority candidate). In effect, the court found that to infer a policy of covert, reverse discrimination requires evidence, not speculation. *Burke*, 128 Cal. App. 3d at 666–67.

C. Antidiscrimination Statutes

A few states have specific, antidiscrimination franchising laws barring materially different treatment of similarly situated franchisees.[63] Relatively few court opinions have considered these statutes.[64]

Federal "fair franchising" bills have also included antidiscrimination provisions,[65] and so has the Model Franchise Investment Act proposed by the North American Securities Administrators Association ("NASAA").[66] Federal

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63. *See, e.g.*, Arkansas Franchise Practices Act (1977), ARK. CODE ANN. § 4–72–206(2) (Michie 1995); California Fair Dealership Law (1980), CAL. CIV. CODE §§ 51.8, 80–86 (West 1996); California Franchise Investment Law (1970), CAL. CORP. CODE § 31220 (West 1996); CONN. GEN. STAT. § 42–133l (1994); Hawaii Franchise Investment Law (1974), HAW. REV. STAT. § 482E–6(2)(C) (1996) (unlawful to discriminate between franchisees in charges or other business dealings unless based upon reasonable distinction); Illinois Franchise Disclosure Act of 1987, ILL. ANN. STAT. ch. 121 1/2, para. 718 (Smith–Hurd 1993) (unfair practice to unreasonably discriminate between franchisees unless based upon reasonable distinctions); Indiana Deceptive Franchise Practice Law, IND. CODE § 23–2–2.7–2(5) (1996) (unlawful to discriminate unfairly among franchisees); IOWA CODE ANN. § 523H.5 (West Supp. 1997); Michigan Franchise Investment Law (1974, amended in 1984), MICH. COMP. LAWS § 445.1527(e) (1996); Minnesota Unfair Practices Law, MINN. STAT. § 80C.14 (1996) (antidiscrimination provision is based in MINN. R. 2860.4400) (1996); Nebraska Franchise Practices Act (1978), NEB. REV. STAT. § 87–406(2) (1996); New Jersey Franchise Practices Act (1971), N.J. REV. STAT. § 56:10–7(b) (1996); Washington Franchise Investment Protection Act (1972), WASH. REV. CODE § 19.100.180(2)(c) (1995); Wisconsin Fair Dealership Law, WIS. STAT. § 135.04 (1996); McDonald's Corp. v. Robert A. Makin, Inc., 653 F. Supp. 401, 403 (W.D.N.Y. 1986) (discussing franchise discrimination as violating Illinois law); Corp v. Atlantic Richfield Co., 860 P.2d 1015, 1021 (Wash. 1993) (interpreting the Washington franchising law and noting that franchisor ARCO met the statutory requirement that it offer franchise terms to all franchisees "on a non-discriminatory basis"). Additionally, there are antidiscrimination provisions found in franchising statutes covering particular industries. *See* ARK. CODE ANN. § 4–75–411 (Michie 1995) (auto dealerships); KAN. STAT. ANN. § 41–1101 (1995) (liquor franchises); MO. REV. STAT. § 407.413 (1994) (wholesale liquor franchises); NEV. REV. STAT. § 597.160 (1995) (wholesale liquor franchises); TENN. CODE ANN. § 47–25–605 (1996) (petroleum/gasoline dealerships); VA. CODE ANN. § 4.1–514 (Michie 1996) (beer franchises).

64. *See, e.g.*, *Robert A. Makin, Inc.*, 653 F. Supp. at 403 (discussed *supra* note 63); Burke v. Superior Ct. of Sacramento County, 128 Cal. App. 3d 661 (1982) (discussed *supra* notes 54–58 and accompanying text); *Corp*, 860 P.2d at 1021 (discussed *supra* note 63).

65. *See, e.g.*, Federal Fair Franchise Practice Act, H.R. 1717, 104th Cong., 1st Sess. (May 25, 1995) (proposal), at § 4(a)(3) (provision barring racial or other discrimination in the sale, site selection, or operations of a franchise). None have been enacted.

66. Byron E. Fox & Peter I. Hoppenfeld, *A Review of NASAA's Model Franchise Investment Act*, FRANCHISE L.J., Fall 1989, at 7, 10 (discussing the Model Act's section 19, which bars franchisor discrimination between franchisees except for "reasonable

statutes prohibit discrimination in public and private employment,[67] but—despite the many congressional acts banning racial and sexual discrimination in employment,[68] housing,[69] and voting[70]—none expressly proscribes discrimination in business transactions between two commercial entities. While, on its face, Title VII appears limited to employment matters,[71] section 1981[72] claims can be brought in the nonemployment context, including franchising. Still, very few cases have been reported involving allegedly discriminatory acts by and against business partners, franchise parties, or others involved in an independent contractual relationship.[73] One commentator has concluded that victims of private racial discrimination in the business, nonemployment context have no realistic opportunity of successfully suing in federal court.[74]

III. RACIAL DISCRIMINATION: SECTION 1981 CLAIMS

A. Minority Applicants or Franchisees

For many minorities, owning a franchise is viewed as the best means to enter, and remain a player in, the business world—a feat often difficult for any would-be entrepreneur. A franchise provides the franchisee with the opportunity to see his or her work turn into very real profits. However, many minorities have discovered that the road to riches is blocked. Some minorities have contended that

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discrimination" based on the grant of franchises at different times, on the efforts to cure franchise deficiencies or defaults, or on the adoption of affirmative action programs).

67. *See, e.g.*, Title VII of the Civil Rights Act of 1964, Pub. L. No. 88–352, §§ 701–716, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. § 2000e (1994)). The law provides that an employer may not "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment" or "to limit, segregate, or classify his employees or applicants for employment in any way which would 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." 42 U.S.C. § 2000e–2(a) (1994).

68. 42 U.S.C. § 2000e–2(a).

69. *See, e.g.*, Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90–284, § 804, 82 Stat. 73, 83 (commonly known as the Fair Housing Act) (codified as amended at 42 U.S.C. § 3605 (1994)).

70. Voting Rights Act of 1965, Pub. L. No. 89–110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973gg–10 (1994)).

71. *See, e.g.*, Title VII of the Civil Rights Act of 1964 §§ 701–716, 78 Stat. at 253–66; *see also supra* note 67 (providing some of the act's language).

72. 42 U.S.C. § 1981 (1994).

73. *See* Robert E. Suggs, *Racial Discrimination in Business Transactions*, 42 HASTINGS L.J. 1257, 1285 (1991).

74. *Id.* at 1287. Professor Suggs opines, "At best, a private sector section 1981 challenge amounts to an academic exercise. Given the difficulties presented by such a suit, only a foolhardy [minority business enterprise] would incur the wrath of potential customers by filing such a suit. As a practical matter these actions cannot succeed." *Id.*

many barriers to their advancement were erected by the very businesses they had counted on to help them: the franchisors.

Many franchisees only discover after the franchise contract is signed that franchisors usually keep close control over the operations at each franchise.[75] Periodic quality and service inspections by the franchisor may become akin to final exams that the franchisee continually must pass in order to remain a franchisee. Moreover, special problems, or at least a magnified level of difficulty, may arise in the context of minorities and franchising. For instance, minority franchisees frequently have smaller cash reserves and encounter special difficulties if their stores are located in poorer, inner-city neighborhoods.[76]

Few states, though, expressly prohibit discrimination against franchisees, or prospective franchisees, on the basis of race.[77] At the federal level, section 1 of the Civil Rights Act of 1866 ("section 1981" of title 42 of the United States Code)[78] reads as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.[79]

Unlike Title VII of the Civil Rights Act of 1964,[80] and unlike most other discrimination statutes, section 1981 covers *all* contracts, not simply employment contracts. Commentators note that section 1981 long "has been employed to redress *racial* discrimination relating to contracts in numerous contexts other than employment."[81] These other areas have included, inter alia, education,[82] medical

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75. *See* Emerson, *supra* note 32, at 967–68, 972 (finding that surveyed franchise agreements evince extensive franchisor control over site selection, business layout, franchisee training, operations manuals, product quality control standards, advertising, employees hired by the franchisee, and inspections and auditing of the franchisee's business).

76. *See infra* notes 262–64 and accompanying text.

77. One of the few states explicitly to prohibit franchisor discrimination against minority franchisees has been California. *See* Charles Bernstein, *The 80's: Rapid Growth, Saturation; The 90's: Opportunities, Challenges; Restaurant Industry*, NATION'S RESTAURANT NEWS, Dec. 18, 1989, at 7.

78. 42 U.S.C. § 1981 (1994).

79. *Id.* § 1981(a).

80. *Id.* §§ 2000e to 2000e–17 (1994).

81. Brief for the State of New York, as Amici Curiae in Support of Petitioner, at 17, Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (No. 87–107) (emphasis added) (filed by the attorneys general of 47 states and four territories).

In *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987), the Supreme Court unanimously concluded that while section 1981 does not reach religious or national origin discrimination, it broadly covers all *racial* discrimination, which includes "intentional

treatment,[83] insurance coverage,[84] housing,[85] utility services,[86] access to roads,[87] dealings with mortuaries[88] or beauty salons,[89] commercial ventures,[90] banking

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discrimination solely because of [a plaintiff's] ancestry or ethnic characteristics." *Al-Khazraji*, 481 U.S. at 613 (emphasis added). In *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617 (1987), the Supreme Court unanimously applied that same reasoning to claims against private or public racial discrimination in violation of section 1982, which guarantees to all citizens "the same right...as is enjoyed by white citizens...to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982 (1994).

82. *See* Runyon v. McCrary, 427 U.S. 160 (1976) (holding that section 1981 prohibits private, nonsectarian schools from depriving admission to qualified prospective students because they are African American); Riley v. Adirondack Sch. for Girls, 541 F.2d 1124, 1126 (5th Cir. 1976); Phelps v. Washburn Univ. of Topeka, 632 F. Supp. 455, 459 (D. Kan. 1986); Grier v. Specialized Skills, Inc., 326 F. Supp. 856, 860 (W.D.N.C. 1971) (finding that covered conduct includes discrimination in admissions to barber school). *But see* Albert v. Carovano, 851 F.2d 561 (2d Cir. 1988) (finding suspended students failed to state a section 1981 cause of action).

83. *See* Hall v. Bio–Medical Application, Inc., 671 F.2d 300 (8th Cir. 1982) (medical facility's allegedly racially discriminatory refusal to treat an African-American patient; holding, though, that the plaintiff did not sustain his section 1981 claim); Taylor v. Flint Osteopathic Hosp., 561 F. Supp. 1152 (E.D. Mich. 1983); Alma L. Saravia & Leah C. Healey, *Health Care and Correctional Institutions*, N.J. LAW., Feb. 1987, at 59.

84. *See* Sims v. Order of United Commercial Travelers of Am., 343 F. Supp. 112 (D. Mass. 1972) (alleging discrimination by the defendants when rejecting applications for insurance). *But see* Mackey v. Nationwide Ins. Cos., 724 F.2d 419 (4th Cir. 1984) (holding that an insurance agent lacked standing to attack the defendant's alleged redlining practice because he did not claim to be a direct victim of the discrimination).

85. *See* Marable v. H. Walker & Assocs., 644 F.2d 390 (5th Cir. 1981); Quinones v. Nescie, 110 F.R.D. 346 (E.D.N.Y. 1986); Jiminez v. Southridge Co–op, Section I, Inc., 626 F. Supp. 732 (E.D.N.Y. 1985); Bendetson v. Payson, 534 F. Supp. 539 (D. Mass. 1982). *But see* Spann v. Colonial Village, Inc., 662 F. Supp. 541, 547 (D.D.C. 1987) (finding that section 1981 is not available to redress racially discriminatory real estate advertising), *rev'd*, 899 F.2d 24 (D.C. Cir. 1990); Saunders v. General Servs. Corp., 659 F. Supp. 1042, 1062–63 (E.D. Va. 1986) (same).

86. *See* Cody v. Union Elec., 518 F.2d 978 (8th Cir. 1975) (involving defendant utility's racially discriminatory policy for the amount of security deposit required to obtain service).

87. *See* Jennings v. Patterson, 488 F.2d 436 (5th Cir. 1974). *But see* Memphis v. Greene, 451 U.S. 100 (1981).

88. *See* Scott v. Eversole Mortuary, 522 F.2d 1110 (9th Cir. 1975) (section 1981 claim by relatives of deceased Native Americans brought against a mortuary for refusing to provide funeral services or sell caskets to them); Terry v. Elmwood Cemetery, 307 F. Supp. 369 (N.D. Ala. 1969) (discrimination concerning burial plots).

89. *See* Perry v. Command Performance, 913 F.2d 99 (3d Cir. 1990) (cause of action brought by an African-American woman who was refused service by the defendant salon's hairdresser).

90. *See* Fraser v. Doubleday & Co., 587 F. Supp. 1284 (S.D.N.Y. 1984); Vietnamese v. Knights of K.K.K., 518 F. Supp. 993 (S.D. Tex. 1981); Howard Sec. Serv. v. Johns Hopkins Hosp., 516 F. Supp. 508, 513 (D. Md. 1981).

transactions,[91] and use of restaurants, clubs, and recreational facilities.[92] This breadth of subject matter means that section 1981 suits "are now commonplace; their sheer numbers reflect the centrality of the statute to our legal fabric."[93] In line with this growth, "courts have developed a body of law interpreting § 1981 that enables individuals to obtain remedies not available under Title VII [of the Civil Rights Act of 1964, at 42 U.S.C. § 2000e]."[94] For example, section 1981 can reach franchise selection claims, an important development because parties that are not already franchisees may lack standing to sue using other theories, such as Title VII, other federal or state employment laws, state franchise statutes, or the common law.

Section 1981 prohibits certain forms of *private* discrimination, not simply state action.[95] Also, the Civil Rights Act of 1991[96] ensures that the "to make and

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91. *See* Hall v. Pennsylvania State Police, 570 F.2d 86, 92 (3d Cir. 1978) (bank's policy to offer services on different terms depending on race).

92. *See* Tillman v. Wheaton–Haven Recreation Ass'n, Inc., 410 U.S. 431 (1973) (finding that section 1981 prohibited a community recreation facility from denying membership based on race); Wyatt v. Security Inn Food & Beverage, Inc., 819 F.2d 69 (4th Cir. 1987) (affirming jury award of $15,001 for a plaintiff deprived access to a lounge; the defendant hotel bar discriminatorily applied its policy of ejecting persons who do not order drinks); Wright v. Salisbury Club, Ltd., 632 F.2d 309 (4th Cir. 1980) (club membership denied); Olzman v. Lake Hills Swim Club, Inc., 495 F.2d 1333 (2d Cir. 1974) (access to recreation facilities denied); Scott v. Young, 421 F.2d 143 (4th Cir. 1970) (recreation facilities access denied); Bermudez Zenon v. Restaurant Compostela, Inc., 790 F. Supp. 41, 44 (D.P.R. 1992) (restaurant access denied); Durham v. Red Lake Fishing & Hunting Club, 666 F. Supp. 954 (W.D. Tex. 1987) (recreation facilities access denied); Hernandez v. Erlenbush, 368 F. Supp. 752 (D. Or. 1973) (restaurant access denied). *But see* Hudson v. Charlotte Country Club, 535 F. Supp. 313 (W.D. N.C. 1982) (finding no section 1981 relief available because the defendant was a private club, and the court had previously found bona fide private clubs to be exempt from the provisions of Title VII, which supersedes an employment discrimination suit under section 1981).

93. Brief for the State of New York, as Amici Curiae in Support of Petitioner, at 16, Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (No. 87–107). Studies have shown section 1981 to be one of the most commonly invoked civil rights laws. Theodore Eisenberg & Stewart Schwab, Comment, *The Importance of Section 1981*, 73 CORNELL L. REV. 596, 599–601 (1988) (reporting on a study that found section 1981 to be the third most frequently relied on civil rights statute, after section 1983 and Title VII; only a small percentage, less than five percent, involved matters that might concern contracts other than for employment).

94. Brief for the State of New York at 16, *Patterson* (No. 87–107).

95. Runyon v. McCrary, 427 U.S. 160, 169–72 (1976). Likewise, 42 U.S.C. § 1982 (1994) reaches private, discriminatory interference with property rights. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 422–37 (1968). Section 1983 claims, 42 U.S.C. § 1983 (1994), may be brought by a franchisee or class of franchisees, but to succeed these claims require some overt and significant state participation in the action that allegedly deprived the plaintiff(s) of a right secured by the U.S. Constitution or federal laws. Hoai v. Vo, 935 F.2d 308, 312 (D.C. Cir. 1991).

enforce contracts"[97] language of section 1981 is broadly interpreted to include "making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[98] Still, although section 1981 now covers all aspects of private contracts except those contracts involving government employees,[99] employment contracts remain the predominant source of section 1981 litigation.[100]

The franchise relationship, as a contractual relationship between private individuals or organizations, does implicate section 1981. Cases involving the discriminatory termination of a franchise or the franchisor's breach of a franchise agreement, as well as cases of discrimination during the formative stages of a potential franchise agreement,[101] can all potentially be brought under section 1981.

In his concurrence in *Runyon*, Justice Powell concluded that section 1981 reaches private ("no state action") matters involving a commercial relationship, such as advertising or otherwise extending an open offer of one's services to the public. *See Runyon*, 427 U.S. at 186, 188–89 (Powell, J., concurring). While admitting that no "'bright line' can be drawn that easily separates the type of contract offer within the reach of [section] 1981 from the type without," *id.* at 188 (Powell, J., concurring), Powell opined that only those entering into a relationship not offered generally or widely, or that is "a personal relationship," fall outside of section 1981. *Id.* at 189 (Powell, J., concurring); *see* Peter Brandon Bayer, *Rationality—And the Irrational Underinclusiveness of the Civil Rights Laws*, 45 WASH. & LEE L. REV. 1, 71 n.225 (1988) (opining that the advertising element in *Runyon* was not dispositive; stating that the school's actions fell under section 1981 unless the school was, in fact, a "private club" or protected under a "right of privacy" exception; concluding that the significance of advertising is that such activity indicates the defendant was not a private club).

The Court, in *Patterson v. McLean Credit Union*, 491 U.S. 164, 171–72 (1989), reaffirmed the *Runyon* interpretation.

96. Pub. L. No. 102–166, 105 Stat. 1071.

97. 42 U.S.C. § 1981(a) (1994).

98. *Id.* § 1981(b) (1994) (enacted by the Civil Rights Act of 1991, Pub. L. No. 102–166, § 101(2), 105 Stat. 1071, 1072). This provision directly overturns the Supreme Court's holding in *Patterson*, 491 U.S. at 175–85, which had limited section 1981 to the formation and enforcement of contracts and thereby excluded from coverage any postformation conduct. *See* Rodriguez v. General Motors Corp., 27 F.3d 396, 397 (9th Cir. 1994) (stating that the 1991 Civil Rights Act's section 101, codified at 42 U.S.C. § 1981(b), "explicitly rejected *Patterson's* restrictive reading of § 1981"); Blanding v. Pennsylvania State Police, 12 F.3d 1303, 1310 (3d Cir. 1994) (same).

99. Brown v. General Servs. Admin., 425 U.S. 820, 825 (1976) (declaring that Title VII covers federal employees).

100. Anthony R. Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Courtroom*, 28 CONN. L. REV. 1, 36 & n.227 (1995) (stating that approximately 77% of all section 1981 claims involve employment contracts (citing Eisenberg & Schwab, *supra* note 93, at 601)); *see also* Alexis Panagakos, *Section 1981 and Private Discrimination: An Historical Judicial Trend*, 40 GEO. WASH. L. REV. 1024, 1043 (1972) (stating that section 1981 remains an untapped reservoir in civil rights litigation for the enforcement of private contractual rights in nonemployment settings).

101. In other words, a franchisor's discrimination against a prospective franchisee.

While it may remain unclear precisely what falls within "the formation stage of contracting," very little activity has to take place before that stage has been reached.[102] Section 1981's protection of the individual's right to "make and enforce contracts" covers conduct in the initial stages of contract formation, including the very opportunity to enter into a contract.[103] For example, if a franchisor does not even send an application to a prospective franchisee because of that potential franchisee's racial minority status, has this discrimination taken place during the "formation" stage, or is it too soon to fall under section 1981? The plaintiffs would have to demonstrate that they actually intended to enter into a contract.[104] Therefore, "testers" hired simply to find possible discrimination, but who would not have actually followed through on renting an apartment, buying a house, taking a job, or obtaining a franchise, may succeed in bringing other types of discrimination claims, in other fields, but not a section 1981 claim.

According to Professor Robert E. Suggs, section 1981 provides the broadest potential basis to redress claims of business discrimination.[105] However, Suggs notes that although this provision has been interpreted broadly as reaching the making and enforcement of private contracts without requiring state action, it also has been interpreted narrowly as remedying only purposeful discrimination.[106] Thus, the burden on a prospective franchisee plaintiff is very high, requiring proof of intentional discrimination.[107]

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102. In *Runyon*, a private nonsectarian school was found to have violated section 1981 by excluding African-American applicants who responded to the school's advertisement. Private commercial goods or services must not be advertised or otherwise presented for consideration by members of the general public, if they are not offered on an equal basis to whites or nonwhites because of their race. Runyon v. McCrary, 427 U.S. 160, 172–73 (1976).

103. Loren Page Ambinder, Note, *Dispelling the Myth of Rationality: Racial Discrimination in Taxicab Service and the Efficacy of Litigation Under 42 U.S.C. § 1981*, 64 GEO. WASH. L. REV. 342, 351 (citing *Patterson*, 491 U.S. at 176–77); *see also supra* note 98 (noting that the 1991 amendment of section 1981, Civil Rights Act of 1991, Pub. L. No. 102–166, § 101(2), 105 Stat. 1071, 1072, overruled *Patterson* in part).

104. Fair Employment Council, Inc. v. BMC Mktg. Corp., 28 F.3d 1268, 1270–72 (D.C. Cir. 1994) (finding that because testers applying for employment lacked the intent to enter into employment contracts, they lacked standing under section 1981).

105. Suggs, *supra* note 73, at 1276.

106. *Id.*; *see* General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 390–91 (1982) (concluding that, unlike Title VII employment discrimination cases, section 1981 cases cannot simply invoke a disparate impact, or disparate effect, standard of proof).

107. The court in *T & S Service Associates, Inc. v. Crenson*, 666 F.2d 722 (1st Cir. 1981), outlined the burden on a minority-owned business alleging that it was denied a contract on the basis of race. Its prima facie case must include evidence that (1) it is, in fact, a minority-owned firm; (2) its bid met specifications required of all those competing for the contract; (3) its bid was significantly more advantageous to the contracting authority than the bid actually awarded, whether in terms of price or some other relevant factor; and (4) the contracting authority selected another contractor. *Id.* at 725. Once the minority-owned business makes out its prima facie case, the contracting authority carries the burden of

Proof of disparate impact (as allowed under Title VII) is not enough for a section 1981 action. Unlike Title VII, section 1981 does not prohibit decisions made on facially neutral grounds even if such decisions would adversely affect minority franchisees. In other words, a franchisor does not violate section 1981 by refusing a prospective minority franchisee's application because the prospective franchisee is small, inexperienced, or undercapitalized, even though these characteristics are the continuing effects of prior discrimination and even though rejecting such minority prospective franchisees will have a disparate impact on minority franchising in general.[108] According to Professor Suggs, even if a franchisor deliberately adopts policies or procedures because they have a disparate impact on minority franchisees, but leaves no record of its true purpose, no violation of section 1981 could be shown.[109]

A franchisor could, therefore, choose its franchisees for noneconomic reasons such as friendship, social, political, or ethnic ties, or family connections. Prohibiting these bases of choice in the private sector would raise problems regarding freedom of association under the Constitution's First Amendment, or of due process infringement under the Fifth and Fourteenth Amendments.[110] Just as "the courts have traditionally respected the rights of partners to freely choose their co-owners and have been reluctant to get involved in forcing partnerships to

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articulating a legitimate, nondiscriminatory reason for rejecting the minority business' bid. *Id.* at 725–26. This burden is one of production, not persuasion. *Id.* If the defendant satisfies the burden of production, the minority business must demonstrate by a preponderance of the evidence that the defendant's asserted reason is a pretext, either because the defendant's actions more likely were prompted by discriminatory motives than by its asserted, nondiscriminatory reason, or because the defendant's asserted criterion actually was applied in a discriminatory fashion or otherwise insufficiently explains the defendant's decision. *Id.* at 727.

108. In *Meyers v. Ford Motor Co.*, 659 F.2d 91 (8th Cir. 1981), the court rejected a white automobile dealer's claim of racial discrimination premised upon Ford's providing more favorable terms to a black dealer who ended his franchise than to the white dealer, who also had terminated his franchise. Ford's payment of $20,000 to the black dealer, rather than just the one dollar paid to the white dealer, was "rational economic behavior," and the two dealers were not similarly situated. *Id.* at 94.

109. Suggs, *supra* note 73, at 1277.

110. *See, e.g.*, McAlpine v. AAMCO Automatic Transmissions, Inc., 461 F. Supp. 1232, 1273 (E.D. Mich. 1978) (noting that franchisees have a First Amendment freedom to associate); Kania v. Airborne Freight Corp., 300 N.W.2d 63, 76 (Wis. 1981) (citing the Fifth and Fourteenth Amendments and stating that dealers' and other businesses' "right of free contract is a property right protected by both state and federal constitutions and should not be lightly impaired"). *But see* British Motor Car Distrib., Ltd. v. New Motor Vehicle Bd., 194 Cal. App. 81, 90 (1987) (rejecting the franchisor's assertion, made without any citation of authority, that the state must sustain the franchisor's "fundamental" right, based on freedom of contract and freedom of association, to choose its business affiliations; upholding the state's right to deny, for lack of good cause, a franchisor's attempted termination of an automobile dealer); Emerson, *supra* note 3, at 1517–20 (discussing the dicta in *McAlpine* on franchisees' freedom to associate and noting that other courts have not yet adopted this language).

unwillingly accept a new partner,"[111] so courts may be reluctant to force franchisees upon franchisors. However, just as in *Price Waterhouse v. Hopkins*,[112] in which—as commentators noted—the Supreme Court "served notice it will not be deterred by the complexity of sorting out motives and assigning burden of proof in high-level promotion decisions,"[113] courts should not shirk such tasks involving a franchise relationship.

For now, much opinion on franchising and section 1981 is mere supposition. No case has articulated clearly the requirements under section 1981 for a prima facie showing of private business discrimination. Virtually no decisions have even been reported involving litigation in this area. Of the few cases reported, the following five are most relevant to this analysis.

In *Randle v. Lasalle Telecommunications, Inc.*,[114] a minority business enterprise ("MBE") claimed a violation of section 1981, but the claim was dismissed because the plaintiff failed to establish either direct evidence of discrimination or evidence indicating that the explanation the defendant offered for its actions' being nondiscriminatory was pretextual.

In *Chowdhury v. Marathon Oil Co.*,[115] a Bengali American who applied to operate a gasoline station sued the franchisor, Marathon Oil Company, after it converted the site to a franchisor-owned store. The court held that the franchisor had a nonpretextual reason for denying the franchise application, as it had made a business decision—based on a study—to increase revenue from the site by operating a company store.[116] The franchisor's decision to replace the outgoing franchisee not with the plaintiff but with a company store earned the court's approval, to a substantial degree, because, after the franchisor took over the location, monthly gasoline sales increased by 125,000 gallons.[117]

In *Baskin–Robbins Ice Cream Co. v. D & L Ice Cream Co.*,[118] a franchisor sued to terminate a license because of trademark infringement and unfair competition, and the franchisee counterclaimed under section 1981 alleging that termination was sought because the franchisee was black. The court found that the franchisee failed to show that the license had been terminated for discriminatory reasons. The franchisee had consistently failed to pay rent or invoices for ice cream, had failed to abide by the franchise agreement, and had

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111. Gerald A. Madek & Christine Neylon O'Brien, *Women Denied Partnerships: From* Hishon *to* Price Waterhouse v. Hopkins, 7 HOFSTRA LAB. L.J. 257, 262 (1990) (citing Note, *Tenure and Partnership as Title VII Remedies*, 94 HARV. L. REV. 457, 460–61 & n.24 (1980)).

112. 490 U.S. 228 (1989).

113. Madek & O'Brien, *supra* note 111, at 301.

114. 697 F. Supp. 1474 (N.D. Ill. 1988), *aff'd*, 876 F.2d 563 (7th Cir. 1989).

115. 949 F. Supp. 1353 (N.D. Ill. 1997).

116 *Id.* at 1357.

117. *See id.*

118. 576 F. Supp. 1055 (E.D.N.Y. 1983).

sold another brand of ice cream in the trademarked containers, thereby providing ample nondiscriminatory reasons for termination.[119]

In *Quarles v. General Motors Corp.*,[120] the Second Circuit upheld a summary judgment for the franchisor. It noted that the plaintiff had been implicated in a kickback scheme that defrauded the franchisor, had failed to submit promised reports concerning these allegations, and had failed to attend a deposition in a lawsuit to recover the money that allegedly had been improperly paid.[121] The court held that these facts justified the defendant's actions in terminating the plaintiff.[122] Finally, the court noted that the plaintiff was terminated along with his white partner.[123] Therefore, although the court did not grant the defendant's request for Rule 11 sanctions, the court implicitly agreed with defense counsel that the plaintiff's allegations of discriminatory intent bordered on frivolous.[124]

In *Harper v. BP Exploration & Oil Co.*,[125] the petroleum franchisor, BP, refused to relocate a minority dealer in Nashville, Tennessee, whose lease BP did not intend to renew. Instead, the franchisor allegedly placed a less qualified, nonminority dealer in the proposed location.[126] The court held that such conduct—the failure to select the minority dealer under the franchisor's relocation program—constituted racial discrimination in violation of both federal civil rights laws and the Tennessee Human Rights Act.[127] The franchisor's defense, that the plaintiff had not been a "quality dealer" entitled to relocation under the franchisor's internal policies, was found to be pretextual given the plaintiff's faithful compliance with his franchise contract commitments over a thirteen-year

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119. *Id.* at 1058–61. Even if the franchisee had been wrongfully terminated, it had no right to continue using the franchisor's trademarks without permission. *See* Burger King Corp. v. Agad, 911 F. Supp. 1499 (S.D. Fla. 1995) (entering a permanent injunction against use of the franchisor's trademarks by a former franchisee who claimed that the franchisor had wrongfully terminated the franchise); *see also* S & R Corp. v. Jiffy Lube Int'l, Inc., 968 F.2d 371, 377–78 (3d Cir. 1992); Cal City Optical, Inc. v. Pearle Vision, Inc., No. 93–C–7577, 1994 WL 114859 (N.D. Ill. March 29, 1994); Romacorp., Inc. v. TR Acquisition Corp., No. 93 Civ. 5394, 1993 WL 497969, at *13 (S.D.N.Y. Dec. 1, 1993), *aff'd*, 29 F.3d 620 (2d Cir. 1994); Burger King Corp. v. Majeed, 805 F. Supp. 994, 1003 (S.D. Fla. 1992); Little Caesar Enters. v. R–J–L Foods, Inc., 796 F. Supp. 1026, 1033–34 (E.D. Mich. 1992); Burger King Corp. v. Hall, 770 F. Supp. 633, 638–39 (S.D. Fla. 1991).

120. 758 F.2d 839 (2d Cir. 1985).

121. *Id.* at 840.

122. *Id.*

123. *Id.*

124. *See id.*

125. 896 F. Supp. 743 (M.D. Tenn. 1995), *aff'd*, 134 F.3d 371 (6th Cir. 1998).

126. *Id.* at 750.

127. *Id.* at 747. The court held, though, that certain other theories advanced by the plaintiff, such as breach of contract, did not arise because BP's decision against renewal of Harper's lease could be construed as a strictly financial decision—a nondiscriminatory choice intended to divest BP of certain low-volume stores. *Id.* at 748.

relationship.[128] The court found no pattern and practice of racial discrimination simply because of BP's current racial composition, exclusion of black dealers from white neighborhoods, or lack of a minority recruitment policy.[129] While statistics were inadequate evidence, the court found direct evidence of discrimination: that BP had passed over the plaintiff in favor of a white dealer, John Kendrick, even though BP's own performance evaluations consistently ranked the plaintiff higher than Kendrick.[130]

B. White Applicants or Franchisees

What if a white prospective franchisee sued a franchisor which, acting in accordance with its affirmative action program or set-asides, rejected that white person's application in favor of a minority franchisee? Given that *City of Richmond v. J.A. Croson Co.*[131] and *Adarand Constructors, Inc. v. Pena*[132] do not apply because the franchisor is a private entity, could the white prospective franchisee nevertheless succeed with a section 1981 claim?[133] Would the courts treat a franchisor's existing, established affirmative action policy or set-aside program as evidence of "intentional discrimination" sufficient to carry a section 1981 action? Would affirmative action (and its goals and objectives) qualify as a legitimate noneconomic reason for choosing a minority franchisee over a white franchisee?

Minorities and franchisors arguing in support of such private programs must be concerned about a potential spillover effect from the set-aside cases decided after *Croson*. Judges frequently have stricken municipalities' set-asides for their failure to meet strict-scrutiny standards requiring strong, statistical evidence of specific, past discrimination. For example, in August 1996, U.S. District Court Judge James L. Graham comprehensively reviewed six so-called disparity studies for Columbus, Ohio, and rejected each one as insufficient evidence to justify a city program awarding government construction contracts on the basis of gender or race.[134]

Because statutory law so often appears unpromising for franchisees claiming franchisor discrimination, plaintiffs may even turn to constitutional

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128. *Id.* at 750–51.

129. *Id.* at 751.

130. *Id.* at 750. Ultimately, BP was ordered to pay Harper, its only African-American dealer in Tennessee, $630,287. Catherine Trevison, *Racial Discrimination to Cost BP $630,287*, TENNESSEAN–NASHVILLE, May 16, 1996, at B1.

131. 488 U.S. 469 (1989).

132. 515 U.S. 200 (1995).

133. For example, discrimination on the basis of race during the formation stage of a contract.

134. *See* Stephanie N. Mehta, *A Ruling in Ohio Could Invalidate Minority-contracting Plans in Other Cities*, WALL ST. J., Sept. 3, 1996, at B2; *see also* Paul M. Barrett, *Courts Attack Studies Used for Set-asides*, WALL ST. J., Sept. 26, 1996, at B1 (discussing Judge Graham's ruling and similar rulings in Philadelphia and Miami).

arguments, albeit ones that, at least presently, seem far-fetched. For example, suppose a private business' discrimination against consumers, franchisees, or others could be considered unconstitutional by a broad reading of the commerce clause,[135] which grants Congress the power to regulate interstate commerce: If a business could be said to affect interstate commerce,[136] then that business' discriminatory practices that negatively affect interstate commerce must be suspended. Could this interpretation apply to franchise relationships? Perhaps it could, but the franchisee would bear the burden of proving that the discrimination was a practice of the franchisor, and if the franchisor has some minority franchisees, then an individual case may fail because the franchisor's rejection of an individual minority franchisee cannot, by itself, reflect a "policy" implementation that affects interstate commerce.[137] Without a congressional statute specifically on point,[138] and without any public policy or governmental action at issue, the reach of the commerce clause appears far too uncertain—indeed, unlikely.

IV. FRANCHISEE SELECTION

A. Suspicious Overall Statistics, but Little Proof for Particular Complaints

Although a terminated franchisee may be able to fight its termination on the grounds that the franchisor failed to use "good cause," would-be franchisees are in a different, usually worse, posture: they never obtained a franchise in the first place and, consequently, may not be able to assert a broad "good cause" challenge.[139] The relatively few state statutes that bar discrimination by franchisors

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135. U.S. CONST. art. I, § 8, cl. 3.

136. The supposition depends on how broadly the Commerce Clause is read. Under a broad interpretation, almost all businesses, no matter how small, must affect interstate commerce.

137. The Supreme Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995), indicates that what constitutes interstate commerce may no longer be interpreted as broadly as it had since the late 1930s.

138. Congress could enact a franchising statute barring discrimination and mandating certain franchisor activities, something perhaps similar to the numerous employment statutes. *See, e.g.*, 42 U.S.C. § 2000e (1994).

There have been many proposed federal statutes on franchising generally, but none have been enacted. *See supra* note 16.

139. The "good cause" legislative protections for franchisees extend to the termination or nonrenewal of existing franchises; most do not, at least on their face, apply to franchise applicants. *See generally supra* notes 18–20, 25–33, 46–48 and accompanying text. However, there are exceptions: states that prohibit the offer or sale of a franchise to one prospective franchisee on terms different from those extended to another include Hawaii, Illinois, Indiana, Minnesota, and Washington. AXELRAD & RUDNICK, *supra* note 2, at 144.

apply only to existing franchisees, not prospective franchisees.[140] Potential franchisees can, however, allege discrimination as a more general concept.[141] The goal of such a claim is not necessarily a successful lawsuit, but a convincing public relations gambit.

For many franchisors, minority ownership of franchises has long proven a delicate, often embarrassing topic. Claims of discriminatory practices in franchise selection procedures have become commonplace. In a basic sense, the problem is amply demonstrated in simple numbers and percentages. There is a dearth of minority franchisees in many franchise systems, and this underrepresentation is spread across perhaps every industry in which franchising plays a prominent role. For example, the black owner of a Colorado realty office sued Re/Max, the nationwide real estate franchisor, and alleged that it practiced racial discrimination when it turned him down for a franchise.[142] The federal lawsuit focused attention on Re/Max's failure to have even one African American among its 159 franchise owners in five Rocky Mountain states, with only three minority owners[143] among the 130 Re/Max franchisees in Colorado.[144] In what is believed to be the first case filed by a would-be franchisee under the Federal Fair Housing Act,[145] the jury ruled in the plaintiff's favor and awarded him, besides attorneys' fees and costs, over $100,000 for economic damages and emotional distress.[146]

For franchising generally, there are no figures. The FTC does not track minority ownership of franchisees,[147] nor does it require affirmative action programs for franchises.[148] Such programs effectively would require franchisors to maintain extensive records, including statistics on minority franchisees and minority franchise applicants. Instead, public interest groups, civil rights

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140. W. MICHAEL GARNER, FRANCHISE DISTRIBUTION LAW AND PRACTICE § 10:43 (1996) (noting that the state franchise statutes "do not directly prohibit discrimination in the granting or sale of franchises").

141. Although not a specific element of "good cause," the absence of unequal treatment may be considered part of an implied covenant of good faith and fair dealing. *See generally* Emerson, *supra* note 32, at 940–41 (noting that it is the franchisor who contends uniform treatment of the franchisees "is essential" and is sought by the franchisee because that "improves the marketing of the trademark, the business concepts, and the overall goodwill that the franchisee purchases"). Also, as discussed *supra* notes 78–138 and accompanying text, the franchisee might claim that the franchisor violated 42 U.S.C. § 1981 (1994).

142. Bill McKeown, *Re/Max Accused of Bias: Rejection Was Racist, Black Says*, COLO. SPRINGS GAZETTE TELEGRAPH, Mar. 10, 1997, at A1.

143. The minority owners were two Hispanics and one Native American. *Id.*

144. *Id.* The other largest real estate company, Century 21, has only one black and one Hispanic among its 132 franchisees in the same five states. *Id.*

145. 42 U.S.C. §§ 3601–3631 (1994 & Supp. I 1995).

146. Bill McKeown, *Re/Max Discriminated, Jury Determines: Black Real Estate Agent Denied Franchise*, COLO. SPRINGS GAZETTE TELEGRAPH, Feb. 26, 1998, at A1.

147. McKeown, *supra* note 142, at A1 (citing FTC attorney Steve Toporoff).

148. *Id.*

advocates, franchisees, and others must depend on figures provided in media surveys or obtained by individual inquiries. Meaningful statistics are easiest to develop for large, well-known industries such as fast-food restaurants and automobile dealerships. These two industries are, therefore, profiled in the following tables and discussion.

Data on the leading fast-food franchises and automobile dealerships indicate that few, if any, of the largest franchisors have minority franchisee participation even approaching the percentage of minorities in the population as a whole.[149] This conclusion is especially disconcerting because these large, well-publicized franchisors probably face more pressure, both external and internal, to recruit and retain minority franchisees than do smaller, less notable, franchisors.

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149. Women also are underrepresented as franchisees. *See* John O'Dell, *Dealership Diversity*, L.A. TIMES, June 16, 1996, at D1 (tables showing that women owned a very low number of car dealerships—only about two percent for many manufacturers); Vicki Torres, *Diversity Not Top Priority for Small Firms*, L.A. TIMES, Sept. 12, 1995, at A12 (reporting on a 1993 survey of 371 franchisors conducted by the franchisee advocacy group, Women in Franchising; according to the study, Asian Americans owned 5.4% of these franchises, African Americans 2.6%, Latinos 2.2%, and Native Americans 0.1%, while solely woman-owned franchises constituted only 9.7% of the total). *But see* Ronald Alsop, *Business Bulletin: A Special Background Report on Trends in Industry and Finance*, WALL ST. J., Jan. 22, 1998, at A1 (reporting the estimates of the National Foundation for Women Business Owners, which stated that the number of businesses owned by minority women is growing three times as fast as the overall rate of business growth, with, from 1987 to 1996, the number of firms rising 206% for Hispanic women, 138% for Asian-American, Native-American, and Alaskan-Native women, and 135% for African-American women). The Women in Franchising ranking of female-owned franchises for 1987 and 1995 found that females' share of franchises increased for ten categories of industries (beauty, pastry/ice cream/yogurt, maintenance/cleaning, printing/mailing, computer/video retail, miscellaneous nonfood retail, miscellaneous restaurants, hamburgers, automotives, and construction/remodeling) and decreased for six categories of industries (diet/exercise/health, recreation/entertainment/sports, education/personal development, employment/personnel, miscellaneous services, and clothing/shoes retail). Overall, in 1995 the female-owned percentages ranged from two percent for auto dealerships and construction/remodeling outlets, to 25% for miscellaneous nonfood retail stores. Women in Franchising, Inc., 1987 Industry Ranking of Female Owned Franchises (Chicago, Ill.) (a copy of the unpublished survey's summary is on file with the author); Women in Franchising, Inc., 1995 Industry Ranking of Female Owned Franchises (Chicago, Ill.) (a copy of the unpublished survey's summary is on file with the author). A 1997 Women in Franchising poll of 81 franchisors found that 61 of these systems' franchisees were predominantly male-owned, only two were predominantly female-owned, and 18 were not predominantly owned by either sex because of corporate and joint, male-female ownership. Women in Franchising, Inc., Survey of Female Owned Franchises (Chicago, Ill.) (unpublished survey, on file with author).

The inadequate number of female franchisees in many industries is outside the scope of this Article.

TABLE 1: UNITED STATES POPULATION BY RACE
(not including Hispanics as a separate category)[150]

Race	Percent of Population
White	82.8%
Black	12.6%
Asian and Pacific Islander	3.7%
Native American (including Eskimo and Aleut)	0.9%

TABLE 2: MINORITY REPRESENTATION IN THE UNITED STATES
(Hispanics included as a separate category)[151]

Race	Percent of Population
White	73.1%
Black	12.0%
Hispanic	10.7%
Asian and Pacific Islander	3.5%
Native American (including Eskimo and Aleut)	0.7%

150. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 14, 19 (117th ed. 1997) (providing the estimated population as of July 1, 1996). These figures place Hispanics in one of the four racial categories. Table 2, *infra*, does not.

151. U.S. BUREAU OF THE CENSUS, *supra* note 150, at 19 (providing the estimated population as of July 1, 1996).

TABLE 3: PERCENTAGE OF BLACK-OWNED UNITS FOR FOUR LEADING FAST-FOOD FRANCHISES IN THE UNITED STATES[152]

Company	Percentage Black-owned Units (Black-owned/Total Number of Franchises)		
	1987	1992	1997
McDonald's[153]	6.6% (365/5500)	8.2% (658/8000)	8.2% (766/9340)
Burger King[154]	4.0% (161/4000)	3.4% (189/5600)	3.5% (223/6397)
Wendy's[155]	2.4% (59/2450)	2.4% (73/3100)	3.5% (111/3178)
Hardee's[156]	n/a	0.7% (25/3750)	0.7% (17/2417)

152. Milford Prewitt, *Hardee's Renews Minority-franchisee Pledge*, NATION'S RESTAURANT NEWS, Oct. 26, 1992, at 7 [hereinafter Prewitt, *Hardee's Renews*] (providing the 1992 figures); *Franchises Lure Black Owners*, USA TODAY, Oct. 22, 1987, at B1 (providing the 1987 figures); *see also Franchisors Ranked by Black-owned Units*, BLACK ENTERPRISE, Sept. 1995, at 64; Milford Prewitt, *Lack of Cash Deters Minority Franchising*, NATION'S RESTAURANT NEWS, Feb. 6, 1995, at 1.

153. Telephone Interview with Robert Villa, McDonald's Franchising Information Coordinator (April 29, 1997) (providing McDonald's 1997 figures). As for Hispanic franchised units, in the two years from March 1991 to March 1993, the number increased by 11%. *Minority Franchising: Is Discrimination a Factor? Hearing Before the House Comm. on Small Business*, *supra* note 23, at 59 (supplemental testimony of Rep. James M. Talent (R-Mo.)). From 1986 to 1993, the number of McDonald's units held by women and minorities increased 120%, *id.* at 58, far outpacing the growth rate for McDonald's as a whole. Of McDonald's franchisee applicants in training in 1993, 29% were African American and 19% Hispanic, *id.* at 58–59, both figures again far above their representation among the general public.

154. Telephone Interview with Clyde Rucker, Burger King Director of Division, Minority Business Enterprises (Apr. 30, 1997) (providing Burger King's 1997 figures). As of 1989, Burger King's number of black-owned units was 174, which equaled 3.9% of the total 4491 domestic Burger King units. Bradford Wernle, *Black Franchisees Say Inner City Is Tough Turf*, CRAIN'S DETROIT BUS., Aug. 13, 1990, at 1.

155. The 1992 figure for Wendy's franchises owned by African Americans rose to 118 by 1996. *B.E.'s 20 Best Franchises: A Guide to Those Outlets Offering the Best Business Opportunities to Black Franchisee Hopefuls*, BLACK ENTERPRISE, Sept. 1996, at 65 [hereinafter *B.E.'s 20 Best Franchises*]. The 1997 figures were provided by Ron Dury, Wendy's Director of Franchise Sales. Telephone interview with Ron Dury, Wendy's Director of Franchise Sales (Apr. 22, 1997).

156. Hardee's 1997 figures were provided by Rita Arrington, Hardee's Office of Corporate Affairs. Telephone interview with Rita Arrington, Hardee's Office of Corporate Affairs (May 1, 1997).

TABLE 4: PERCENTAGE OF MINORITY-OWNED DOMESTIC AUTOMOBILE DEALERSHIPS BY FRANCHISE[157]

Domestic Company	Percentage Minority-owned Units (Total Number of Dealerships)	
	1992	1997
Chrysler	2.6% (128/4923)	3.3% (150/4612)
Ford	5.4% (280/5144)	6.9% (351/5112)
GM	2.0% (176/8804)	3.3% (275/8307)
Total[158]	**3.1% (584/18,871)**	**4.3% (776/18,031)**

157. For all 1992 figures, see *Racial Discrimination in Awarding Toyota Dealerships: Hearing Before the House Employment and Housing Subcomm. on Government Operations*, 102d Cong. 195 (1992) [hereinafter *Racial Discrimination in Awarding Toyota Dealerships*]. For all 1997 figures, except Lexus, see *Automakers' Minority Dealer Presence*, AUTOMOTIVE NEWS, Feb. 3, 1997, at 132. Dealership figures for 1996, generally fairly similar to the 1997 figures, are provided by O'Dell, *supra* note 149, at D1 (reporting about a survey on behalf of the National Association of Minority Automobile Dealers). *See also* Satoshi Isaka, *Minority-dealer Issue Stuck in First Gear: U.S. Civil-Rights Leader, Carmakers Agree on Importance of Diversity, Disagree on Methods*, NIKKEI WKLY., July 22, 1996, at 8; Valerie Reitman, *Jesse Jackson to Add Honda to Boycott, Citing Lack of Diversity in U.S. Arm*, WALL ST. J., July 18, 1996, at B2. *But see* Cliff Hocker, *Gidron's Ride with GM Comes to an End*, BLACK ENTERPRISE, Feb. 1, 1997, at 30 (stating, without any reference, that approximately only 1.2% of GM's dealerships are owned by African Americans).

Note that Tables 4 and 5 omit a number of companies for whom at least some of the 1992 or 1997 figures were unavailable. Such companies include Infiniti, Isuzu, Jaguar, Kia, Lexus, Porsche, Saab, Saturn, Subaru, Volkswagen, and Volvo. Other sources, however, seem to confirm that the figures in Table 4 and 5 are comparable to those that would be found for all automakers. *See Minority Auto Dealers Call for U.S. Assistance*, L.A. TIMES, June 6, 1992, at D1 (noting that minorities owned 584 of 18,871 domestic dealerships—exactly the same 1992 figures as in Table 4—and that minorities owned only 60 of 9490 foreign auto dealerships, or 0.6%, which is comparable to the figures in Table 5). Historically, importers, particularly of Japanese cars, have been accused of racism far exceeding that allegedly present at GM, Ford, or Chrysler. Keith Bradsher, *Import Outlets Slipping by Some Minority Dealers: Foreign Auto Makers Charged with Making It Tough for Blacks, Asians and Latinos*, L.A. TIMES, Apr. 4, 1988, at D1; Laura Clark, *Importers: Few Have Many Black Dealers Now, and None Try Hard to Develop Them*, AUTOMOTIVE NEWS, Feb. 11, 1991, at 120.

158. As of February 1991, the figures for the "Big Three" domestic dealerships were similar to those existing in 1992. *Dealerships at "Big 3" U.S. Automakers*, BLACK ENTERPRISE, June 1991, at 36 (reporting for Chrysler 151 minority dealerships out of 5197 total dealerships, for Ford 297 minority dealerships out of 5400 total dealerships, and for GM 176 minority dealerships out of 9354 total dealerships—the combined totals, 624 out of 19,951, work out to a 3.1% minority level).

In 1997, the Big Three automobile manufacturers had these figures: of the 8234 GM dealerships in the United States, 107 (1.3%) were black-owned; 250 Ford dealerships (5.0%) were black-owned; and 75 Chrysler dealerships (1.6%) were black-owned. *The Auto*

TABLE 5: PERCENTAGE OF MINORITY-OWNED FOREIGN AUTOMOBILE DEALERSHIPS BY FRANCHISE

Foreign Company	Percentage Minority-owned Units (Minority-owned/Total Number of Dealerships)	
	1992	1997
A. Asian Companies		
Acura	0.7% (2/300)	4.2% (11/265)
Honda	0.1% (1/987)	4.8% (61/1264)
Hyundai	0.2% (1/495)	3.2% (15/475)
Lexus[159]	0.0% (0/147)	0.0% (0/145)
Mazda	0.1% (1/908)	3.8% (34/897)
Mitsubishi[160]	1.0% (5/520)	5.4% (28/514)
Nissan	0.2% (2/1103)	4.1% (45/1100)
Suzuki	0.3% (1/332)	2.3% (7/300)
Toyota	2.3% (27/1193)	3.7% (44/1190)
Total	**0.7% (40/5985)**	**4.0% (245/6150)**
B. European Companies		
BMW	0.3% (1/358)	8.8% (30/342)
Mercedes Benz[161]	0.3% (1/396)	7.2% (25/346)
Total	**0.3% (2/754)**	**8.0% (55/688)**

Game: While General Motors and the Other Two Major Dealers Are Trying to Entice Blacks to Buy Their Products, GM Is Being Accused of Foul Play by Its Black Dealers, TRI-STATE DEFENDER, Oct. 22, 1997, at A1 [hereinafter *The Auto Game*]. Those figures, for both GM and Ford, represent an increase since 1990, when the black-owned percentages of total dealerships were: 0.9% for GM (90 black dealers out of a total of 9595); 4.7% for Ford (258 black dealers out of a total of 5510); and 1.6% for Chrysler (84 black dealers out of a total of 5300). Stephen Franklin, *Minority Car Dealers Face Rockier Road*, CHI. TRIB., Aug. 6, 1990, § 4, at 1.

159. Angelo B. Henderson, *Jesse Jackson, Mitsubishi Motors Unit Reach Accord to End National Boycott*, WALL ST. J., Jan. 15, 1997, at B6 (noting Lexus' confirmation that its sole African-American dealer and its sole Latino dealer both recently sold their franchises, and that Lexus currently has no minority dealers).

160. Similar figures for Mitsubishi Motor Sales of America are available in Larry Bivins, *Minorities to Boycott Mitsubishi*, DETROIT NEWS, Sept. 11, 1996, at B3; *Remarks by Richard D. Recchia, Executive Vice President and Chief Operating Officer, Mitsubishi Motor Sales of America*, PR NEWSWIRE, July 16, 1996, *available in* LEXIS, PRNEWS File [hereinafter *Remarks by Richard D. Recchia*]; Arlena Sawyers, *Mitsubishi Plans to Attract More Minority Dealers*, AUTOMOTIVE NEWS, June 10, 1996, at 4.

161. While the Rev. Jesse Jackson contends that only 21 of 10,500 import dealerships are owned by African Americans, with Mercedes having only one black-owned dealership, a spokeswoman for Mercedes argues that Mercedes has only 330 American dealerships, with 25 of them minority-owned (including an unknown number of black-owned dealerships). Henderson, *supra* note 159, at B6.

TABLE 6: NUMBER OF MINORITY-OWNED AUTOMOBILE DEALERSHIPS[162]

	Minority-owned/Total Number of Dealerships (Percent of Total Dealerships)[163]	
	1992	1997
All Minorities Combined	626/25,610 (2.4%)	1076/24,869 (4.3%)
African-American Dealers	376/25,610 (1.5%)	576/24,869 (2.3%)
Hispanic Dealers[164]	202/25,610 (0.8%)	295/24,689 (1.2%)

Although some of these figures are striking, they tell only the story's ending and not the story itself. A lack of complete, accurate data makes it difficult for businesses, civil rights groups, judges, and others to decide whether there has been a definite practice of minority exclusion in franchise selection.[165] It is

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162. *National Association of Minority Automobile Dealers (NAMAD)*, AUTOMOTIVE NEWS, Apr. 1992 (providing 1992 figures for African-American and Hispanic dealers); *Racial Discrimination in Awarding Toyota Dealerships*, *supra* note 157 (providing 1992 figures for African-American dealers); *Automakers' Minority Dealer Presence*, *supra* note 157 (providing 1997 figures for African-American and Hispanic dealers); Mark Rechtin, *Point Spread: With Rising Spending Power and a Growing Population, Hispanics Argue They're Entitled to More Dealerships*, AUTOMOTIVE NEWS, Feb. 3, 1997, at 7 (for 1997 African-American and Hispanic figures). In 1990, the Hispanic-owned percentage was even lower than for 1992 or 1997. For the Big Three domestic automobile manufacturers, the number of Hispanic-owned dealerships in 1990 was only 128 out of 20,405 total dealerships—only 0.6%. Franklin, *supra* note 158, § 4, at 1.

163. The total number of domestic, Asian, and European dealerships listed in Tables 4 and 5, *supra*, were added to derive the value for "Total Dealerships." Thus, there were 25,610 total dealers in 1992 and 24,869 total dealers in 1997.

164. From 1995 to 1997, the number of total dealerships held by Hispanics increased from about 255 to 301. Rechtin, *supra* note 162, at 7. (That number for 1997 is slightly above the 1997 figure for Table 6 because the table does not include every manufacturer with dealerships in the United States.) GM, in particular, increased its Hispanic dealership count, from 76 to 92 in two years, a 21% increase that is especially striking inasmuch as GM's total number of dealerships declined by 4% during that time period. Rechtin, *supra* note 162, at 7. *See generally* HISPANIC ASS'N ON CORP. RESPONSIBILITY, THE 1995/96 *HACR* STUDY OF HISPANIC-OWNED AUTO DEALERSHIPS IN AMERICA (1996).

165. In the much larger area of employment law, there likewise exists a relative dearth of failure-to-hire proceedings, as opposed to termination lawsuits. Michael J. Yelnosky, *Filling an Enforcement Void: Using Testers to Uncover and Remedy Discrimination in Hiring for Lower-skilled, Entry Level Jobs*, 26 U. MICH. J.L. REFORM 403, 410–15 (1993). In fact, from 1974 to 1985, failure-to-hire charges decreased from 12% of all charges filed with the Equal Employment Opportunity Commission to 3%, while discriminatory firing complaints increased from 23% to 37%. Minna J. Kotkin, *Public*

estimated that African-Americans own only one-fourth as many businesses—3% of the total—as is the black percentage of United States population (12%).[166] Those figures, for all businesses, suggest that the minority ownership and participation record in franchising, though far from meeting societal goals, actually may already be commendable compared to the world of business generally.[167] As the court stated in *Brown v. American Honda Motor Co.*,[168] while dismissing the plaintiff's discrimination complaint despite the fact that only two of the 860 Honda dealerships in the United States were owned by black dealers:

> Statistics such as these...without an analytical foundation, are virtually meaningless.... To say that very few blacks have been selected by Honda does not say a great deal about Honda's practices unless we know how many blacks have applied and failed and compare that to the success rate of equally qualified white applicants.[169]

Given the available information, it is impossible to establish with any certainty whether franchisors specifically discriminate against minorities in franchise selection, or whether other factors cause the less than representative participation of minorities. Thus, it is superficial, even deceptive, to use the overall ratio of minority-owned franchises—those broad generalizations—in order to establish the soundness of either particular or general discrimination claims.[170]

Remedies for Private Wrongs: Rethinking the Title VII Back Pay Remedy, 41 HASTINGS L.J. 1301, 1346–47 (1990). As Yelnosky concludes that Title VII protections for employees predominantly serve to protect "the existing positions of incumbent workers," Yelnosky, *supra*, at 495, so it seems likely that franchise legislation and case law have reflected concerns and fostered actions involving allegations about wrongfully terminated franchises far more than about wrongfully denied franchise applicants.

166. Cynthia Barnes Leslie, *A Night of Success Stories and a Call for Black Unity*, WASH. BUS. J., Feb. 24, 1995, *available in* 1995 WL 8211675 (reporting figures stated by Robert Wallace, author of *Black Wealth Through Black Entrepreneurship*).

167. No one knows precisely the percentage of minority franchisees in the United States. Congressman John J. LaFalce (D-N.Y.), then Chairman of the House Committee on Small Business, noted that from the mid-1980s to 1993, the percentage had gone from less than 2% to below 3%. *Minority Franchising: Is Discrimination a Factor? Hearing Before the House Comm. on Small Business*, *supra* note 23, at 1. However, the figures in the Tables, *supra*, evince that—at least for the two very large industries of fast-food and automobile dealerships—the minority share is far higher than LaFalce's estimate.

168. 939 F.2d 946 (11th Cir. 1991).

169. *Id.* at 952; *see* Andrew M. Dansicker, *A Sheep in Wolf's Clothing: Affirmative Action, Disparate Impact, Quotas and the Civil Rights Act*, 25 COLUM. J.L. & SOC. PROBS. 1, 24–25 (1991). *Brown* is discussed *infra* notes 184–88, 207–13 and accompanying text.

170. In fact, franchisors frequently raise the defense that courts and public opinion must consider the actual applicant pool, not overall numbers. *See, e.g.*, McKeown, *supra* note 142, at A1 (noting Re/Max's defenses to discrimination charges: (1) it had granted many franchises to minorities in parts of the country where they comprised a larger proportion of the population; and (2) in areas where there simply were few minorities, and

Such claims may be valid, but so proving requires a careful examination of the facts on a case-by-case basis.[171] For instance, it would be insufficient, in a court case, for a plaintiff's lawyer to argue as did Chairman Tom Lantos (D-Calif.) in his opening statement at a 1992 hearing before the House Committee on Government Operations' Employment and Housing Subcommittee. There, Lantos used general, overall statistics to chastise American-owned Southeast Toyota, the exclusive distributor of Toyota automobiles in Florida, Georgia, Alabama, and the Carolinas:

> For a period of almost 25 years, from the time Southeast Toyota was established in 1968 until a few weeks ago, Southeast Toyota did not have a *single* dealership—not a single dealership—owned by an African-American. Even though it operates in a five-state region with a large black population, and has over 160 dealerships in its area, with regular dealer turnover, Southeast Toyota, incredibly, could not find a single qualified African-American for a dealership. Black dealer applicants were passed over by Southeast Toyota.[172]

Despite Lantos' words and the many other protests against the low numbers of, or special problems relating to, minority franchisees,[173] the cases

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very few minority applicants for franchisees, the franchisor could not be blamed for the resulting low percentage of minority franchisees).

171. As stated in Dansicker, *supra* note 169, after quoting from the decision in *Brown*, 939 F.2d at 952, "The court's rejection of plaintiffs' prima facie showing of discrimination is a typical example of why many disparate impact cases fail. Plaintiffs must concentrate on 'fine-tuning' the statistical evidence of discrimination." Dansicker, *supra* note 169, at 25.

172. *Racial Discrimination in Awarding Toyota Dealerships*, *supra* note 157, at 2 (statement of Chairman Tom Lantos). Joe Washington, a former Washington Redskins professional football player, applied for a Toyota dealership and never received a response. In a statement before the Subcommittee, Washington declared that he saw transcripts of sworn testimony stating that James Moran, owner and chairman of the board of Southeast Toyota Distributors, Incorporated, told other executives that Southeast Toyota had a "no nigger" policy. *Id.* at 45–46 (statement of Joe Washington). Furthermore, in a statement before the Subcommittee, Dennis Puskaric, a former Southeast Toyota official, stated that it was an unwritten policy at Southeast Toyota that no blacks would get dealerships and that top officials made racial slurs in his presence. *Id.* at 58, 61 (statement of Dennis Puskaric).

In March 1996, Southeast Toyota paid an undisclosed sum to settle the $7.7 million lawsuit of a black applicant denied a Toyota franchise that was instead awarded to a white businessman. *Car Dealer Settles Discrimination Suit*, ST. PETERSBURG TIMES, Mar. 19, 1996, at E1. The problem of underrepresentation, however, may remain. Despite the author's repeated telephone calls in May 1997 and March 1998 seeking an update on Southeast Toyota's number of minority dealers generally and black dealers in particular, Southeast Toyota never provided the information.

173. *See, e.g.*, *Minority Auto Dealers Call for U.S. Assistance*, *supra* note 157, at D1 (reporting the National Association for Minority Automobile Dealers' claim that about 20% of all minority-owned dealerships had gone out of business in the prior two years, a rate perhaps twice as high as the overall rate of dealership failures for that time period;

brought to court ordinarily have not led to judicial remedies favoring minority franchisees or franchise applicants. While a few prominent cases have settled out of court,[174] franchisors typically win challenges brought by minorities who sought, and were denied, a franchise.[175] Public policy makers such as Congressman Lantos may argue convincingly that franchisors are doing far less than they should. Turning his attention to Japanese-owned Toyota Motor Sales, U.S.A., which distributes and manages Toyota products throughout the United States, Lantos added:

> At present only 11 of Toyota's almost 1200 dealerships in the U.S. are owned by African-Americans. Yet Toyota argues that it has more African American dealers than Nissan and Honda, it has more minority dealers on a percentage basis than General Motors and is roughly the same as Chrysler, and it has a minority dealer program in place. In short, Toyota appears to be saying "Who could ask for anything more?" Congress can, and the American people can expect something more from Toyota, the auto maker with the greatest clout, the most profitable, and the industry leader in the 1980s and still today....[176]

Still, political grievances based on numbers or percentages often lead nowhere near any judicial findings of discrimination.

B. A Rare Franchisee Success: The Sud *Case*

A federal court did allow a franchise applicant's discrimination claim in *Sud v. Import Motors Ltd.*[177] There, natives of India alleged that they had been denied an automobile franchise on the basis of race and national origin. The district court held that the plaintiffs made a showing sufficient for it to issue a

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members of the groups singled out foreign automakers as doing little, if anything, to recruit minority dealers).

174. *See, e.g., Car Dealer Settles Discrimination Suit, supra* note 172 (stating that Toyota's largest distributor in the United States paid an undisclosed amount of money to settle allegations that he rejected African-American businessman William Adkins' application for a Toyota franchise because of Adkins' race); *see also infra* notes 298–302 (discussing a claim brought by a black franchisee against McDonald's).

175. *See, e.g.*, Sandhu v. AAMCO Transmissions, Inc., 782 F.2d 1043 (6th Cir. 1985) (affirming a summary judgment against a franchisee who claimed he was denied an additional franchise and was otherwise mistreated by the franchisor due to racial animus against him, an American citizen from India, in violation of section 1981). *But see* Sud v. Import Motors, Ltd., 379 F. Supp. 1064 (W.D. Mich. 1974) (winning franchisee selection claim discussed *infra* notes 177–85 and accompanying text); Harper v. BP Exploration & Oil Co., 896 F. Supp. 743 (M.D. Tenn. 1995) (winning franchisee selection claim discussed *supra* notes 125–130 and accompanying text), *aff'd*, 134 F.2d 371 (6th Cir. 1998).

176. *See Racial Discrimination in Awarding Toyota Dealerships, supra* note 157, at 5 (statement of Chairman Tom Lantos) (emphasis added); Table 5, *supra*. For a newspaper account of the hearing, see Alex Pham, *Toyota Distributor Biased, Would-be Dealers Allege*, WASH. POST, June 19, 1992, at C1.

177. 379 F. Supp. 1064 (W.D. Mich. 1974).

preliminary injunction preventing the franchisor from transferring the dealership to another party.[178]

The *Sud* court found that the plaintiffs, when compared to other applicants, had demonstrated superior intelligence as well as imagination, energy, aggressiveness, integrity, financial stability, and business capability.[179] Despite all of these characteristics, the franchisor, Import Motors, not only refused to award the plaintiffs the franchise in question, but also refused to give their application serious consideration when new franchises opened.[180] The court found that the record strongly supported an inference that the defendant's refusal to consider the plaintiffs' application was based on the plaintiffs' color and national origin, characteristics which prevented the lead plaintiff from ever being considered the "best man" for an Import Motors franchise.[181]

Sud illustrates the extraordinary lengths to which a court apparently must go if it is to permit a franchise discrimination claim: the opinion portrayed the lead plaintiff as someone who was extremely qualified[182] and took all the proper steps to obtain a franchise, but was repeatedly denied for no apparent reason. Note, also, that *Sud* was decided in 1974, prior to the current barrage of discrimination suits and the higher burdens placed on some discrimination claims.[183] In fact, the most prominent franchise case in which *Sud* was cited, *Brown v. American Honda Motor Co.*,[184] featured a holding against an African-American dealership applicant who claimed there was racial animus on the part of the franchisor, which had instead picked a white person. The court in *Brown* noted that the plaintiff heavily relied upon *Sud*, but found there were factual differences between the two cases, particularly on the fundamental issue of discrimination.[185] So *Brown*, in noting and then distinguishing *Sud*, serves only to point out how very unusual the facts, the ruling, and the reasoning in *Sud* have proven to be.

C. Failure to Provide Adequate Information About Minority Business Failure Rates: The Sperau *Case*

A franchisor's efforts to improve its "minority numbers" can backfire if not properly formulated and implemented. The classic case on point is *Sperau v. Ford Motor Co.*,[186] which concerned fraud arising from the purchase of a Ford

178. *Id.* at 1072–75.
179. *Id.* at 1072.
180. *Id.* at 1072–73.
181. *Id.* at 1073.
182. *Id.* at 1072.
183. Some would argue that these increased burdens are the result of a large, recent rise in frivolous actions. *See infra* notes 337–43 and accompanying text.
184. 41 Empl. Prac. Dec. (CCH) ¶ 36,585 (N.D. Ga. Mar. 28, 1986), *available in* 1986 WL 15491.
185. *Id.* at *11.
186. 674 So. 2d 24 (Ala. 1995), *vacated as to punitive damages*, 116 S. Ct. 1843 (1996).

dealership in Selma, Alabama. Samuel R. Foster II, an African-American dealer candidate in Ford's Minority Dealer Program, and Dee-Witt C. Sperau, Foster's white business partner, owned and operated the Selma dealership under the name "River City Ford" from May 1988 until the business failed in January 1991.[187] Foster and Sperau subsequently sued Ford and alleged fraud, breach of contract, and violation of the Alabama Motor Vehicle Franchise Act.[188]

The plaintiffs in *Sperau* claimed that Ford had a duty, because of a confidential relationship and/or special circumstances, to disclose to them all material facts concerning the profitability, performance, and failure rates of minority dealers as reflected in the Equal Opportunity Progress Reports ("EOP Reports") to which only Ford had access.[189] According to the court opinion, Ford derived a substantial benefit from recruiting black dealer candidates: increased sales, a method to maintain dealerships in less desirable geographic locations, and a positive corporate business image.[190] The Alabama Supreme Court, therefore, upheld the trial court's conclusion that Ford should be liable for its failure to disclose, a failure presumably motivated by Ford's desire not to impede sales of minority-owned dealerships. The court wrote:

> [T]here was substantial evidence from which the jury could conclude that Ford occupied a superior position with respect to historical information, as evidenced by the EOP Reports, which could predict future sales and profits. Additionally, Ford had established its own guidelines regarding initial capital requirements. The plaintiffs did not have this information at their disposal, and thus had to rely upon [Ford's statements] regarding the Selma dealership. The jury had substantial evidence before it concerning the *aggressive recruitment of Foster* and *Ford's manipulation of the capitalization requirement and sales and profit forecasts*.[191]

Ford evidently had represented that an astounding 65.4% sales and profit forecast was reasonable when, as decided at trial, Ford actually knew that all new dealers—minority and nonminority alike—were predicted to be loss leaders.[192] Although the new dealers had signed disclaimers stating that no sales or profits were guaranteed, Ford's own fraud trumped these disclaimers and left Ford liable[193] for inducing those dealers to incur over a million dollars of debt in order to acquire and operate River City Ford.[194] To make matters worse, while Ford

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187. *Id.* at 26.
188. ALA. CODE § 8–20–1 (1993).
189. *Sperau*, 674 So. 2d at 27.
190. *Id.* at 39.
191. *Id.* at 34 (emphasis added).
192. *Id.*
193. *Id.* at 35 ("To refuse relief [because of the disclaimers] would result in a multitude of frauds and in thwarting the general policy of the law." (quoting Bates v. Southgate, 31 N.E.2d 551, 558 (Mass. 1941))).
194. *Id.* at 36.

argued that it had no duty to disclose "race-based" data and that such data was not material, the plaintiffs introduced expert testimony that anyone called upon to prepare a profit and sales forecast or a capital requirement for a newly appointed African-American dealer should take into consideration the fact that the dealer is a minority.[195]

Ford argued on appeal that the plaintiffs' claims "boil[ed] down to the contention that Ford should have inflated the capital requirement and concomitantly reduced the projected return on investment because Foster is an African-American,"[196] and thus the jury verdict, in effect, would require Ford to do precisely what section 1981 of the 1866 Civil Rights Act[197] prohibits: offering dealerships to black applicants on less favorable terms than are offered to white applicants. The Supreme Court of Alabama rejected this contention on the facts, holding that the verdict did *not* require higher capitalization for an African-American dealership than a white dealership.[198] It also rejected Ford's argument on the law, stating that the verdict was based on a state law claim for fraud and was not preempted by federal law such as section 1981.[199]

Two of Alabama's nine justices dissented, principally on the grounds that the punitive damages awarded ($6 million) were excessive.[200] At the outset of the dissent, however, Justice Gorman Houston lamented that the plaintiffs' theories for the case were: (1) a person's identity as a racial minority member impairs his ability to compete; and (2) businesses offering minorities the chance to compete, without disclosing that alleged racial handicap, can be held liable for compensatory and punitive damages when a minority member takes that chance and then fails.[201] The majority found these fears to be groundless. It noted that Ford could make a "start" toward correcting the problems noted in *Sperau* simply by disclosing to all prospective dealers the cyclical nature of the business and the failure rate of all new dealers,[202] not just the rate for minority dealers. The court reiterated the trial court's conclusion that this case does *not* leave Ford straddling the horns of a dilemma: either being susceptible to suits of this nature, or no longer having a minority dealer development program.[203]

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195. *Id.* at 34.
196. *Id.* at 36.
197. 42 U.S.C § 1981 (1994).
198. *Sperau*, 674 So. 2d at 36.
199. *Id.* As stated by the trial court, the racial element of Ford's dealer development strategy was obvious, but the ultimate issue was simply fraud: "Although a Program designed to give black dealer candidates the opportunity to acquire an automobile dealership may be a laudable objective, the end of meeting an extremely aggressive black dealer count does not justify the *perpetration of an intentional fraud*." *Id.* at 39 (emphasis added).
200. *Id.* at 42 (Houston, J., dissenting).
201. *Id.* (Houston, J., dissenting).
202. *Id.* at 39.
203. *Id.*

The court's majority in *Sperau* emphasized the evidence of fraud as distinguished from the racial aspects of the case, and thus *Sperau* can be seen not as imposing different standards for minority dealerships, but as simply requiring more disclosure to all potential new dealers.[204] Some commentators, however, have not discerned these distinctions,[205] and only time will tell what case law, if any, springs from *Sperau*. Despite the *Sperau* court's confidence in a compartmentalized reading of the facts and the law, it seems obvious that some franchisor policy makers may read the case as a precautionary tale against the rapid development of new, financially less secure, often minority, franchisees.

D. Brown v. American Honda Motor Co.: *Representative of the Dismal Record for Franchisee Selection Discrimination Claims*

A realistic picture of franchise selection discrimination claims is likely a pessimistic one. There are extremely few recent, published court holdings in which a franchisee or franchise applicant recovered against a franchisor on a discrimination claim. A number of cases have been filed, but almost none have resulted in reported judgments favoring the franchisee's discrimination claim.[206]

As an example, consider a 1986 case in which the trial court denied the discrimination claim of a dealer who was refused an automobile dealership.[207] Two parties had applied for the same Honda dealership: the first, an African-American man named Johnny Mac Brown, owned a successful Toyota automobile distributorship in another area of Georgia; the second, a nonminority, owned a successful Honda dealership. Honda, which had a low number of minority dealerships,[208] chose to award the franchise to the nonminority applicant. Brown

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204. *See id.* at 35–36, 38–39.

205. Theodore J. Boutrous, Jr., *Alabama's New Affirmative Action Tort*, WALL ST. J., Aug. 16, 1995, at A11 (lambasting the Alabama court for placing responsible, socially proactive businesses such as Ford in a no-win situation). *But see* Chaka M. Patterson, Editorial, *Ford Gave Him a Raw Dealership*, WALL ST. J., Sept. 12, 1995, at A27 (vehemently disputing Boutrous' contentions and arguing that the only genuine grounds for possibly challenging the Alabama court's decision is on punitive damages, not liability).

206. *See, e.g.*, Nemet v. Hyundai Motor Am., No. 87 C 1501, 1989 WL 65518 (E.D.N.Y. June 14, 1989) (mem.) (plaintiff, a Jewish American, alleged that the franchisor refused to award him a franchise because of his ethnic characteristics, religion, and race; a second amended complaint added a federal civil rights claim under 42 U.S.C. § 1981 (1988)). This claim was ultimately settled without any adjudication on its merits. Telephone Interview with Terri E. Simon, attorney for dealer Nemet and partner in the New York City law firm of McGuire, Kehl & Nealon (Jan. 28, 1997).

207. Brown v. American Honda Motor Co., 41 Empl. Prac. Dec. (CCH) ¶ 36,585 (N.D. Ga. Mar. 28, 1986), *available in* 1986 WL 15491, *aff'd*, 939 F.2d 946 (11th Cir. 1991).

208. To establish a prima facie case of disparate impact, the plaintiff presented evidence that only two of the 860 Honda dealerships in the United States were owned by black dealers. Brown v. American Honda Motor Co., 939 F.2d 946, 952 (11th Cir. 1991); *see also* Dansicker, *supra* note 169, at 24–25.

claimed discrimination, and brought suit pursuant to the Thirteenth Amendment of the United States Constitution and section 1981.

The United States District Court for the Northern District of Georgia noted that a franchisor's preference for an applicant who had sales and service experience specifically with Honda automobiles, and would carry no other line of automobiles in the same market area, is a legitimate, nondiscriminatory reason for awarding a dealership to that applicant.[209] Although the dismally low number of minority Honda dealers troubled the court, the number alone, in light of the facts of this case, was insufficient to give rise to an inference of racial discrimination.[210] In fact, the circuit court held that statistics, "without an analytic foundation, are virtually meaningless."[211] Section 1981 cases require proof of *intentional* discrimination, the court noted, and thus evidence merely pointing to a possible adverse impact is insufficient.[212]

In *Brown*, the franchisor faced a difficult situation: two qualified parties, one black and one white, had applied for the same position. Either applicant, if denied a franchise, might have filed a discrimination claim.[213] The federal court, however, refused to permit the discrimination claim to stand.[214] Brown simply was unable to carry his burden of proof in demonstrating specific acts by Honda that tended to show his application was denied because of his race.

If Brown had asserted a more general cause of action, basing it instead on Honda's failure to act in good faith when choosing its dealers, the *Brown* court would have had to evaluate whether Honda's specific action in this case—giving a current Honda dealer preference over a non-Honda dealer—was *unfair*. The court would probably have reached the same result; nevertheless, it may not be sound policy to permit current dealers to monopolize a franchise. Such a practice may be deemed unfair—a lack of "good cause" or a breach of the implied covenant of good faith and fair dealing. However, assuming such covenants do not reach persons who have yet to enter a contractual relationship, a prospective franchisee may still establish a cause of action against a franchisor for failure to adhere to

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209. *Brown*, 1986 WL 15491, at *9.

210. Many disparate impact cases fail because plaintiffs are unable to produce concrete statistical evidence of discrimination. *See* Dansicker, *supra* note 169, at 25. Also, in recent years, courts have evinced increasing skepticism about the studies used to justify governmental affirmative action programs. *See* Barrett, *supra* note 134, at B1.

211. *Brown*, 939 F.2d at 952 (citing Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989)).

212. *Id.* at 953.

213. *See, e.g.*, Wassel v. General Motors Corp., No. 76 Civ. 387, 1979 U.S. Dist. Lexis 8840 (S.D.N.Y. Oct. 31, 1979) (mem.) (court rejected white female plaintiff's claim of reverse discrimination, allegedly violating 42 U.S.C. § 1981; the defendant's mandate required the defendant to award an automobile dealership to a black male prospect rather than a white).

214. Before trial, the judge dismissed Terry Wassel's sex discrimination claim. *Id.* at *10 n.2.

minimal standards of fairness in the precontract setting, that is, in the franchisee selection process.[215]

Even if a claim of wrongful nonselection is actionable, the damages awarded may be minimal. In *Walser v. Toyota Motor Sales, U.S.A., Inc.*,[216] the Court of Appeals upheld a trial court judgment limiting a prospective franchisee's damages to his out-of-pocket expenditures made in reliance on a franchisor's promise to grant him a dealership. The prospective franchisee, who eventually was denied a franchise, sued for breach of contract, fraud, and promissory estoppel. He won on only the last count—promissory estoppel—and could only collect his expenses, $232,131, not his $7.6 million in lost profits.[217] The court also found that the cancellation and termination provisions of Minnesota's dealership protection statutes did not apply to a prospective franchisee because that person did not have a written franchise contract.[218]

Likewise, in *McDonald's Corp. v. Miller*,[219] a prospective franchisee who was "terminated" during a franchise training program could not invoke the protections of New Jersey's statutory, wage-and-hour law. An agreement between McDonald's and the prospective franchisee defined their relationship as one other than employment and thus effectively barred the use of those statutory protections.[220]

V. SET-ASIDES, AFFIRMATIVE ACTION, AND INTERNATIONAL LAW

Professor Robert E. Suggs opines that, despite their legal difficulties, set-asides are the only effective remedies for discrimination in business relations.[221] Other, facially neutral policies that in theory are equal and fair, Suggs argues, in practice favor the already superior party over the person who historically has suffered discrimination.[222] Suggs, therefore, suggests that an American legislative

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215. 42 U.S.C. § 1981 (1994). Even *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), which narrowed the scope of section 1981 claims (until overturned by the Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1071 (1991)), noted that section 1981 covers "conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations." *Patterson*, 491 U.S. at 179. Therefore, even under a very narrow interpretation of section 1981, a potential franchisee has a section 1981 claim against a franchisor for its discriminatory behavior in not choosing the claimant to be a franchisee.

216. 43 F.3d 396 (8th Cir. 1994).

217. *Id.* at 400–03.

218. *Id.* at 405.

219. Civ. Action No. 92–4811, 1994 WL 507822 (D.N.J. Sept. 14, 1994), *aff'd*, 60 F.3d 815 (3d Cir. 1995).

220. *Id.* at *7–9.

221. Suggs, *supra* note 73, at 1303.

222. *Id.* at 1291–92. Suggs uses the example of the supposedly neutral business practice of preferring to deal with firms that in the past have performed successfully or otherwise have substantial prior experience. The practice effectively bars from business

and judicial policy that increasingly opposes or restricts minority business set-asides is philosophically at odds with an American foreign policy that has pushed for trade "set-asides"[223] to open up foreign markets to American businesses, who are the disadvantaged "minority" in, for example, Japan.[224] Although an interesting notion, Suggs' proposal has had no effect on the public policy debate. Indeed, in the seven years since the article's publication, trade "set-asides" have eased as "Japan, Inc."[225] has entered into an economic funk, and—on the domestic front—*Adarand*[226] and other court decisions, as well as various legislative and referenda initiatives,[227] have further eroded the legal underpinnings for affirmative action.

Comparative law, though, may furnish some guidance for American policies affecting minority-owned businesses. A number of other countries with heterogeneous populations have found it impossible to operate simply on the basis of antidiscrimination and equal personal rights.[228] For example, section 15(1) of Canada's Constitution Act of 1982 provides that every individual is entitled to equal protection without discrimination based on race, national or ethnic origin, color, religion, sex, age, or mental or physical disability,[229] but section 15(2)

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transactions a higher proportion of minority firms (because they on average tend to be less experienced) than white-owned firms. *Id.* at 1291.

Another analogy would be to divorce decrees that split assets fifty-fifty between spouses with vastly different levels of education and job experience, with the homemaker spouse theoretically treated equally to the working spouse. In practice, this facially neutral policy fails to account for the fact that the homemaker deferred her or his career in order to enable the other spouse to devote more time to his or her career. Thus, the homemaker does not receive a division of assets that may better compensate him or her for the dramatic differences in earning power.

223. *See id.* at 1310–12. In other words, managed trade to boost the American market share in, say, sales of semiconductor chips. *Id.* at 1315.

224. *Id.* at 1314–23.

225. That was a much used term to denote a powerful, often impenetrable Japanese market. *See, e.g., id.* at 1314 (quoting Peter Passell, *Does Japan Play Fair?*, N.Y. TIMES, Jan. 31, 1990, at D2).

226. Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

227. The California Civil Rights Initiative (Proposition 209), approved by Californian voters in November 1996, effectively ends most governmentally mandated affirmative action programs for the State of California in the fields of employment, education, or government contracts. On November 3, 1997, the United States Supreme Court refused to review the Ninth Circuit Court of Appeals' decision upholding Proposition 209. Coalition for Economic Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 397 (1997). As of April 1998, a number of states, including Arizona, Colorado, Florida, Illinois, Missouri, Ohio, Oregon, Washington, and Wisconsin, have movements sponsoring measures similar to California's Proposition 209. *See, e.g.*, G. Pascal Zachry, *Move Heats up Battle to End Preferences*, WALL ST. J., Feb. 23, 1998, at A3 (predicting success in November 1998 for a ballot initiative in the State of Washington opposing affirmative action).

228. VERNON VAN DYKE, EQUALITY AND PUBLIC POLICY 228 (1990).

229. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 15(1).

further states that this antidiscrimination provision "does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups," including those disadvantaged because of any of the traits previously listed (race, national or ethnic origin, et cetera).[230] This provision permitting affirmative action programs ensures that Canada's approach to affirmative action will differ from that in the United States; it also supports the view that section 15's purpose is to promote equality, not just to prevent discrimination.[231] While "Canadians tend to view the term 'affirmative action' with some suspicion," a different nomenclature, "employment equity," coined by a Canadian Commission in 1984,[232] has received much more support.[233] For example, the Canadian Parliament enacted the Employment Equity Act of 1986,[234] which authorizes further measures to bolster government employment of women, aboriginal peoples, minorities, and the disabled. Simultaneously, the legislation has been bolstered by proaffirmative action decisions of the Supreme Court of Canada.[235]

The law of Canada evidently means that American franchisors operating in Canada have less need to fear reverse discrimination charges, because of a franchisor-instituted affirmative action plan, than they might in the United States. Canadian law, however, ordinarily does not require private businesses, such as franchisors, to establish preferential programs or other assistance plans. Because the Canadian approach toward governmental affirmative action has been remarkably different from the recent American approach announced in *Croson*[236] and *Adarand*,[237] it is difficult to draw any general conclusions that could be applied to franchise systems in the United States.

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230. *Id.* § 15(2).

231. C. Lynn Smith, *Adding a Third Dimension: The Canadian Approach to Constitutional Equality Guarantees*, 55 LAW & CONTEMP. PROBS. 211, 225–26 (1992); *accord* Alan Brudner, *What Are Reasonable Limits to Equality Rights?*, 64 CAN. B. REV. 469, 470 (1986); Franklin R. Liss, Comment, *A Mandate to Balance: Judicial Protection of Individual Rights Under the Canadian Charter of Rights and Freedoms*, 41 EMORY L.J. 1281 (1992).

232. ROSALIE SILBERMAN ABELLA, REPORT OF THE COMMISSION ON EQUALITY IN EMPLOYMENT 7 (1984).

233. John Hucker, *Towards Equal Opportunity in Canada: New Approaches, Mixed Results*, 26 ST. MARY'S L.J. 841, 849 (1995).

234. Ch. 31, 1986 S.C. 1065 (Can.).

235. *See* Canada (Canadian Human Rights Comm'n) v. Canadian Nat'l Ry. [1987] 1 S.C.R. 1114; Ontario Human Rights Comm'n v. Simpsons–Sears Ltd., [1985] 2 S.C.R. 536.

236. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (holding that race-conscious, state or local government-mandated affirmative action programs are subject to a strict scrutiny standard).

237. Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (holding that race-conscious, federally mandated affirmative action programs are subject to a strict scrutiny standard).

American discrimination law, though, must now account for a treaty recently ratified by the United States Senate. In late 1994, the Senate ratified the International Convention on the Elimination of All Forms of Racial Discrimination ("Convention").[238] Thus, the United States has joined more than 146 nations that have become parties to the Convention.[239]

Most significantly, the Convention's goals, as summarized by Professor Connie de la Vega, are "couched in terms of guaranteeing the full and equal enjoyment of human rights rather than remedying past discrimination."[240]

> Arguably, it would be sufficient to make a showing that a certain group has not attained the equal enjoyment of a particular right. That may be easier to establish than proving that the inequality is a result of intentional discrimination.
>
> ...Although many of the rights enumerated in the [Convention] are similar to those provided for in state and federal constitutions and statutes, there are many areas where the [Convention] clauses are more protective of individuals' rights. Even with the reservations [that the Senate imposed as a condition to ratifying the Convention], civil rights advocates have many avenues available to make use of the treaty provisions in order to protect and to promote human rights in the United States. This is exemplified by issues surrounding affirmative action, which is not only endorsed, but required by [the Convention].[241]

There appear to be several problems with de la Vega's analysis, however. For one thing, she may be exaggerating the affirmative action requirements allegedly imposed by the Convention. Most of the world's nations have ratified the Convention, and certainly many of the ratifying nations have a far more serious problem with prima facie, intentional discrimination than does the United States.[242] Therefore, it seems that the first priority of the Convention must be to

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238. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969); *see* 140 CONG. REC. S7634 (daily ed. 1994) (entered into force for the United States in 1994)).

239. U.S. DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 1997, at 427 (1997).

240. Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 U. CIN. L. REV. 423, 470 (1997).

241. *Id.* (also referring to the International Covenant on Civil and Political Rights ("ICCPR"), *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976; adopted by the United States Sept. 8, 1992), with the ICCPR's Article 2(2) perhaps requiring affirmative action by ratifying nations).

242. For the most recent lists of parties to various international agreements, *see* United Nations Treaty Database, Multilateral Treaties Deposited with the Secretary–General (last modified Feb. 4, 1998):

treat that greater evil of outright, purposeful discrimination than venture into the far more complex, subtle issues of remedying widespread economic or social disparities between various groups of people. Secondly, de la Vega too quickly dismisses the fact that the U.S. Senate enacted several conditions on the Convention before consenting to it. Even Senate floor debate could provide helpful insight about what the treaty ratification was expected to accomplish. Surely American courts may take into account the predominant understanding among senators, one propounded by treaty loyalists in the Congress, the executive department and elsewhere, that the Convention simply endorses the antidiscrimination laws already found in American statutes.[243] Thirdly, the Convention provisions probably can never be used as the basis for a private cause of action. The affirmative action provisions, and many other Articles in both the Convention and the International Covenant on Civil and Political Rights ("ICCPR"), are not self-executing.[244] Finally, even if de la Vega is correct, the Convention probably does not reach business contracts, such as franchises. Instead, the affirmative action provisions of Convention Article 2(2) and of ICCPR Article 2(2) concern employment, housing, health care, education, children's rights, voting rights, and equal protection.[245] The international agreement that comes closest to considering business and franchise contracting

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<http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_4.html> (International Covenant on Civil and Political Rights); <http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_5.html> (Optional Protocol to the International Covenant on Civil and Political Rights); <http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_2.html> (International Covention on the Elimination of All Forms of Racial Discrimination); <http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_3.html> (International Covenant on Economic, Social and Cultural Rights).

243. In the formal statement of Conrad Harper, the Legal Adviser to the Secretary of State, presented to Chairman Claiborne Pell (D-R.I.) of the Senate Foreign Relations Committee concerning ratification of the Convention, Mr. Harper stated, "the Convention leaves undisturbed existing U.S. law." 5 DEP'T OF STATE, DISPATCH 354 (1994) (statement of Conrad Harper, Legal Adviser to the Secretary of State), *reprinted in* Marian Nash, *Contemporary Practice of the United States Relating to International Law*, 88 AM. J. INT'L L. 719, 722 (1994); *see also* Jordan J. Paust, *Race-based Affirmative Action and International Law*, 18 MICH. J. INT'L L. 659, 665 (1997) (quoting Harper's statement).

244. S. EXEC. DOC. NO. C, 95–2, at VIII (1978) (Letter of Submittal regarding the International Convention on the Elimination of All Forms of Racial Discrimination) ("The United States declares that the provisions of Articles 1 through 7 of this Convention are not self-executing."); S. EXEC. DOC. NO. E, 95–2, at XV (1978) (Letter of Submittal regarding the International Covenant on Civil and Political Rights) ("The United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing.").

245. International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 238, 660 U.N.T.S. at 218; International Covenant on Civil and Political Rights, *supra* note 241, 999 U.N.T.S. at 173–74.

issues, the International Covenant on Economic, Social and Cultural Rights,[246] declares no special assistance or affirmative action type of rights.

VI. FRANCHISE SITE SELECTION AND MARKET PRICE DETERMINATION

A. Redlining in General

Minority franchisees long have argued that franchisors often engage in "*redlining*." Redlining is a pattern of racial discrimination in which businesses or financial institutions refuse to do business with persons in certain, usually inner-city, areas due to a perceived higher level of risk.[247] For example, some studies indicate that mortgage lenders discriminate against minorities at a level that "shocks the conscience."[248] The evidence, though, is inconclusive, as some

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246. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976), *reprinted in* 6 I.L.M. 360 (1966).

247. Mark A. Hofmann, *Congress May Turn Attention to Redlining*, BUS. INS., Mar. 1, 1993, at 3. Many franchised businesses are engaged in retail trade, an industry whose firms, whether franchised or not, are frequently accused of redlining. *See, e.g.*, Rudolph A. Pyatt Jr., *Hechinger Mall II Facing Retail Redlining*, WASH. POST, Nov. 26, 1990, at F3.

248. The Community Reinvestment Act of 1977 ("CRA"), 12 U.S.C. §§ 2901–2907 (1994), expressly states that financial institutions have a "continuing and affirmative obligation to help meet the credit needs of the local communities in which they are chartered." *Id.* § 2901(a)(3) (1994). The CRA requires that every federal agency that regulates financial institutions must "use its authority when examining financial institutions, to encourage such institutions to help meet [local communities'] credit needs...consistent with the safe and sound operation of such institutions." *Id.* § 2901(b) (1994).

According to a study conducted in January 1992 by the San Francisco-based Greenlining Coalition and the Boston-based National Community Reinvestment Network, California's five largest Japanese-owned banks regularly violate the CRA by denying mortgage loans to blacks and other minorities. The study showed that only a mere 68 of the 3287 loans (2%) approved by the banks were granted to blacks in 1990. However, in response to these findings, the Bank of Tokyo has set a goal of 20% of loans to minority- and women-owned businesses. *See* Pearl Stewart, *Japanese Banks: Bias?*, BLACK ENTERPRISE, June 1992, at 33.

Data collected in 1990 pursuant to the Home Mortgage Disclosure Act of 1975 ("HMDA"), 12 U.S.C. §§ 2801–2810 (1994), shows that approximately 12.9% of Asian applicants and 14.4% of white applicants were turned down for conventional financing as compared to approximately 21.4% for Hispanic applicants and 33.9% for black applicants. Additionally, the same pattern exists when the applicants are classified by levels of income. When assembled in the lowest income category, 17.2% of Asian Americans, 23.1% of whites, 31.1% of Hispanics and 40.1% of blacks are declined; when assembled in the highest income category, 11.2% of Asian Americans, 8.5% of whites, 15.8% of Hispanics, and 21.4% of blacks are declined. *See* Stewart, *supra*; *see also* Kenneth H. Bacon,

scholars infer that the rate of mortgage approvals is actually much higher for qualified black applicants than for comparable whites.[249]

Reaching out: Under Strong Pressure, Banks Expand Loans for Inner-city Homes, WALL ST. J., Feb. 23, 1994, at A1 (reporting three years of Federal Reserve Board studies based on HMDA data showing that blacks were more than twice as likely to be turned down for mortgages as whites with similar incomes). *But see* Leon E. Wynter, *Business & Race: Software Programs Help Identify Loan Disparities*, WALL ST. J., July 2, 1997, at B1 (reporting the same statistics from the 1990 study, but noting that the "disparity index"—the rate of minority loan denials divided by the rate of white denials—fell from 2.4 in 1990 to 1.81 in 1995).

The Federal Reserve Board report on this data insists that the data does not definitively establish racial discrimination in mortgage lending because of the lack of information on both creditworthiness of individuals and valuation of parcels offered for collateral. *See* Bacon, *supra*, at A1 (noting that bankers criticized the reports as misleading because they overlooked credit risks, such as income stability, other loans outstanding, and savings, while concentrating simply on a loan applicant's race). Additionally, many argue that this data contains both obvious and so-called technical errors. Mark Curnutte & Jeff McKinney, *Banks Say Survey Is Misleading: Credit Histories Overlooked, Lenders Say*, CINCINNATI ENQUIRER, Nov. 25, 1993, at B1 (reporting data that blacks are about two and a half times more likely than whites to be denied a home loan; but noting the bankers' complaints about mistakes—data are incomplete, and the analysis therefrom does not consider applicants' credit and employment histories, debt-income ratios, and ability to pay out-of-pocket expenses). Nevertheless, the HMDA as amended by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101–73, 103 Stat. 183, is aimed at providing more effective enforcement of antidiscrimination in lending laws, and the release of this data has induced a major response on the part of lending institutions, who are now following fair lending laws more attentively. However, still more significant incentives must be created for these lenders to invest in disadvantaged areas and, thereby, reduce mortgage discrimination. *See* Robert G. Boehmer, *Mortgage Discrimination: Paperwork and Prohibitions Prove Insufficient—Is It Time for Simplification and Incentives?* 21 HOFSTRA L. REV. 603 (1993); Stephen D. Burwell & Christine A. McCarthy, *Community Banking: Developments in Banking Law: 1994*, 14 ANN. REV. BANKING L. 116 (1995); A. Brooke Overby, *The Community Reinvestment Act Reconsidered*, 143 U. PA. L. REV. 1431 (1995); Michael Selz, *Race-linked Gap Is Wide in Business-loan Rejections*, WALL ST. J., May 6, 1996, at B2; John R. Wilke, *Race Is Factor in Some Loan Denials*, WALL ST. J., July 13, 1995, at A2.

249. Albert R. Karr, *Fed Study Challenges Notion of Bias Against Minorities in Mortgage Lending*, WALL ST. J., Jan. 26, 1995, at A16. The Federal Reserve Board studied the default rates for 220,000 Federal Housing Administration mortgage loans from 1987 to 1989. It found that blacks defaulted about twice as often as white borrowers, with Hispanics defaulting somewhat more frequently than whites. *Id.* The study's authors opined that if lenders do hold black mortgage applicants to a higher standard than whites, the blacks, on average, would be more qualified for loans (less of a credit risk) and their default rates would be lower than for whites. Since blacks' overall default rate was actually twice as high, the study's authors concluded that there must not be a systemic pattern of discrimination against qualified black mortgage applicants. *Id. But see* Jeffrey Zack, *Banks Caught Red-handed on Redlining*, BUS. & SOC'Y REV., Winter 1992, at 54. Zack reported that a Fall 1990 Federal Reserve report indicated that redlining discrimination in lending is rampant. *Id.* at 54. He further noted that a reforms group, ACORN (Association of

If minority franchisees are permitted to exist at all in a redlined system,[250] it is likely that those franchisees operate units only in inner-city, urban neighborhoods—particularly areas where the ethnic group to which the franchisee belongs is heavily represented (e.g., African-American franchisees are limited to opening restaurants in predominantly African-American neighborhoods).[251] Thus, it is claimed that opportunities for minority franchisees, no matter how successful in their past or current business endeavors, are "redlined" away according to demographics and market studies.[252] For this reason, redlining has been termed by some a form of *economic apartheid*, with franchisors "steering most minority franchisees to low income, depressed, urban locations while reserving more lucrative locations for white franchisees."[253] The effect is to restrict minority firms to an exceedingly tiny market, perhaps as small as just one percent of the total U.S. market,[254] far below the minority proportion of the total American population. A leading franchise law commentator and attorney for franchisees notes, "[s]ome of the best franchisors have adopted a policy of selling off [their economically] sick franchised operations to minority-group members, compounding discrimination by refusing to allow them to obtain new viable stores in decent neighborhoods."[255]

B. Excluding White Franchisees from Minority Neighborhoods

Ironically, the reservation of certain geographic areas for members of particular ethnic or racial groups could lead to a redlining claim by whites kept out of minority neighborhoods. A case filed in Florida state court in 1989, *Don L Subaru, Inc. v. Subaru of America, Inc.*,[256] included unusual allegations of

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Community Organizations for Reform Now), used the redlining issue to gain minority loan commitments from the merger of two leading banks—Chemical Bank and Manufacturers Hanover. *Id.* at 55.

250. Many franchisors may simply not operate, whether via franchises or company-owned stores, in inner-city locations. *See* Brown, *supra* note 6, at 60 (detailing how a Detroit real estate developer conducted a three-year campaign of letter writing and negotiations before he could finally get one franchisor, out of thirty contacted, to open a restaurant in a prime, albeit inner-city, location).

251. *See* U.S. BUREAU OF THE CENSUS, *supra* note 150, at 45–47 tbl.46 (listing the percentage of each minority category (African American; American Indian, Eskimo, Aleut; Asian, Pacific Islander; Hispanic) in all U.S. cities with 100,000 or more inhabitants). The data shows, on average, much higher percentages of minorities, especially African Americans, residing in cities than for the population as a whole.

252. *Minorities and Franchising: Hearing Before the House Comm. on Small Business*, 102d Cong. 36 (1991) (testimony of Franklin M. Lee, Chief Counsel, Minority Business Enterprise Legal Defense and Education Fund, Inc.).

253. *Id.*

254. ROBERT E. SUGGS, MINORITIES AND PRIVATIZATION: ECONOMIC MOBILITY AT RISK 53 (1989).

255. Harold Brown, *The 20-year Agreement*, N.Y.L.J., Oct. 22, 1992, at 3 (citing Hall v. Burger King Corp., Civ. Action No. 89–0260, Civ–Kehoe (S.D. Fla. Feb. 20, 1989) (originally filed in the District Court for the District of Columbia)).

256. Civ. Action No. 89–04837 CA–31 (Fla. 11th Cir. Ct. 1989).

redlining: that franchisor Subaru reneged on a franchise arrangement with a white franchisee, Don Lloyd, the owner of plaintiff Don L Subaru, after the franchisor realized that Lloyd's new franchise was in a seventy-eight percent black area of Miami. While Lloyd's claim could have been for racial discrimination against him (losing a franchise because he is Caucasian), it actually was premised on the notion that Subaru refused to serve the African-American community because it located all franchises in white, suburban locations.[257] Lloyd's bid for an injunction preventing Subaru from canceling its letter of intent to grant Lloyd a franchise was denied by Florida Circuit Court Judge Gerald Wetherington, who ruled that Subaru had the right to cancel, and then award the franchise to someone else, because Lloyd had not fully disclosed his having been investigated by U.S. Customs for allegedly importing gray-market cars.[258]

Don L Subaru does not, on the facts, rise to the level of a successful "reverse redlining" case—one filed by a redlined nonminority franchisee or potential franchisee. It does, however, evince the potential for such claims.[259] Moreover, some of the strongest advocates for helping minorities break into franchising and break out of redlined market restrictions do not see that they may be laying the groundwork for a "reverse redlining" claim by arguing for minority franchise development as a method to develop new inner-city markets.[260] While that notion seems practical, if it leads to practices that effectively reserve certain city markets for minorities, then the franchisors engaged in such practices may well be summoned to court by white franchise applicants with far more factually sound and legally viable cases than *Don L Subaru.*

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257. *Id.* (alleging violations of the Equal Credit Opportunity Act, 15 U.S.C. § 1691 (1994), and the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1994)); Charles M. Thomas, *Redlining Charge Leveled in Subaru Franchise Case*, AUTOMOTIVE NEWS, Mar. 20, 1989, at 3.

258. Charles M. Thomas, *Subaru Upheld on Franchising: Race Not Issue, Fla. Court Says*, AUTOMOTIVE NEWS, Apr. 10, 1989, at 1.

259. Telephone Interview with Arlene B. Muenz, Miami attorney for plaintiff Don L Subaru (Feb. 18, 1997) (noting that the Florida trial court did not address the redlining charges but denied the plaintiff's bid for an injunction on the grounds that the plaintiff-franchisee had failed to make necessary disclosures to the defendant-franchisor).

260. *See, e.g.*, Susan P. Kezios, *Women and Minorities in Franchising, in* THE FRANCHISING HANDBOOK, *supra* note 5, at 443, 456 (President of Women in Franchising and of the American Franchisee Association—franchisee advocacy groups—arguing that franchisors should "rifle-shot" their expansion into urban areas by targeting the black, Hispanic, and Asian communities for these new franchises; also quoting, with implicit approval, a McDonald's spokesperson who stated, "It makes sense to be represented in every community by the people who live there.").

C. Redlining of Minority Franchisees

1. The Problem

Minority franchisees' claims of redlining essentially build upon a more general discrimination claim: that franchisors wish to exploit not only the individual franchisees, but also the communities in which these franchises are located. Typical franchise agreements provide that royalties will be paid as a percentage of gross sales, rather than net income.[261] Thus, by offering minority franchisees stores in areas where potential sales are great but net incomes are low, franchisors are able to exploit the market with little risk.[262] Additionally, stores located in minority areas often are victimized by high rates of crime (acts of both violence and vandalism) and, therefore, must spend much more money on overhead costs, particularly rent, insurance, security, and repairs, than do stores located in other areas.[263] These additional costs further limit the profits that the franchisees can realize.[264]

If a minority franchisee is successful in an inner-city or minority area, then it seems likely that he or she also would be successful in a predominantly white suburban area, especially for outlets such as fast-food establishments, where the patron likely never considers the race of the business owner. Given an experienced franchisee with a proven track record, or even a first time franchise

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261. Emerson, *supra* note 32, at 955.

262. As in most franchising arrangements, the greater risk tends to fall upon the franchisee. This risk seems to be far more grave for the redlined, minority franchisee in the inner city:

> [M]any minority franchisees find themselves in a financially vulnerable situation. Their cash-flow is negative. Due to depressed sales and substantially higher costs than their white counterparts, they frequently are unable to meet all of their financial obligations under their franchise agreements. As a result, minority franchisees can often find themselves at the mercy of the franchisors that set them up for failure in the first place.

Minorities and Franchising: Hearing Before the House Comm. on Small Business, *supra* note 252, at 36 (testimony of Franklin M. Lee, Chief Counsel, Minority Business Enterprise Legal Defense and Education Fund, Inc.).

263. *Id.* at 6 (testimony of Susan Kezios, President and Founder of Women in Franchising, Inc.); *id.* at 16 (testimony of Fran Jones, President of National Black McDonald's Operators Association).

264. Some scholars, however, maintain that the profitability of franchises in inner-city or minority-dominated neighborhoods sometimes is better than in more affluent neighborhoods because sometimes "poorer" areas offer excellent profit opportunities due to limited competition, lower operating costs (e.g., lower rent), and a good match between the business format and the consumer preferences of neighborhood residents. *See* TIMOTHY BATES, BANKING ON BLACK ENTERPRISE (1993); Marc Bendick, Jr. & Mary Lou Egan, *Linking Business Development and Community Development in Inner Cities*, 8 J. PLAN. LITERATURE 3 (Aug. 1993).

applicant with the requisite entrepreneurial skills and financial backing, it would seem the more lucrative the location, the more profitable the business enterprise. But franchisors continue to be charged with redlining.[265]

While almost every franchisor denies having a policy which forces minority franchisees into minority neighborhoods, many franchisors see minority ownership in certain areas as making good business sense. As a McDonald's company spokesman put it: "The fact that the problems of operating certain locations in inner-city, predominately black areas require persons with particular abilities and that persons having these abilities have, in many instances, been black, involves no act of racial discrimination."[266] So the question becomes, Are franchisors denying the rights of minority franchisees to operate franchises outside minority areas due to racist business practices,[267] or are such franchisors simply organizing their business practices so as to capitalize on the biases and racism that exist in American society today?[268] Perhaps even more interesting is the fact that, while no franchisee asks to be redlined (i.e., restricted to certain neighborhoods), the alarm over restrictive practices that seem to redline, for example, African-American franchisees away from white neighborhoods does not necessarily mean that those protesting the redlining would approve of nonblack franchisees

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265. *Minorities and Franchising: Hearing Before the House Comm. on Small Business*, *supra* note 252, at 36 (testimony of Franklin M. Lee, Chief Counsel, Minority Business Enterprise Legal Defense and Education Fund, Inc.). Lee found minority franchisee complaints about redlining to be almost universal, regardless of the geographic region or the industry (fast-food restaurants, car dealerships, or convenience stores). *Id.*

266. Lynne Reaves, *Big Mac Attack: Black Franchisee Charges Bias*, A.B.A. J., Dec. 1984, at 32, 32 (quoting a McDonald's company spokesman).

267. Such practices may arise from a business' "organizational culture," which is something similar to the culture in a society and consists of such things as shared values, beliefs, and assumptions. Furthermore, culture provides the mechanism for members of an organization to define their social context, not only internally within the organization, but also externally with stakeholders and outside resources. As a result, culture has an indirect effect on both strategic and administrative decisions, such as site selection of a franchise. However, if such value systems are race based and the "person-organization fit" concept is used to advance a preexisting discriminatory organizational culture, then Title VII becomes an issue. *See* Daniel J. Herron et al., *The "Person-Organization Fit" (POF): Will It Stand-up to Title VII Scrutiny?*, *in* ACADEMY OF LEGAL STUDIES IN BUSINESS NATIONAL PROCEEDINGS 185, 185–87, 195–96.

268. Query: Even if franchisors simply are capitalizing on preexisting biases, is such a practice justifiable? At law, presumed customer preference (i.e., that whites want to be helped by white sales clerks) is not a bona fide occupational qualification for either favoring or discriminating against employees or prospective employees on account of their race. 42 U.S.C. § 2000e–2(e) (1994); Diaz v. Pan Am World Airways, Inc., 442 F. 2d 385 (5th Cir. 1971); Spragg v. Shore Care, 679 A.2d 685 (N.J. Super. Ct. App. Div. 1996). The fact that the clientele, the overall business culture, or other outside factors presumably support a discriminatory climate does not legally justify franchisor measures that have an adverse impact. *See* Herron et al., *supra* note 267, at 189–92.

operating in black neighborhoods (i.e., whites or other minorities).[269] That may have to be the quid pro quo, though, if redlining is to be fought effectively.[270]

2. Redlining Charges Against Prominent Franchisors

Companies such as the Southland Corporation,[271] General Motors Corporation ("GM"),[272] Ford Motor Company,[273] BP Oil Company,[274] the McDonald's Corporation,[275] and the Burger King Corporation[276] have been accused of redlining.[277]

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269. *See Minorities and Franchising: Hearing Before the House Comm. on Small Business*, *supra* note 252, at 24 (statement of Donald Lopes, Kentucky Fried Chicken Minority Franchise Owner: "black markets and Hispanic markets should be owned by black people and Hispanic people"); *id.* at 25 (statement of Fran Jones, President, National Black McDonald's Operators Association: "[w]e don't want to see those stores removed from minority ownership, Hispanics and blacks"); *see also* Shilpi Somaya, *Non-philanthropic Corporate Involvement in Community Development*, BUS. & SOC'Y REV., Spring 1996, at 32, 35 (noting that Burger King's effort to diversify its franchise base includes the development of "a subset of African-American franchise owners in the Southeast who are targeting new site locations on historically black college campuses"; implying that it would solely be up to black franchisees to operate in such a "black" market).

270. To do otherwise would almost be equivalent to saying, "What's mine is mine, and what's yours may also be mine!" In other words, in order for redlining to be obliterated and for minority franchisees to break into suburban or other "upscale" areas, these franchisees and their community supporters may have to agree that franchisors should be free to put nonminority franchisees into a minority community. Such agreement would require a changed outlook on the part of some minority franchisees or their advocates. *See Minorities and Franchising: Hearing Before the House Comm. on Small Business*, *supra* note 252, at 26 (statement of Fran Jones that "we definitely have to have both" an end to redlining, so that minorities can expand into "white" areas, and a continued minority hold of inner-city stores); *id.* at 27–28 (explanation of Donald Lopes for his belief in nonreciprocal exclusivity, that is, that minorities should own the franchises in minority areas, while in other areas they should be free to enter the market and have the same opportunities to be franchisees as do whites).

271. *See* Hamil Harris, *Council Bill Aimed at 7–Eleven "Redlining": Southland Denies Allegations from Black Franchisers*, WASH. AFRO AM., May 14, 1988, at A1; Jim Schachter, *NAACP to Help Southland Corp. End Dispute*, L.A. TIMES, Nov. 19, 1987, at D2.

272. *See infra* notes 281–85 and accompanying text.

273. *See infra* notes 286–89 and accompanying text.

274. *See* Howard v. BP Oil Co., 32 F.3d 520 (11th Cir. 1994) (discussed *infra* notes 292–97 and accompanying text); Harper v. BP Exploration & Oil Co., 896 F. Supp. 743 (M.D. Tenn. 1995) (discussed *supra* notes 125–30 and accompanying text), *aff'd*, 134 F.3d 371 (6th Cir. 1998).

275. *See* McDonald's Corp. v. Griffis, No. 83–1739–LEW KX (C.D. Cal. Mar. 1983) (first amended counter-claim filed on July 27, 1983) (discussed *infra* notes 298–302 and accompanying text).

In 1990, an arbitrator found Southland, the parent company of the 7–Eleven chain of convenience stores, liable for intentional racial discrimination against a black couple who owned two of the company's convenience stores in the Los Angeles area.[278] The arbitrator found that Southland officials improperly pressured the couple to sell their 7–Eleven store in a predominantly white area of Venice, and awarded the couple $500,000 in damages, $200,000 in attorney fees and unspecified legal expenses.[279] Southland had previously refused to sell the store to a black buyer, instead arranging the sale of the Venice location to a white franchisee who already owned three 7–Eleven outlets, but did not meet the company's usual financial standards.[280]

Recently, an African-American car dealer sued GM for alleged racial discrimination in terminating his franchise after twenty-three years.[281] After losing his Bronx dealership in 1995, the dealer lost his attempt to relocate to neighboring Yonkers, New York.[282] The franchisee, Dick Gidron, contended that he was victimized by a GM marketing strategy, "Project 2000," under which a third of GM's dealerships—mostly in minority, crime-plagued, and "least favored" areas—were to be shut down or moved.[283] Targeted dealerships were denied the financial, sales and product support that GM provided to preferred franchises, and

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276. *See* Hall v. Burger King Corp., 912 F. Supp. 1509 (S.D. Fla. 1995) (discussed *infra* notes 312–15, 326–29 and accompanying text). For more discussion of *Hall*, see Emerson, *supra* note 45.

277. Another example, involving a nonfranchisor, is Wal–Mart. *See* Eric L. Smith, *Caught Red-handed? Civil Rights Group Charges Wal–Mart with Retail Redlining*, BLACK ENTERPRISE, May 1996, at 21, *available in* 1996 WL 8333645. Three minority-controlled plaintiffs, including a black-owned real estate development and management company, have sued Wal–Mart for rejecting a proposal to build a store in a predominantly black St. Louis suburb, despite a study allegedly indicating that the area's economic demographics are superior to those of a nonblack area in Springfield, Missouri, where Wal–Mart constructed a store. *Id.* The plaintiffs' allegation of "commercial retail redlining in minority communities" was denied by a Wal–Mart representative, who stated that Wal–Mart has about 20 stores in the St. Louis area and hundreds of stores in towns and cities with significant minority populations. *Id.* Query: Does the spokesman's response refute the redlining allegations? The very nature of redlining is not that there are few or no stores in a metropolitan area with a large black population, but that African-American neighborhoods and businesses are excluded, restricted in their economic opportunities, or otherwise ill-served.

278. Stuart Silverstein, *Southland Corp. Found Guilty in Racial Bias Case*, L.A. TIMES, Feb. 6, 1990, at D1.

279. *Id.*

280. *Id.*

281. Richard Pyle, *Former Bronx Car Dealer Sues GM for $357 Million*, ASSOCIATED PRESS, July 15, 1996, *available in* 1996 WL 4431533.

282. *Id.*

283. *Id.*

GM's "streamlining" was actually a thinly veiled effort to redline, according to the plaintiff.[284] The case remains in litigation.[285]

In another redlining car dealership case, former Ford dealers, all graduates of Ford's minority dealer training program, sued Ford in federal court and alleged, among other things, that Ford lured them into poor locations where they were bound to fail.[286] In testimony before the House Committee on Small Business, James Mitchell, the Vice President of the Lincoln–Mercury Division, Black Ford–Lincoln–Mercury Dealers Association, stated:

> The Ford Motor Co. has given an opportunity of ownership to over 550 minority operators in the last 12 to 13 years. At the present time, we are less than 200 operators still in business. We [African Americans] are usually given the opportunity for smaller points [operations] for two reasons. One, [Ford] feel[s] that [the] management skills [of African Americans] are not [adequate to] handle a larger store, and [that the financial] resources needed for a larger store [are] not there.[287]

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284. *Id.*; *see also Ex-N.Y. Dealer Loses Franchise, Sues GM*, AUTOMOTIVE NEWS, July 22, 1996, at 24; Hocker, *supra* note 157, at 30; Brian Lysaght, *Ex-auto Dealer Sues GM for Discrimination*, DENVER POST, July 16, 1996, at C11; *GM Sued for $357 Million*, ARIZ. REPUBLIC, July 16, 1996, at E1; *The Auto Game*, *supra* note 158, at A1 (quoting a former GM manager, Bill Johnson of Montgomery, Alabama, who states, "African-American dealers are put into deteriorating locations that White dealers have sat on for 20 or 30 years. When you mix a deteriorating location with lack of experience and lack of sufficient capitalization, then you're sitting on a time bomb").

285. In another case involving allegations of an indirect form of financial "redlining" (against customers), GM dealer Charles Bell obtained an $18.8 million judgment against GM and the General Motors Acceptance Corporation ("GMAC"). A part of Bell's case concerned the extreme difficulty many of his customers faced in obtaining credit to purchase a car. A study produced for the trial indicated that the predominantly African-American credit applicants at Bell's Tuskegee dealership were 25.1% less likely to be approved for financing by GMAC than a credit appplicant at a white-owned dealership in neighboring Montgomery. *The Auto Game*, *supra* note 158, at 1A. However, the Alabama Supreme Court reversed the judgment and remanded for a new trial on Bell's misrepresentation claim. General Motors Corp. v. Bell, No. 1950506, 1996 WL 532507, at *21 (Ala. Sept. 20, 1996).

286. Greg Bowens & Larry Armstrong, *Hardly a Showroom for Equal Opportunity*, BUS. WK., Feb. 15, 1993, at 37.

287. *Minorities and Franchising: Hearing Before the House Comm. on Small Business*, *supra* note 252, at 19 (testimony of James Mitchell, Vice President, Lincoln–Mercury Division, Black Ford–Lincoln–Mercury Dealers Association). At the 1991 hearing, eight franchisees or franchisee advocates provided a series of anecdotes about minorities in franchising and the boorish behavior and abysmal statistical record of some franchisors. *Id.* at 5–39. That theme continued in subsequent hearings. *See Minority Franchising: Is Discrimination a Factor? Hearing Before the House Comm. on Small Business*, *supra* note 23 (testimony of six more franchisees or franchise advocates lambasting franchisor practices toward minorities in general); *Racial Discrimination in*

Ford admitted that available dealerships are often in predominantly white rural areas where it is hard for minorities to succeed.[288] Of course, Ford has denied any discriminatory intent,[289] and no reported court decisions have found Ford liable for redlining.

Two separate court actions have led to well-publicized jury findings that BP Oil Company has engaged in redlining. In one of the cases, *Harper v. BP Exploration & Oil Co.*,[290] an African-American BP dealer in Nashville, Tennessee, was held to have been discriminated against under both Tennessee civil rights laws and under federal civil rights law (section 1981).[291] In the other case, *Howard v. BP Oil Co.*,[292] the Court of Appeals for the Eleventh Circuit reversed a summary judgment for BP and held that genuine issues of material fact were presented by an African-American dealer, Cornelious Howard, who claimed that BP had redlining policies that favored white and Asian dealers and discriminated against Howard because of his race.[293] A federal jury in Georgia subsequently found that the oil company unlawfully had limited Howard to a dealership location in Southwest Atlanta where his chances of success were far less promising than for a dealership located in the more affluent neighborhood where Howard actually lived.[294] Howard won more than one million dollars in damages: $954,000 in punitive damages and $106,000 in compensatory damages.[295] Also, in return for giving up his judicially declared right to another dealership,[296] Howard agreed to take from BP a $225,000 settlement payment.[297]

Awarding Toyota Dealerships, *supra* note 157 (testimony and written statements of seven such individuals alleging discrimination by one particular franchisor, Toyota).

288. Bowens & Armstrong, *supra* note 286, at 37.

289. *Id.*

290. 896 F. Supp. 743 (M.D. Tenn. 1995), *aff'd*, 134 F.3d 371 (6th Cir. 1998).

291. *Id.* at 746. The *Harper* decision is described *supra* notes 125–30 and accompanying text. The winning dealer in *Howard v. BP Oil Co.* testified against BP and on behalf of the dealer in the *Harper* case. Glenn Henderson, *Harper Wins BP Race Bias Lawsuit*, NASHVILLE BANNER, Aug. 24, 1995, at A12.

292. 32 F.3d 520 (11th Cir. 1994).

293. *Id.* at 522–23. The court reversed the summary judgment primarily because it found that BP's inconsistent explanations, the problems in testimony by BP's employees, and BP's absence of any written criteria cast sufficient doubt on BP's explanation for its choice of dealers. *Id.* at 526–27.

294. Ernest Holsendolph, *Courts Reshaping Corporate Thinking on Discrimination*, ATLANTA J.–CONST., Dec. 9, 1996, at E12.

295. Bill Rankin, *Cobb Race Bias Case Costs BP $1 Million*, ATLANTA J.–CONST., Dec. 15, 1994, at D2. The judgment was affirmed without a reported decision, on November 12, 1996. Howard v. BP Oil Co., 102 F.3d 555 (11th Cir. 1996) (table).

296. U.S. District Judge Marvin Shoob ordered BP to give Howard his choice among several BP dealerships in a prime metropolitan area—the northern section of Atlanta. Bill Rankin, *BP Oil Ordered to Give Black Man Choice of Dealerships*, ATLANTA J.–CONST., July 22, 1995, at A1.

297. Holsendolph, *supra* note 294, at E12. Another gasoline dealership redlining case concerns a Texaco dealer, Farhan Ahmed, who alleges, among other things, that Texaco sought to have him move from a profitable metropolitan area to a "significantly less

In one of the more notable redlining cases, *McDonald's Corp. v. Griffis*,[298] Charles Griffis, a black McDonald's franchisee in Los Angeles, alleged, in a counterclaim, that the McDonald's Corporation specifically refused, on several occasions, to sell him a franchise in a white neighborhood, even though Griffis was deemed the best qualified candidate by McDonald's own arbitrator of franchise disputes. Griffis brought a number of counterclaims against McDonald's, including one based on section 1981,[299] and his charges were accepted and disseminated by both the National Association for the Advancement of Colored People ("NAACP") and the National Black McDonald's Operators' Association.[300] Ultimately, McDonald's paid Griffis $4.7 million; McDonald's representatives said the payment was simply a fair price for purchasing Griffis' four inner-city restaurants, but Griffis' attorneys labeled the payment a settlement of the racial discrimination charges.[301] The assessment by Griffis' lawyers seems accurate given that the settlement took place shortly after the U.S. District Court for the Central District of California dismissed all charges against McDonald's except for a discrimination claim.[302]

Several other redlining cases have been filed against McDonald's.[303] For example, in *Sanchez v. McDonald's Corp.*,[304] McDonald's was sued in 1991 by a Hispanic franchisee who contended that he was forced to sell his Houston franchise at a below-market price and induced to buy a troubled, inner-city franchise in Baltimore. Franchisee Sanchez alleged that he was denied the right to sell his Houston franchise to an African-American buyer and was told that the demographics for that restaurant meant that he must sell only to a white or a Hispanic.[305] Sanchez further alleged that McDonald's personnel told him the work force at his Baltimore restaurant, almost all black, had to be one-hundred percent

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profitable location" in Seattle's Central District. Gil Bailey, *Texaco Franchisee Sues over Relocation: Re-assignment from Bothell Is Called Race Discrimination*, SEATTLE POST-INTELLIGENCER, Feb. 15, 1997, at A11. The dealer, a Somalian immigrant, alleges racial discrimination. *Id.*

298. No. 83-1739-LEW KX (C.D. Cal. Mar. 1983); *see* Tamar Lewin, *McDonald's Dispute on Coast*, N.Y. TIMES, Nov. 9, 1984, at D5; Lynne Reaves, *McBias Case over: Burger Chain, Operator Settle*, A.B.A. J., Jan. 1985, at 25.

299. *See* Defendant's First Amended Counter-Claim, McDonald's Corp. v. Griffis, No. 83-1739-LEW KX (C.D. Cal. filed July 27, 1983).

300. Lewin, *supra* note 298, at D5.

301. *Id.*

302. Reaves, *supra* note 298, at 25.

303. *See, e.g.*, Sanchez v. McDonald's Corp., Civ. Action No. K-91-2135 (D.Md. filed July 29, 1991) (discussed *infra* notes 304-11 and accompanying text); Robinson v. McDonald's Corp., Civil Action No. W87-0127 (S.D. Miss. filed Nov. 16, 1987) (settled before trial, Telephone Interview with David J. Aronofsky, plaintiffs' counsel (May 29, 1997)); McMillan v. McDonald's Corp. (Dist. Ct., Harris County, Tex., filed April 7, 1989) (settled before trial, Telephone Interview with Marie Hughes, secretary for Julius Glickman, plaintiffs' counsel (May 26, 1997)).

304. Civ. Action No. K-91-2135.

305. Plaintiff's Complaint, ¶ 27, at 9, Sanchez v. McDonald's Corp., Civ. Action No. K-91-2135.

African American because the restaurant was in a neighborhood purported to be totally African American.[306] Allegedly, McDonald's mistakenly transferred the Baltimore franchise to Sanchez when it was supposed to go to an African American (and Sanchez should instead have gotten a "white neighborhood" McDonald's).[307] Sanchez's complaint, which alleged franchisor discrimination against him based on his Mexican-American nationality,[308] alleged sections 1981 and 1982 violations[309] as well as breach of contract, tortious interference with prospective business, fraud, negligent misrepresentation, breach of the franchisor's implied duty of good faith and fair dealing, and a violation of Maryland's franchising statute.[310] Sanchez lost on all counts, including his allegations of racial discrimination in the franchise award, sale, and operations of McDonald's in both Houston and Baltimore.[311] *Sanchez* underscores an obvious point: asserting discrimination is fairly easy, but proving it is often quite difficult.

That same principle applies to a redlining charge brought against Burger King. In *Hall v. Burger King Corp.*,[312] two of the plaintiffs alleged that Burger King Corporation's real estate agent tried to discourage their purchase of a new location in a predominantly white neighborhood, even though they were two well-established franchisees, by "telling them the Klu [sic] Klux Klan would not want them in the area."[313] The Burger King Corporation denied "knowledge or information sufficient to form a belief as to the truth [of this allegation], and denied it caused the two black franchisees to encounter any problems."[314] The plaintiffs' claims were dismissed before trial.[315]

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306. *Id.* ¶ 33, at 11–12.

307. *Id.* ¶¶ 37–39, at 13–14. More recently, Latino business advocacy groups and numerous franchisees have voiced complaints that most franchisor affirmative action programs are devoted almost exclusively to African-American recruitment and retention, to the detriment of worthy Latino prospects. Rechtin, *supra* note 162, at 7.

308. Plaintiff's Complaint, ¶¶ 17, 30, 35, at 6–7, 11–13, Sanchez v. McDonald's Corp., Civ. Action No. K–91–2135.

309. 42 U.S.C. §§ 1981–1982 (1994).

310. MD. CODE ANN. BUS. REG. §§ 14–201 to 14–233 (1992 & Supp. 1997).

311. Sanchez v. McDonald's Corp., 21 F.3d 424 (4th Cir. 1994) (unpublished table decision), *available in* 1994 WL 83892 (affirming the district court's holding and reasoning).

312. Plaintiffs' Second Amended Class Action Complaint, Hall v. Burger King Corp., Civ. Action No. 890–620–CD–Kehoe (S.D. Fla. Feb. 20, 1989).

313. *Id.* ¶ 185, at 61.

314. *Hall*, Answer to Second Amended Complaint and Counterclaims, ¶ 152, at 30–31.

315. Hall v. Burger King Corp., 912 F. Supp. 1509 (S.D. Fla. 1995). Indeed, the two franchisees with the allegations of the Ku Klux Klan comments, as well as all but seven of the original 24 plaintiffs, discontinued their claims against Burger King after their motion for class certification was denied. *Id.* at 1515. This case is further discussed in Emerson, *supra* note 45.

Even when efforts are made to increase the number of black dealerships in a franchise system, franchisors still often cling to the redlining mentality. In 1991, GM announced a plan to increase minority dealerships forty percent by 1994.[316] GM indicated that it would establish an unspecified number of dealerships, primarily in cities with large minority populations, such as Detroit, Chicago, and Houston.[317] Nonetheless, as of 1996, only three percent of GM's dealerships were owned by minorities.[318] More important, though, may be the fact that GM's realizing of its minority dealership goals is premised on matching new minority dealers with communities predominantly populated by that same minority group. The plans thus may reflect a redlining mind-set, and may be partly responsible for at least one lawsuit alleging redlining.[319]

3. Summation

Until capable minority franchisees are given the opportunity to expand outside of their traditional ethnic marketplace, the problem of redlining by franchisors will persist. Redlining in franchising is not just a problem of restricting minority franchisees to inner-city areas where the costs of doing business are higher and the earnings potential is lower, but is a problem of shutting out minorities from other lucrative markets, no matter where they may be. Thus, although redlining, like any claim of discrimination, is extremely difficult to prove,[320] and allegedly redlining franchisors are far less likely to be held

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316. Margo Walker, *GM to Add Dealerships*, BLACK ENTERPRISE, June 1991, at 36.

317. *Id.*

318. O'Dell, *supra* note 149, at D1. Japanese car manufacturers typically have a far worse record, but many, such as Mitsubishi, have recently announced their own, systemwide efforts at improvement. *See* Bivins, *supra* note 160; *Remarks by Richard D. Recchia*, *supra* note 160; Sawyers, *supra* note 160.

319. *See supra* notes 281–85 and accompanying text (discussing a suit brought by an African-American franchisee).

320. The franchisee must show that the primary reason he or she was denied a franchise in a specific location is because of race, national origin, or some other illegitimate discriminatory reason. "If the defendant's proffer of credible, nondiscriminatory reasons for its actions are sufficiently probative, then the plaintiff must come forward with specific evidence demonstrating that the reasons given by the defendant were a pretext for discrimination." Brown v. American Honda Motor Co., 939 F.2d 946, 950 (11th Cir. 1991). However, with the passage of the Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1071 (1991), which significantly modifies the Civil Rights Act of 1964, it appears that Congress has adopted a more rigorous standard than that previously formulated by the courts, with the ultimate burden of persuasion now falling upon the defendant/employer in a discrimination suit. To illustrate, with employment policies that seem on their face to be neutral but that have the effect of excluding individuals because of race, color, sex, et cetera, it appears from the Civil Rights Act of 1991 that employers now must demonstrate more than simply "credible, nondiscriminatory reasons for its actions." The employer must show that the practice at issue is "job related for the position" and also that it is "consistent with business necessity." *See* Janell Kurtz et al., *The Civil Rights Act of 1991: What Every*

accountable than are "quasi-public institutions" such as banks and insurers,[321] if redlining can be established, it demonstrates that franchisors have implicitly limited the return on investment that their minority franchisees can expect.[322]

D. Franchise Market Price Determination

Franchisees' claims of discrimination have occasionally raised the issue of market price determination for new and current franchises. Class action lawsuits have been filed in the District of Columbia, Puerto Rico, and Minnesota[323]

Small Business Needs to Know, J. SMALL BUS. MGMT., July 1993, at 103, 105; Amy Saltzman & Ted Gest, *Your New Civil Rights: Female, Minority and Disabled Employees Get More Power to Fight Back*, U.S. NEWS & WORLD REP., Nov. 18, 1991, at 93; Ellyn E. Spragins, *The New Civil Rights Act*, INC., Aug. 1992, at 81(1).

321. Betsy Jelisavcic, *When 'Redlining' Isn't: Only Banks and Insurers Are Required to Do Business in Minority Neighborhoods*, BLOOMBERG BUS. NEWS, Nov. 17, 1996, at 6H (quoting W.H. Knight, a banking law professor at the University of Iowa Law School).

322. If it is not a poor location, franchisees—minority or otherwise—sometimes claim, in effect, the opposite: that the location was sufficiently marketable for the franchisors to open additional units, whether owned directly by the franchisor or by another franchisee, in close proximity to the first location. Franchisees charge that even after the franchisor must have known the new units were cannibalizing the first franchisee's sales, it often refuses to permit that franchisee to open another unit or buy the neighboring outlets. For an example that encroachment claims may be viewed as entirely distinct from discrimination claims, see *Lewis v. McDonald's Corp.*, No. 94–1351, 1995 WL 699707 (6th Cir. 1995) (encroachment claim by a black McDonald's franchisee against McDonald's for awarding a franchise, about 1.5 miles from his restaurant, to another black male; summary judgment for the defendant due to the plaintiff's longstanding delinquency in royalties payments). *See also, e.g.*, Scott Higham, *Franchisee Wins 1st Round over McDonald's; Owner of 3 Stores Sues over Chain's Saturation*, BALTIMORE SUN, Jan. 28, 1997, at C1 (Osborne A. Payne, the first African-American McDonald's franchisee in Baltimore and the present owner of three franchises, sued McDonald's because the franchisor had established new McDonald's restaurants near his restaurants, including some within blocks of his units. Although Payne allegedly owed almost $200,000 in rent and service fees and, for the duration of their dispute, continued to withhold from McDonald's a portion of the current amount due the franchisor, the judge denied McDonald's request for a temporary restraining order forcing Payne to close his restaurants.).

The problem of encroachment serves to indicate that, throughout the term of a franchise, a franchisee may face significant problems that make any initial start-up difficulties (e.g., financing) pale by comparison. For more on these matters, see Robert W. Emerson, Franchising Encroachment: Private Solutions to a Systemic Problem (Mar. 1998) (unpublished manuscript, on file with author). According to the President of the American Franchisee Association, franchisees consider encroachment their "number one problem." Richard Gibson, *Court Decides Franchisees Get Elbow Room*, WALL ST. J., Aug. 14, 1996, at B1. A recent court decision and a state enactment attempting to compensate franchisees for encroachment are, respectively, *Vylene Enters. v. Naugles*, 90 F.3d 1472 (9th Cir. 1996), and IOWA CODE ANN. § 523H.6 (West Supp. 1997).

323. *See* Josephine Marcotty, *Suit Challenges Burger King Offer*, MINNEAPOLIS STAR & TRIB., Feb. 20, 1991, at D1. The result in the case originally filed in Washington,

alleging that franchisors have charged minorities up to twice the market price charged to nonminorities for comparable franchises. In addition, these franchisees also alleged that the franchisors tricked them into accepting inferior locations. However, it is important to note that none of these allegations have been proven, and neither the NAACP nor the Reverend Jesse Jackson and other leaders of the Chicago-based operation, People United to Serve Humanity ("PUSH"),[324] have publicly supported these suits.[325] Indeed, if a franchisor has committed the acts alleged, it has carried out one of the most blatant campaigns of franchise discrimination imaginable: charging minority franchisees up to twice as much for the same license, goods, or services as provided to white franchisees.

The most prominent case involving allegations of discriminatory franchise prices may be *Hall v. Burger King Corp.*[326] There, several minority franchisees alleged that the Burger King Corporation imposed more rigorous and costly operational and financial requirements on minority franchisees in an effort to prohibit them from acquiring new franchises in locations where the company deemed the franchisees unsuited to operate.[327] Such units were, for the most part, located in more lucrative suburban areas with higher sales potentials.[328] The death of the class certification effectively killed these claims.[329] As for potential redlining claims by nonfranchisees, case law makes it quite difficult for these parties, such as lenders, to maintain their own actions if they are centered upon the

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D.C. (and then transferred to the Southern District of Florida), *Hall v. Burger King Corp.*, 1992–2 Trade Cas. (CCH) ¶ 70,042 (S.D. Fla. Oct. 26, 1992), *available in* 1992 WL 372354, indicates, though, that success in such actions is improbable because the plaintiffs' first obstacle—class certification—is quite difficult to overcome.

324. The organization was originally called People United to Save Humanity. It was founded and originally headed by civil rights leader, Jesse Jackson. Joyce Purnick & Michael Oreskes, *Jesse Jackson Aims for the Mainstream*, N.Y. TIMES, Nov. 29, 1987, § 6 (Magazine), at 28.

325. Malcolm Gladwell & Paul Farhi, *Black Franchise Owners Sue Burger King Firm*, WASH. POST, Oct. 18, 1988, at C1. (In defense of franchisor Burger King, the principal defendant in these suits, PUSH officials have said that, "based on the quarterly meetings they have had with Burger King during the past few years to review the company's affirmative action record, the fast food chain had performed well.").

326. Hall v. Burger King Corp., Civ. Action No. 890–620–CD–Kehoe (S.D. Fla. Feb. 20, 1989); *see* Emerson, *supra* note 45; *supra* notes 312–15 and accompanying text.

327. Plaintiffs' Second Amended Class Action Complaint, ¶¶ 32–47, at 12–20, Hall v. Burger King Corp., Civ. Action No. 890–620–CD–Kehoe.

328. *Id.*

329. Soon after the trial judge decided against certifying the class, Hall v. Burger King Corp., 1992–2 Trade Cas. (CCH) ¶ 70,042 (S.D. Fla. Oct. 26, 1992), *available in* 1992 WL 372354, almost all of the individual cases died, as 17 of the 24 plaintiff-franchisees either discontinued or abandoned their individual claims against Burger King. Hall v. Burger King Corp., 912 F. Supp. 1509, 1515 (S.D. Fla. 1995).

franchisor's alleged mistreatment of the franchisee, not the party with whom the franchisee dealt (e.g., its lender).[330]

E. The "Greenlining" Alternative to Redlining

An alternative to redlining that has achieved some success is *greenlining*, which attempts to appeal to corporate self-interest by encouraging investment in inner-city areas. Many companies are beginning to see the profit potential of doing business within the minority community,[331] a market that is increasing at an annual rate of thirty percent as compared with eleven percent growth in the white community.[332]

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330. *See, e.g.*, Capital Nat'l Bank of N.Y. v. McDonald's Corp., 625 F. Supp. 874 (S.D.N.Y. 1986) (holding that lender to insolvent fast-food franchisee lacked standing to bring civil rights claims against franchisor).

331. *See* Paul C. Judge, *Minority Auto Dealers Face More than Just the Recession*, N.Y. TIMES, Feb. 17, 1991, at F4.

332. Lynnette Hazelton, *Japanese Sun Has Yet to Rise on Minority Dealerships*, BLACK ENTERPRISE, Aug. 1988, at 20; *accord* Joseph N. Boyce, *Nonwhites Wake to 'American Dream': Survey Finds Hot Pace in Housing, Business, Education*, WALL ST. J., Oct. 7, 1997, at A2 (reporting on a study that concludes each of the three main minority groups—African Americans, Hispanics, and Asian Americans—is, on average, so rapidly outpacing white America in per capita growth of mortgage originations, business ownership, and college degrees that all three groups could reach parity with whites over the next ten years; finding that the average annual percentage growth in business ownership, from 1987 through 1996, was 7.55% for blacks, 8.11% for Asian Americans, and 11.85% for Hispanics, but only 1.52% for whites); *"Do Good" Won't Do It on the Supply Front*, PURCHASING, Feb. 16, 1995, *available in* 1995 WL 8466976 (stating that minorities and women now comprise the biggest sales growth market for many businesses, with minorities constituting nearly 40% of the American population by the year 2015); Rochelle Sharpe, *Stuck in a Niche: Japanese Bank in U.S., Built for One Minority, Is Pressed to Aid Others*, WALL ST. J., Dec. 30, 1996, at A1 (concerning the low levels of employment, and of contracting with, American blacks by Japanese companies operating in the United States; noting that 1995 EEOC statistics show that Japanese-controlled companies in the United States had only a 9.6% black work force compared to 13.1% for American-controlled employers, and that blacks were only 3.9% of the managers for the Japanese-controlled companies, but 5.8% of the managers in the American-controlled companies). According to the U.S. Bureau of Labor Statistics, from the years 1990 to 2005, over half of the growth in the American labor force will come from minorities: 28% Hispanic, 16% African American, and 10% Asian. U.S. BUREAU OF THE CENSUS, *supra* note 150, at 19 tbl.19 (stating that the middle series of projected population growth will lead to the white, non-Hispanic population going from 72.5% of the total population in 1998 to just 68.0% in 2010; predicting, via its middle series of projections, that from the years 2000 to 2010 the white, non-Hispanic population will increase by just 2.7%, while in that same time period the Hispanic population will grow by 31.2%, the black population by 11.6%, the Native American, Eskimo, and Aleut population by 12.9%, and the Asian and Pacific Islander population by 36.1%); *Keep Affirmative Action Alive*, BUS. MARKETING, June 1, 1995, at 8, *available in* LEXIS, Busmkt File.

Many organizations have combined to encourage greenlining. For example, in California the Greenlining Institute, a San Francisco-based coalition started in 1979, includes over a dozen multiethnic and public service organizations, among them the California Council of Urban Leagues, the Filipino-American Political Association, and Consumer Action.[333] Some of the Greenlining Institute's proposals entail increased financial assistance to entrepreneurs in inner-city areas, including prospective franchisees.[334] While Congress has not enacted a similar, publicly funded program—one centered around an inner-city enterprise zone—thirty-five states and the District of Columbia, perhaps more in touch with the day-to-day difficulties of unemployment and its ancillary social problems, have authorized these enterprise zones.[335] Within these zones, the states in the early 1990s created approximately 663,885 jobs and stimulated investment of nearly $41 billion by offering incentives to existing and prospective employers.[336]

VII. REACTIONS BY BOTH THE PUBLIC AND PRIVATE SECTORS TO DISCRIMINATION ALLEGATIONS

A. Franchisor-initiated Affirmative Action Programs

1. Responses to Discrimination Claims and Outside Pressure

Discrimination claims have been on the rise not just in the franchising arena, but in most areas of business generally.[337] In fiscal 1989, there were 7613

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333. George Dean & Robert Gnaizda, *Greenlining: An Equal-opportunity, Grass-roots Antidote to Redlining Economics*, L.A. TIMES, May 13, 1990, at M5.

334. *See* Jaret Seiberg, *Merrill Lynch Commits $77M to Invest in Urban Los Angeles*, AM. BANKER, Sept. 12, 1996, at 3 (detailing the pledge of securities firm Merrill Lynch to invest $77 million dollars in urban Los Angeles over the next three years, including $25 million for small-business lending and equity investments; the pledge was arranged by the Greenlining Institute).

One franchisee advocate has listed a number of "creative equity financing strategies" that franchisors could implement to assist worthy, but underfinanced minority candidates for a new franchise: deferring the franchise fee, providing part of upfront equity (paid back in royalty payments), and using public financing programs that permit lower equity participation for the financing of fixed assets. Kezios, *supra* note 260, at 452. She further notes some "creative debt strategies": structuring the term for a longer amortization, deferring principal and interest payments, structuring an "interest-only" payment plan for the first six to twelve months of operations, and obtaining loans from lenders (e.g., friends, relatives, investors, or oneself) likely to be more patient about repayment than are institutional lenders. *Id.*

335. *See* John S. DeMott, *Recasting Enterprise Zones: Federal Action Could Give a Shot of Adrenaline to What's Already Happening at the State Level*, NATION'S BUS., Feb. 1993, at 16.

336. *Id.*

337. The Civil Rights Act of 1991 was foreseen as likely to increase dramatically the number of employment discrimination lawsuits and the size of judgments in those

federal lawsuits alleging acts of employment discrimination, an increase of 2166% over the past two decades.[338] The numbers of lawsuits, and also of administrative proceedings, have continued to increase tremendously throughout the 1990s, although much more so, on a percentage basis, for allegations of sex discrimination (or other categories, such as age and religion) than for racial discrimination.[339] The Equal Employment Opportunity Commission ("EEOC"), though, finds no wrongdoing in about two-thirds of its cases,[340] and those remaining cases that may proceed to court are still unlikely to succeed.[341]

Because of numerous frivolous charges of discrimination,[342] and perhaps also due to special difficulties associated with claims based on race,[343] the chance

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lawsuits because of provisions in the act that make a jury trial available and increase the amount of potential damages recoverable. *See* Kurtz et al., *supra* note 320; Saltzman & Gest, *supra* note 320; Spragins, *supra* note 320. That belief apparently has come true. *See infra* notes 338–39 and accompanying text.

338. Daniel B. Moskowitz, *Changes in Equal Employment Opportunity Commission to Spark Debate*, WASH. POST, Jan. 1, 1990, at F31 (suggesting that every time a woman, black, Hispanic, or older worker is let go, even for the most legitimate of reasons, there is a strong possibility that a lawsuit will be filed).

339. Alan L. Rupe & Jane Holt, *Who Is Disabled in Kansas*, 35 WASHBURN L.J. 272, 276 (1996) (table listing employment discrimination complaints filed annually with the Equal Employment Opportunity Commission from 1990 through late 1995). The figures show an overall increase in each category (age, disability, equal pay, national origin, race, religion, retaliation, and sex), with most categories increasing each year. *Id.* The total number of complaints went from less than 80,000 in 1991 to well over 200,000 in 1995. *Id.* While the number of racial discrimination complaints stayed about the same for the years 1990 through 1994, it then shot up by over 70% in 1995; sex discrimination and religious discrimination complaints rose, on average, over 10% annually for the years 1990–94, and then more than doubled in 1995. *Id.* By 1995, discrimination claims based on race and sex remained the most common, with each numbering over 50,000. *Id.*

340. Evan Ramstad & Louise Lee, *Circuit City Suit Shows Problems in Proving Bias*, WALL ST. J., Nov. 18, 1996, at B1.

341. *Id.* Note, also, that the EEOC simply counts as "resolved" the thousands of complaints annually withdrawn unilaterally by the claimants. *Id.* (listing EEOC race-discrimination complaints and resolutions data for the period from September 1991 to September 1996). Only 15% to 25% of complaints result in some compensation for the employee. Barbara Rosewicz, *EEOC Flexes New Muscles in Mitsubishi Case, but It Lacks the Bulk to Push Business Around*, WALL ST. J., Apr. 29, 1996, at A24.

EEOC-filed lawsuits remain rare. In 1990, for example, the EEOC filed suit for only about one percent of the discrimination complaints filed with the agency. *See* Saltzman & Gest, *supra* note 320, at 95. By 1995, the number of lawsuits had fallen to only 315, about 0.3% of the complaints filed, and the lowest level in ten years. Rosewicz, *supra*, at A24. One reason for the EEOC's relative inactivity is that it is, as former EEOC General Counsel Don Livingston puts it, "understaffed, underfunded and most of its efforts are spent trying to keep up. There's not a lot of time there for a proactive or activist approach." *Id.*

342. One may analogize to employment cases. The vast majority of employment discrimination cases are processed by the EEOC. Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 1 (1996). Of those cases that annually lead to a full investigation and an EEOC determination

of obtaining a judicial remedy against a franchisor who has acted in a discriminatory manner has likely diminished, as shown by the extremely low number of successful discrimination suits brought by franchisees. However, it is important to realize that just the filing of a discrimination claim, or the threat of such a claim, can be extremely damaging to the franchisor against which it is leveled. A charge of racial discrimination strikes at the very essence of our collective sense of morality and fair play;[344] thus, in this age when corporate image and goodwill are so valuable and the threat of a boycott is very real,[345] allegations of discrimination can inflict on a defendant business substantial economic damage.[346]

Charges of discrimination easily draw attention to, and perhaps sympathy for, a franchisee's or would-be franchisee's plight. Such charges also may draw the franchisor into a whirlwind of controversy, opprobrium, and shunning. The result is that any focus on the true nature of the charges may be lost; and, thus, it may matter little whether the alleged mistreatment of a franchisee is, in fact,

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on the merits, for the past two decades the rate of findings for the claimant has hovered each year between about 3.8% and 7.2%. *Id.* at 13 & n.51. The defendant thus has had, on average, about a 95% chance of winning a finding on the merits by the EEOC. *Id.* at 13. Even if one expands the pool of causes beyond determinations on the merits and also counts all settlements (conciliations), the claimant only obtains a favorable resolution less than 14% of the time. *Id.* at 13 & n.47; *see, e.g.*, RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 159–81 (1992) (arguing that Title VII distorts labor markets and that employment discrimination laws are too easily invoked or "overenforced"); John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 983–86 (1991) (stating that, to many people, Title VII's "drain on business" exceeds the utility of the statute; noting that between 1970 and 1989 employment discrimination filings increased by 2166%, almost twenty times the rate of growth as for other civil filings, which was only 125%).

343. In the field of employment law, the largest number of cases filed with the EEOC—over 40%—involve alleged racial discrimination, but they result in the fewest number of lawsuits, only about 19%. Selmi, *supra* note 342, at 17 & n.69.

344. In modern sociology and jurisprudence, this view may initially have come to prominence in the works of the Swedish sociologist Gunnar Myrdal, who suggested that Americans' belief in fairness and equality should undermine their discriminatory practices. *See generally* GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (20th Anniversary ed. 1962).

345. *NAACP Considers Launching Boycott of McDonald's over Minorities Issue*, [May] Daily Lab. Rep. (BNA) No. 96, at A2 (May 17, 1984).

346. *See* Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, *in* EQUAL EMPLOYMENT OPPORTUNITY: LABOR MARKET DISCRIMINATION AND PUBLIC POLICY 247, 253 (Paul Burstein ed., 1994) (noting that a business' failure to look compliant with antidiscrimination laws carries "an increased risk of legal liability and social disapproval"). For an analysis of the economic theory that discrimination will disappear, or at least become quite rare, in market economies driven to eradicate economic inefficiency, see GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION (2d ed. 1971); STANLEY LIEBERSON, A PIECE OF THE PIE: BLACKS AND WHITE IMMIGRANTS SINCE 1880 (1980).

franchisor discrimination against that franchisee or is simply the franchisor's objectionable behavior against a franchisee who happens to be a minority. There are a litany of complaints about franchisor behavior, and there are numerous sources of franchisor-franchisee "friction," none of which ordinarily relate to minority or gender status.[347] Many businesses, however, genuinely fear even the hint that they may be engaged in discrimination, and for a franchisor selling goods or services to the public to be prominently linked to odious acts of discrimination is an unmitigated disaster. Therefore, the mere threat of discrimination claims has led most large franchise systems to develop "voluntary" plans encouraging, inter alia, greater franchisee diversity.[348] It has caused many franchisors to join the International Franchise Association's attempt to develop greater minority opportunities in franchising. It may be reflected in the Association's code of ethics provision supporting privately implemented affirmative action programs and not labeling them as a form of proscribed discrimination.[349]

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347. *See, e.g.*, BROWN, *supra* note 9, at iii; *id.* §§ 2.02[3], 4.01, 4.02[3][b], 6.01[2], 7.07[7], 9.14[1], 9.14[5], 9.16[6], 9.16[10] (detailing numerous instances of egregious practices by franchisors and the gross disparities between powerful, ruthless franchisors and uninformed, weak franchisees); MUNNA, *supra* note 2; ROBERT L. PURVIN, JR., THE FRANCHISE FRAUD (1994). Large portions of the Brown treatise, and virtually the entire Munna and Purvin texts, emphasize the franchisee's utter impotence and lambast many franchisors' motives and actions. For example, some of the representative chapters and subchapters in the Purvin book are entitled, "The Plunder of an American Dream," "Franchisee *Abuse* Is a Bigger Problem Than Fraud," "Selling a Lie," "The Franchisor Owes You Nothing," "The Franchisee as Indentured Servant," "The False Promise of Business Ownership," "Illusory Promises," "Manifestations of Franchisee Expendability," "The Vicious Life Cycle of Franchisors," "The Franchise Termination Trap," "The Federal Government's Ignorance of the Franchising Industry," "The Inability of Our Legal System to Deal with Franchising Issues," "The Franchisees' Pathetic Scorecard," and "The Imbalance in Franchising." *Id.* at xix–xxi.

348. In 1985, after more than nine months of negotiations, the McDonald's Corporation and the NAACP announced McDonald's pledge "to establish 100 new black-owned restaurants over the [following] four years." Sandy Banks & Eric Malnic, *Wider Role for Blacks Pledged by McDonald's*, L.A. TIMES, Feb. 17, 1985, Metro Section, at 1. A group of officials from both the NAACP and McDonald's were appointed to monitor the success of the plan, which followed a 1984 "fair share" agreement between the NAACP and the Adolph Coors Company. *Id.*

Given that there were approximately 300 black-owned McDonald's franchises as of the beginning of 1985, *id.*, and that this number rose to 418 as of September 1989, Wernle, *supra* note 154, it appears that McDonald's met the target. By 1992, the McDonald's African-American franchisee total had risen to 658, another dramatic increase. For the current figures, see *supra* notes 152–56 and accompanying text and Table 3.

McDonald's, Burger King, and KFC all have independent, formal black franchisee associations. Brown, *supra* note 6; Mary Conroy, *Franchises Slow to Reflect Nation's Diversity*, WISCONSIN ST. J.—THE CAPITAL TIMES, Mar. 20, 1996, at C1.

349. After stating that franchisors and franchisees must not discriminate based on race, color, religion, national origin, sex, sexual preference, or disability, the code of ethics further provides:

This broad-based movement to adopt strong affirmative action programs has occurred even though the black-letter legal doctrine is that "neither the existence nor the lack of an affirmative action program [holds any] persuasive legal significance in determining...whether an employer had discriminatory intent."[350] It has occurred in an environment where government programs geared toward minority franchise recruitment are far less significant than the programs franchisors have created and tailored to their own particular systems.[351] Indeed, these privately initiated programs often have a life of their own, irrespective of the recently burgeoning legal doctrine that ostensibly undermines all affirmative action plans.[352]

> Franchisors and franchisees may utilize reasonable criteria in determining eligibility for its franchise and employees and may grant franchises to some franchisees and hire some employees on more favorable terms than are granted to other franchisees or employees as part of a program to make franchises and employment opportunities available to persons lacking capital, training, business experience or other qualifications ordinarily required of franchisees and employees. A franchisor and its franchisees may implement other affirmative action programs.

INTERNATIONAL FRANCHISE ASS'N, CODE OF PRINCIPLES AND STANDARDS OF CONDUCT, § V, pt. 10 (Sept. 19, 1996 ed.).

350. Green v. Kinney Shoe Corp., 715 F. Supp. 1122, 1124 (D.D.C. 1989).

351. In addition to franchisors offering assistance, some states have joined the program to assist minorities in obtaining franchises. By 1992, Florida had seven black business investment councils offering up to 70% guarantees on loans. *Board for Black Business in Florida Touted as a Model*, ST. PETERSBURG TIMES, Sept. 19, 1993, at I2. Another example is Maryland, which provides up to $100,000 of project costs through its Equity Participation Investment Program. Albert B. Crenshaw, *Md. Program May Help Disadvantaged Entrepreneurs Realize Dreams*, WASH. POST, June 5, 1989, at F6. Also, Pennsylvania's Minority Business Development Authority offers loans up to as much as $200,000 of project costs. *Dow Down 53.76*, READING TIMES & EAGLE, Oct. 3, 1992, at A11.

Although voluntary corporate concessions are always best, some franchisee advocates are pushing for legislation to increase not only the number of minorities employed by companies, but also the level at which they are employed. For example, Representative Henry B. Gonzales (D-Texas) and Representative Augustus F. Hawkins (D-Los Angeles) drafted legislation in 1990 that would have blocked any takeover or merger unless the acquiring corporation could demonstrate its commitment to equal opportunity. *See* Dean & Gnaizda, *supra* note 333, at M5. This proposal died in committee. There has been no similar legislative activity since then.

352. *See, e.g.*, Edelman, *supra* note 346, at 257–58 (stating that "organizations' collective response to law becomes the de facto construction of compliance; it is shaped only at the margins by formal legal institutions"; noting that the institutional process within American businesses evidently renders those businesses' equal employment opportunity and affirmative action ("EEO/AA") structures "somewhat immune from changes in the political environment"; concluding that, "over time, pressure shifts from the legal realm to the societal and organizational realms," with the businesses' personnel professionals, and often others, so strongly committed to institute proaffirmative action structures that their "waning political support has little immediate effect" and is highly unlikely even to

Some large oil companies and automobile manufacturers have adopted minority dealership development plans. One representative, private affirmative action program is Mobil Oil Company's use of its own capital to leverage an arrangement with black-owned OmniBank, whereby OmniBank will lend $45 million over three years to minority owners of new Mobil gasoline stations.[353] Shortly after it was announced, by July 1996, about eight station financings had already been completed, with the program targeting a gain of 150 new minority franchisees.[354] Each such franchisee would only have to put up $50,000 in equity to receive loans of up to $500,000.[355]

The Big Three Auto Makers (GM, Ford, and Chrysler) each offer assistance to minorities through dealer development programs.[356] Under these programs, the companies develop dealerships for African Americans seeking to become franchisees.[357] Once a dealership is "found," the manufacturer lends up to eighty-eight percent of the purchase price, with repayment to come, over time, from dealership profits.[358] Thus, many automobile manufacturers may assist minority dealers with equity financing.[359] For example, GM has long had a program in place intended to increase the number of minority dealers.[360]

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eventually lead to a business' outright dismantling or drastic reduction of EEO/AA structures); Anne B. Fisher, *Businessmen Like to Hire by the Numbers*, *in* EQUAL EMPLOYMENT OPPORTUNITY: LABOR MARKET DISCRIMINATION AND PUBLIC POLICY, *supra* note 346, at 269, 269–72 (noting strong evidence of the enormous breadth of corporate commitment to affirmative action, that larger American businesses want to have "numerical objectives" in their hiring of minorities regardless of what the government does in terms of public employment and contracting; also noting that once internal affirmative action systems are in place, a business cannot stop or even retreat from the program without stirring up trouble from some workers, customers, or other crucial constituencies).

353. Matt Roush, *Mobil Fuels OmniBank*, CRAIN'S DETROIT BUS., July 22, 1996, at 1, *available in* 1996 WL 8425773.

354. *Id.*

355. *Id.*

356. Kathy Jackson, *Big 3 Trim Efforts to Lure Black Dealers: Backlog of Trained Candidates Grows*, AUTOMOTIVE NEWS, Sept. 14, 1992, at 1, 37. As for a number of foreign manufacturers (American Honda Motor Company, Mitsubishi Motor Sales of America, Mazda Motors of America, Nissan Motor Corporation USA, Subaru of America, Volkswagen–United States, Mercedes Benz, BMW, and Volvo), until quite recently, they had no minority dealer development or training programs, nor even the intent to consider one. *Racial Discrimination in Awarding Toyota Dealerships*, *supra* note 157, at 94–95 (testimony of Mel Farr). Considering that at that time there were only 23 minority dealers out of 6305 U.S. dealerships (just 0.4%), the absence of any efforts seems remarkable.

357. Jackson, *supra* note 356, at 37.

358. *Id.*

359. Judge, *supra* note 331, at F4 (To prevent new minority dealers from insolvency in the early months of franchise ownership, Ford and GM place some dealers' investments in escrow accounts for the first few months.). However, still fewer than 1% of minority auto dealers own their franchises outright, the others are heavily in debt, and *over 80%* of minority dealers are on the verge of bankruptcy. *See Racial Discrimination in*

An industry leader in promoting minority franchises, Ford Motor Company has in the past fifteen years dramatically increased in number its black-owned dealerships,[361] and Ford evidently spends more time and money helping black entrepreneurs than any other car company.[362] Ford typically lends minorities most of the $3 million to $6 million dealership price, and pays them $40,000 per annum while they are trained for two years.[363]

In the 1980s, Ford was especially successful in finding and funding minority-owned dealerships, doing so for about ninety-five percent of qualified candidates.[364] But economic downturns always seem to adversely impact such programs, and even Ford, during the recession of the early 1990s, lost the impetus to bring in more minority franchisees.[365] In fact, in 1995 PUSH sought to reopen its 1988 affirmative action agreement with Ford.[366]

Often, franchisor-instituted affirmative action programs arise from outside pressure.[367] The activist group, PUSH, has led successful boycotts against

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Awarding Toyota Dealerships, *supra* note 157, at 6 (statement of the Honorable Barbara-Rose Collins).

360. *See supra* notes 316–19 and accompanying text.

361. *Ford Agrees to Increase Business with Blacks*, N.Y. TIMES, Dec. 21, 1988, at A17 (noting that the number of black-owned Ford dealerships increased from a mere 20 in 1982 to 246 (approximately 4.1% of total) in late 1988). Numbers continued to increase, as by 1992 the percentage of minority-owned Ford dealerships was 5.4% and by 1997 it was 6.9%. *See supra* Table 4.

362. *Ford Agrees to Increase Business with Blacks*, *supra* note 361, at A17 (In 1988, the total amount of Ford business with black-owned entities was $421 million.); Jim Mateja, *Ford Signs Pact with PUSH on Minority Gains*, CHI. TRIB., Dec. 21, 1988, § 3, at 1 (In 1988, Ford Motor Company spent $241 million on black suppliers, and the number of black dealers in the company reached 246, more than any other automotive company for that year.); Faye Rice, *The Rise of Black Auto Dealers*, FORTUNE, Aug. 14, 1989, at 115.

363. Bowens & Armstrong, *supra* note 286.

364. *See* Jackson, *supra* note 356, at 37.

365. Bowens & Armstrong, *supra* note 286. That recession caused a backlog of about 50 qualified African-American candidates who had not obtained Ford dealerships. *Id.*

In a field related to but distinct from franchising, the manufacturer-supplier relationship, Ford has pledged to target having at least five percent of its annual U.S. purchases come from minority suppliers by the year 2000. That would constitute an increase in Ford purchases from minority suppliers of almost 40% in five years, from $1.8 billion to about $2.5 billion. Diane Trommer, *Ford Establishes MBE Target*, ELECTRONIC BUYERS' NEWS 057, Apr. 1, 1996, at 57, *available in* 1996 WL 9426836 (As of 1995, Ford, Chrysler, and GM collectively purchased from minority suppliers each year about $4 billion in parts and services, with Ford already buying the largest share, about 45% of that total.).

366. *Activist Group Seeks to Reopen Ford Affirmative-action Pact*, AUTOMOTIVE NEWS, May 22, 1995, at 4.

367. *See* Brown, *supra* note 6, at 60 (contending that "[t]he vast majority of franchises don't have any African American owners," and that "a number of franchisors are willing to rectify the situation only when faced with discrimination suits"); Milford Prewitt, *Minority Operators Cash in on Spin-offs: PepsiCo Divestment of Restaurant Empire Should Benefit Minority Franchisees*, NATION'S RESTAURANT NEWS, Mar. 17, 1997, at 1 (quoting Fred Rasheed, a former NAACP economic empowerment advocate, who says that

franchises and their products in order to force changes in franchisors' minority hiring, contracting, and licensing practices concerning their employees, suppliers, and franchisees.[368] Campaigns have been launched against such major business entities as Kentucky Fried Chicken, Burger King, 7-Up, several large beer companies, television networks,[369] the NIKE Corporation,[370] and, most recently, Mitsubishi Motors.[371] Other groups, such as the NAACP, also have worked to spur franchisors to act.[372] Moreover, many community-based groups may be the very

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whenever large businesses decide to broaden the diversity of their franchisee base, it is usually because of some embarrassing, external event, not a heartfelt policy change).

368. Banks & Malnic, *supra* note 348; Purnick & Oreskes, *supra* note 324. Another group, the NAACP, has reached "Fair Share" agreements with about 80 franchisors. Jerry Thomas, *Agreements Help Minorities Unlock Doors of Big Business*, CHI. TRIB., Dec. 10, 1996, § 1, at 1. This number is up from only 17 as of early 1985. Banks & Malnic, *supra* note 348.

369. *See Boycotting Corporate America*, ECONOMIST, May 26, 1990, at 69; James Kelly, *When PUSH Gives a Shove*, TIME, Apr. 14, 1986, at 88. For criticism of PUSH's tactics and alleged conflicts of interest in its operation, see Mark Hosenball, *Jesse's Business: A Shakedown Racket*, NEW REPUBLIC, May 9, 1988, at 10. *See also* Holman W. Jenkins, *Jesse Jackson, Rainmaker*, WALL ST. J., Jan. 7, 1998, at A23 (criticizing PUSH and Jackson for pursuing covenants with corporations that favor an "ethnic elite" and for publicly espousing antidiscrimination while privately demanding racially based patronage and favoritism; arguing that the better course is for PUSH to abandon compulsory affirmative action and adopt a freedom-of-contract approach protecting companies' powers to design affirmative action programs without fear of lawsuits from either side).

370. NIKE believes that its staunch rival, Reebok, was behind the 1990 call of Jesse Jackson and PUSH to boycott NIKE products. PUSH demanded that NIKE grant contracts to minority businesses and hire blacks in proportion to its sales in the black community. PUSH contended that NIKE had no black vice presidents or board members, and that 40–45% of its sales were to black consumers. However, when NIKE presented evidence showing that only 13% of its products were sold to blacks, the public sided with NIKE and the boycott ended. *See* Donald Katz, *Triumph of the Swoosh*, SPORTS ILLUSTRATED, Aug. 16, 1993, at 54.

371. Henderson, *supra* note 159, at B6. PUSH announced that Mitsubishi and it had agreed to certain goals regarding Mitsubishi's hiring of minority employees and signing up of dealers and suppliers. *Id.*; *see also* Bivins, *supra* note 160; Sawyers, *supra* note 160; Barbara Wanner, *PUSH Called for Boycott of Mitsubishi Products*, JEI REP., July 28, 1996, at 1.

372. Schachter, *supra* note 271, at D2; *see also* Purnick & Oreskes, *supra* note 324; Allana Sullivan, *Texaco to Unveil Plan for Diversity in the Workplace*, WALL ST. J., Dec. 18, 1996, at B8 (discussing Texaco's efforts on a number of fronts, including financial aid and other assistance to blacks trying to obtain a Texaco franchise); *Texaco Diversity Plan Is Endorsed by Heads of Activist Groups*, WALL ST. J., Dec. 19, 1996, at B11. After earlier years of harsh criticism from civil rights groups, Southland Corporation, as of 1997, had about 1300 minority-owned franchises for the 5700-store 7–Eleven chain, and it was "lauded as a leader in developing programs for blacks, Hispanics and other minorities." H. Lee Murphy, *Minority Outlook: Franchisors Help Minority Applicants*, FRANCHISE TIMES, Feb. 1, 1997, at 7, *available in* 1997 WL 8816058.

Two other groups that have entered into "fair share agreements" with business are the Southern Christian Leadership Conference and the National Urban League. It is,

best means to gather information about minority communities, acquire some credibility in those communities, and then market the purchase of franchises for and by the people from those communities.[373]

Threats of boycotts by groups such as PUSH have prompted franchisors to take preventive measures fighting discrimination. For example, in a first for the hotel industry, Days Inn, Incorporated, held a conference aimed at attacking prejudice against Asian American hotel and motel owners in the United States.[374] Such measures must be ongoing, however. Recently, for instance, the NAACP evaluated numerous hotel chains and gave them poor grades for their allegedly failed relationships with African Americans concerning hotel employment, advertising, vendors, and, most significantly, franchise opportunities.[375] The NAACP thus called for a boycott of ten of the United States' largest hotel chains.[376]

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however, the NAACP and PUSH that have engaged in the least "friendly" competition over reaching new or revised agreements with large businesses such as franchisors. Thomas, *supra* note 368.

373. Kezios, *supra* note 260, at 450–51 (also mentioning two examples of such community-based organizations that have strongly furthered business development for their membership: the Asian American Small Business Association of Chicago and the United States Hispanic Chamber of Commerce).

374. Robin Amster, *Days Inn Forum to Fight Bias Against Asian-American Hoteliers: Hopes to Draw up to 250 for Conference in Atlanta*, TRAVEL WKLY., Jan. 12, 1989, at 20. Such efforts, of course, may not satisfy already existing claimants, let alone prevent future complaints about a franchisor's alleged discrimination against franchisees or prospective franchisees. *See* Tim Deady, *Indian Hoteliers Cry Foul: Banks, Franchisors Accused of Discrimination*, WASH. BUS. J., Mar. 7, 1997, *available in* 1997 WL 8132302 (noting that a group of local South Asian hotel owners claims it is being discriminated against by both franchisors and financial institutions, with these two groups allegedly doing the following to South Asian hoteliers, but not other hotel owners: charging higher fees and interest rates, enforcing tougher franchisee agreement standards, and placing more restrictions and covenants in loans).

375. Michael A. Fletcher, *NAACP Leads Boycott of 10 Hotel Chains, Citing Hiring Practices*, WASH. POST, Feb. 27, 1997, at A12; Hollis R. Towns, *NAACP Urges Boycott of Certain Hotel Chains*, ATLANTA J.–CONST., Feb. 27, 1997, at F3. *But see* Ed Watkins, *Where Are the Black Franchisees?*, LODGING HOSPITALITY, Apr. 1, 1997, at 2 (contending that the NAACP sought controversy and publicity, not the resolution of its differences with hotel operators; stating that the NAACP's "sloppily conducted" survey and subsequent report had "the earmark of a media ambush"; alleging that because the NAACP surveyed mainly the franchisors, who have less information about and control over local hirings than do the franchisees, the results were fairly meaningless; and noting that some chains either say that they never received the survey or, in the case of one hotel company, that the NAACP refused to grant it an extension to complete the survey and instead gave it an "F").

376. Fletcher, *supra* note 375, at A12. Days Inn was not among the sixteen evaluated hotel chains, of which only six received passing grades from the NAACP. *Id.*

2. Affirmative Action Programs in the Fast-food Industry

An NAACP review of fair share agreements with forty companies showed that they had provided an estimated $47 billion to blacks and other minorities through employment opportunities, franchise development, and purchasing and professional services.[377] The fast-food industry is one of the leaders in adopting these systematic plans to increase minority participation. For instance, in an attempt to assist qualified minority franchisees obtain franchises and simultaneously dispel rumors of racial discrimination, Denny's Restaurants,[378] Hardee's Corporation,[379] Shoney's, Incorporated,[380] Kentucky Fried Chicken,[381] Pepsico,[382] Burger King Corporation,[383] McDonald's Corporation,[384] and many other franchisors, including those outside of the restaurant industry, have developed programs to encourage minorities to apply for franchises.[385]

In August 1993, Denny's Restaurants, through its parent corporation, Flagstar Companies, Incorporated, entered into a consent decree to settle numerous charges of discrimination.[386] As part of the settlement, Flagstar forged a

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377. *See* Robin Schatz, *The Lunch Counter Revisited: Denny's and Others Stumble on Racism Charges*, NEWSDAY, Aug. 8, 1993, at 84, *available in* 1993 WL 11386166. Despite such promising efforts, however, five of these 40 companies still failed to meet their objectives. *Id.* For example, Dillard's Department Stores was battered by charges that it harasses black customers. *Id.*

378. *See infra* notes 386–90 and accompanying text.

379. *See infra* notes 391–96 and accompanying text.

380. *Has the New Generation Changed the Civil Rights Agenda? Five Prominent Heads of Civil Rights Organizations Respond to Question*, EBONY, Aug. 1990, at 60 [hereinafter *Has the New Generation Changed the Civil Rights Agenda?*] (noting that Shoney's had committed $90 million over a three-year period to a program including joint ventures with black-owned businesses and financing for African-American franchisees); *see infra* notes 397–400 and accompanying text.

381. *See infra* notes 401–08 and accompanying text.

382. Milford Prewitt, *Pizza Hut vs. PMI: The War Is over; Franchisee's Founder Torres Resigns, Ending Bitter Battle with PepsiCo Chain*, NATION'S RESTAURANT NEWS, May 4, 1992, at 3 (Pizza Hut bought out its second largest franchisee, a Hispanic-owned company that controlled 236 units, and thus settled litigation featuring charges of discrimination. The settlement created a $15 million fund to develop minority Pizza Hut franchisees. It also laid the groundwork for a nationwide Hispanic boycott against the parent company, PepsiCo.).

383. *See infra* notes 414–30 and accompanying text.

384. *See infra* notes 435–39 and accompanying text.

385. Murphy, *supra* note 372 (discussing Southland advertising and promotional campaigns in minority communities, a franchisor-created program for minority American Leak franchise applicants, and a 1996 affirmative action plan launched by Church's Chicken and Popeye's Chicken & Biscuits). By 1997, 25% of Church's franchisees were African Americans. *Monday Briefing*, SAN ANTONIO EXPRESS–NEWS, Feb. 3, 1997, at 1B.

386. Denny's was charged with systematically discriminating against black customers by requiring them to prepay for their meals and denying them the same service that it afforded to white customers. Denny's admitted no guilt but accepted an injunction

comprehensive, $1 billion "fair share agreement" with the NAACP.[387] As has been the case for all such agreements, the company, pursuant to the fair share agreement, agreed to a call for more recruitment, training programs, and management representation of or for minorities; use of more black-owned banks and other service firms; and greater, overall franchise opportunities for minorities.[388] Fred Rasheed, then director of economic development at the NAACP, was very enthusiastic about the agreement with Flagstar, saying it was one of the best the NAACP had ever signed in terms of the economic benefits involved.[389] Indeed, from late 1993 to mid-1996, the number of black-owned Denny's franchises rose from one (out of 512 franchised units) to twenty-eight (out of 600).[390]

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against it for such alleged violations of civil rights laws. *See* Schatz, *supra* note 377. More recently, a group of customers—six Asian-American students, three African-American students, and one white student—sued Denny's over alleged discrimination, including even violence, against them at a Syracuse, New York, Denny's restaurant. *Flagstar's Denny's Unit Faces Suit Involving Discriminatory Action*, WALL ST. J., Aug. 22, 1997, at B1.

387. Schatz, *supra* note 377; *NAACP Year in Review, 1993*, PR NEWSWIRE, Dec. 31, 1993, *available in* DIALOG, PRNEWS File; *see also* Thomas, *supra* note 368 (stating that Denny's five-year agreement with the NAACP expires in 1998); *Denny's Parent, NAACP to Push Minorities' Plan*, WALL ST. J., June 2, 1993, at A6 (noting that TW Services, Incorporated, a holding company with several food and restaurant operations altogether found in all 50 states and having over 120,000 employees—including such widely known systems as Denny's, Hardee's, El Pollo Loco, Canteen, and Quincy's Family Steakhouse—had agreed with the NAACP to complete, within about 30 days, a program to enhance opportunities for minorities throughout TW Services).

388. *NAACP Year in Review, 1993*, *supra* note 387; *see* Schatz, *supra* note 377.

389. Schatz, *supra* note 377; *see also First Minority-Training Graduate Buys His Own Denny's Franchise*, GREENSBORO NEWS & REC., Aug. 20, 1996, at B4 (announcing that the first graduate of a minority-training program started by Denny's to counter widespread discrimination allegations now owns a Denny's franchise near Detroit, buying it with special, no down payment, franchisor-guaranteed loans rather than incurring at the outset the typical expenditures of between $1.2 million and $1.5 million).

390. *Franchises: Detroiter 1st Out of Denny's Plan*, DETROIT NEWS, Aug. 20, 1996, at B3; Nicole Harris, *A New Denny's—Diner by Diner: A Sweeping Overhaul Chips away at the Company's Racist Past*, BUS. WK., Mar. 25, 1996, at 166; *In Brief*, MINORITY BUS. ENTREPRENEUR, Feb. 28, 1996, at 4 (noting that, in completing the racial discrimination class action settlement reached in May 1994, Denny's thereafter paid $46 million over 19 months in handling claims from almost 300,000 people; observing that minority purchasing contracts with Denny's had increased fivefold, to $50 million annually, between 1993 and 1995; stating that minorities' share of the ownership of Denny's restaurants had risen to 28%); *see* Somaya, *supra* note 269, at 35 (noting that Denny's seven-year goal is to create 53 new minority-owned restaurants); Thomas, *supra* note 368 (noting that Denny's had gone from one black franchisee before 1993 to 29 at the end of 1996 and an expected 53 before the end of 1997); *Adamson Receives 1996 Corp. CEO Achievement Award*, FOODBYTE NEWS, May 20, 1996, *available in* 1996 WL 7808551 (announcing that the NAACP awarded its 1996 honor to the chairman of Flagstar Corporation, which owns several restaurant chains, most notably Denny's); *Denny's Briefs Groups on Diversity Progress*, OAKLAND POST, Jan. 22, 1997, at B1 (noting a dramatic

Hardee's has long had, and made numerous adjustments to, a minority franchisee recruitment program.[391] The Hardee's three-year "business facilities agreement" provides economically disadvantaged minority applicants with special training as well as company leasing of facilities and equipment. At the end of the three years, minority franchisees have the option to purchase the leased equipment.[392] Hardee's and the NAACP also hammered out a plan to breathe new life into a pact the burger chain signed years earlier when it first formally agreed to recruit and retain minority franchisees.[393] Normally, prospective franchisees need to have a $1,000,000 net worth and pay a $250,000 initial fee. Under the Fair Share Agreement with the NAACP, minority franchisees need not meet the net worth requirement and only have to pay $50,000 in cash initially, $35,000 of which is put into an individual operation account to cover certain unit expenses.[394] In addition, Hardee's pays most of the minority franchisee's operating expenses during the three years that this franchisee is in training.[395] Although the confidentiality of the agreement precludes discussion of specific goals, the NAACP has called Hardee's program, "fair and generous."[396]

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increase since 1993 in minorities holding management and supervisory positions at Denny's, in minority representation on the Flagstar Board of Directors, and in minority purchasing contracts; Denny's announced goal was to have, by the close of 1998, minority purchasing contracts in excess of $80 million—nearly an eight-fold increase since 1993); *Denny's Parent Company Settles Lawsuits*, GAINESVILLE SUN, Jan. 16, 1997, at A4 (reporting that $1.5 million, the remainder of the $54 million set aside by Flagstar Corporation in 1994 to settle two class-action suits, was donated to nine civil rights organizations, including the NAACP Legal Defense and Education Fund and the Rainbow/PUSH Coalition).

391. *See, e.g.*, Ann Wead Kimbrough, *West End Hardee's First in Minority Franchising Plan*, ATLANTA J.–CONST., Nov. 11, 1987, at B1 (referring to a Hardee's three-to-five year plan to spend at least $30 million developing 25 to 30 minority-owned restaurants in south Atlanta; the plan arose from a minority franchise program agreed to between Hardee's and the NAACP in 1984). Clearly, the nationwide statistics for 1992 and 1997, *supra* Table 3, indicate that these plans, meant to provide in Atlanta alone many more Hardee's franchises for African Americans, were far from realized.

392. *Restaurant Business*, PR NEWSWIRE, July 1, 1992, *available in* DIALOG, PRNEWS File.

393. *See* Prewitt, *Hardee's Renews*, *supra* note 152. This agreement was reached one week before a high-profile black franchisee, Columbus Vines, filed a lawsuit against Hardee's charging breach of contract and discrimination. As with many such suits, no further public information was ever provided; there is no reported judicial action, nor any report of a settlement.

On June 2, 1993, Hardee's parent company, TW Services, agreed with the NAACP to complete development of a program enhancing opportunities for minorities at Hardee's. *Denny's Parent, NAACP to Push Minorities' Plan*, *supra* note 387, at A6.

394. Prewitt, *Hardee's Renews*, *supra* note 152, at 9.

395. *Id.*

396. *Id.* After signing the agreement with the NAACP, a Hardee's spokesman said, "Mr. Autry [(Hardee's President)] was firm in expressing his sense that he has a strong commitment to minority economic development and that he does not see this as a social program or some public-relations function, but as a business necessity." *Id.* at 8.

In 1989, after paying $105 million to wronged parties in a discrimination suit, Shoney's, Incorporated, signed with a civil rights group, the Southern Christian Leadership Conference ("SCLC"), a "covenant" similar to a fair share agreement.[397] Shoney's agreed to commit $90 million over a three-year period.[398] The covenant has led to increased hiring and promotion of blacks within the corporation, as well as an increase in the number of black-owned franchises from two to twenty-five.[399] It has been renewed twice and now extends to the year 2000.[400]

Kentucky Fried Chicken ("KFC") also has designed a minority franchising program to assist minority franchisees.[401] The program "has created 21 millionaires" among blacks and Hispanics who started businesses with meager seed capital.[402] Since 1983, KFC has borrowed $72 million from various banks for use in the minority-franchise program.[403] In fact, by the early 1990s, the company had franchised and financed 192 minority-owned restaurants, for a total of $69 million in KFC-financed loans.[404] Minorities in the program received financing of up to ninety-five percent of the total cost of buying a franchise,[405] a particularly helpful provision given that few franchise agreements say anything about a

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397. Schatz, *supra* note 377.

398. *Has the New Generation Changed the Civil Rights Agenda?*, *supra* note 380.

399. Schatz, *supra* note 377; *see also* Dwight Lewis, *Shoney's Takes a Step that Others also Ought to Take*, TENNESSEAN–NASHVILLE, Apr. 30, 1995, at 5D (reporting a speech by Dr. Joseph Lowery, president of the SCLC, who noted that when Shoney's and the SCLC signed an affirmative action pact in August 1989, blacks had only two Shoney's franchises and now owned more than 20; Lowery acknowledged that Shoney's was fulfilling its promise to provide, within minority communities, business opportunities worth approximately $60 million).

400. *See* Schatz, *supra* note 377 (noting that there was a two-year renewal in the early 1990s); Thomas, *supra* note 368 (stating that the SCLC–Shoney's covenant was, in 1993, extended for up to seven more years).

401. Ron Cooper, *Simon Traded Basketball for Business and Scored Big*, BUS. FIRST (Louisville), Dec. 28, 1992, at 16. The head of the KFC program, Walter J. Simon, is a former professional basketball player who believes that KFC should use the same approach of targeting prospective minority franchisees that it used in seeking pro athletes to enter its executive ranks.

402. *Id.*

403. *Id.* KFC makes the money available without minorities having to obtain a loan approval on their own. Another method of assisting on financing may be to funnel more franchisor-controlled accounts into the hands of black-owned banks. *See, e.g.*, PR Newswire Ass'n, *Burger King Corp. Announces New Black Banking Plan*, PR NEWSWIRE, May 20, 1988, *available in* DIALOG, PRNEWS File. Perhaps those banks, in turn, will be more receptive to extending credit to African-American franchisees.

404. Earl S. Graves, *A Critical Alliance: African-American Owners of Business Franchises*, BLACK ENTERPRISE, Sept. 1992, at 52. Each year, KFC guarantees 15 to 20 loans made by local banks to minority franchisees. *Id.*

405. Alexei Barrionuevo, *Franchising Hope: Chain Outlets Offer Promise as Seeds for Inner-City*, L.A. TIMES, Feb. 3, 1993, at D1.

franchisee's right to franchisor assistance in obtaining financing.[406] Also, for minority applicants, KFC has waived the requirement that applicants have a minimum of $150,000 in cash and a net worth of at least $400,000.[407] Minority franchise applicants need only show that they have in cash ten percent of the total investment cost.[408]

As these examples indicate, a few franchisors have performed a complete reversal by moving civil rights groups, in a short few years, away from harsh criticism and on to fulsome praise for the franchisor's treatment of minority franchisees.[409] On the other hand, many franchisors with affirmative action programs operate them despite a backlash in the form of lawsuits claiming reverse discrimination against whites.[410] Ironically, the presence of such programs offers

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406. Emerson, *supra* note 32, at 968 (survey showing that only 10% of franchise agreements have such a provision).

407. Barrionuevo, *supra* note 405.

408. *Id.* Ten percent still is a substantial sum for most would-be franchisees. The total start-up cost for a KFC franchise is between $951,000 and $1.4 million. *B.E.'s 20 Best Franchises*, *supra* note 155, at 65.

409. Widespread criticism of the Southland Corporation, franchisor of 7–Eleven, exists. *See, e.g.*, Buck Brown, *Enterprise: Odds and Ends*, WALL ST. J., Mar. 23, 1989, at B2 (noting that the Fair Franchising Coalition, a franchisee-rights group, awarded to Southland its first annual "Worst Franchiser of the Year Award"); Stephen Goldstein, *Franchisees Call for Legislation*, WASH. TIMES, Mar. 2, 1989, at C2 (focusing upon Southland's alleged gross abuse of its franchisees, a coalition of twelve associations of franchisees called for state and national laws to regulate unfair franchisor practices); Kevin Maler, *Area 7–Eleven Owners Rip Southland System as Unfair*, WASH. TIMES, May 12, 1988, at C3 (black franchisees likening their treatment to that of sharecroppers); Michelle Singletary, *Franchisees Claim Southland Unfair*, BALTIMORE EVENING SUN, Mar. 7, 1989, at E10 (discussing, among other things, state legislation specifically intended to counter Southland's allegedly unfair franchising practices); *see also* Rudolph A. Pyatt, Jr., *Southland's No-win Situation*, WASH. POST, Feb. 6, 1989, at 3; Lena H. Sun, *7–Eleven Operators Here Fear Owner May Try to Seize Stores*, WASH. POST, Jan. 26, 1989, at E1. *But see* Ron Dungee, *7–Eleven Makes It Easier for Minorities to Buy Franchises*, L.A. SENTINEL, Feb. 12, 1997, at B6 (referring to 7–Eleven's "innovative plan to recruit minority franchisees" by allowing, when state law permits, a 180-day "trial" period for new franchisees and by financing, for qualified applicants, up to the entire franchise fee as well as the beginning merchandise inventory costs; noting that 7–Eleven already had been cited by the periodicals, *Black Enterprise* and *Hispanic Magazine*, as being one of the very best franchises for African Americans or Hispanics). For a glowing description of how Southland is well regarded for its successful programs to recruit and keep minority franchisees, see Murphy, *supra* note 372.

410. *See, e.g.*, Hall v. Ford Motor Co., 68 F.3d 474 (6th Cir. 1995) (unpublished table decision), *available in* 1995 WL 619972 (a judgment for Ford against a bankrupt, white dealership, W.F. Davis Motor Company, that claimed Ford unfairly competed by using its minority development program to open a black-owned dealership only 20 miles from Davis' location); Wassel v. General Motors Corp., No. 76 Civ. 387, 1979 U.S. Dist. Lexis 8840 (S.D.N.Y. Oct. 31, 1979) (mem.) (described *supra* note 213); Burke v. Superior Ct. of Sacramento County, 128 Cal. App. 3d 661 (1982) (described *supra* notes 54–58 and

to disgruntled minorities *more* bases for lawsuits against the franchisor. Now, suits can be brought not just by frustrated franchise applicants or by allegedly mistreated franchisees, but by business people in an intermediate category: those who constitute franchisee trainees. In *Walker v. Ford Motor Co.*,[411] for example, the court of appeals upheld a trial court judgment in favor of a Title VII suit by a terminated participant in Ford's minority dealership training program.[412] The terminated participant was found to have suffered a retaliatory discharge because of his complaints about racial slurs, and he was entitled to backpay from the time of dismissal to the end of the eighteen-month training program. Clearly, these employment suits under Title VII can work for trainees but would not succeed for current franchisees, who are not the employees of their franchisor.[413]

3. For Franchise Opportunities, Insufficient Efforts and Results? The Burger King Example

All of the best-laid plans may prove inadequate. For the past fifteen years, Burger King has negotiated with PUSH a series of accords intended to increase the

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accompanying text); *see also* Libby–Broadway Drive-In, Inc. v. McDonald's Sys., Inc., 391 N.E.2d 1 (Ill. App. Ct. 1979) (upholding summary judgment for the franchisor in a suit alleging that McDonald's wrongly caved in to pressure from activist groups to make new franchises available to black owners and to have existing franchises in black areas sold to blacks; McDonald's supposedly forced plaintiff, a white-owned business, to release its option on one inner-city location for a new franchise and to sell, at a loss, its existing inner-city franchise to a black franchisee); Eric Freedman, *Court Rejects Suit on Minority Plan*, AUTOMOTIVE NEWS, Nov. 20, 1995, at 22 (describing *Hall v. Ford Motor Co.*); Kathy Jackson, *White Former-Ford Dealers Claim Minority Strategy Forced Them out*, AUTOMOTIVE NEWS, Nov. 9, 1992, at 26.

Ironically, Congress' overruling of the Supreme Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), may bolster reverse discrimination cases because it implicitly ratifies the dissent's focus upon denial of opportunity as the key factor in establishing a civil rights violation. Jonathan Levy, Comment, *In Response to* Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.: *Employment Testers Do Have a Leg to Stand on*, 80 MINN. L. REV. 123, 153 n.170 (1995).

411. 684 F.2d 1355 (11th Cir. 1982).

412. Title VII of the Civil Rights Act of 1964 covers employment. 42 U.S.C. § 2000e (1994). The trainee was considered an employee, not simply a potential franchisee. *Walker*, 684 F.2d at 1363 (finding no right to "continued employment" with Ford at the end of the training program, and that only about 25% of recent trainee graduates obtained a Ford franchise, which is *not* "employment" with Ford). *But see* McDonald's Corp. v. Miller, Bus. Franchise Guide (CCH) ¶ 10,688 (3d Cir. May 23, 1995) (relying upon the express agreement between the franchisor and a franchise applicant that applicants were not McDonald's employees and were not to be compensated while participating in the precontract application process, including the franchisee training program, thus affirming the trial court's summary judgment that the franchisor, McDonald's, was not the employer of the applicant-trainee).

413. Because true franchisees are not employees, *see, e.g.*, Emerson, *supra* note 3, at 1547 & n.204, no Title VII protections extend to them. Braun, *supra* note 23, at 201 & n.175.

number of African-American participants in the Burger King system. A 1986 agreement between Burger King and PUSH targeted a fifteen percent level of minority involvement within Burger King.[414] This agreement, joined in by the Burger King Minority Franchise Association,[415] called for Burger King to increase minority participation in not just franchising, but also in job procurement, banking, marketing, and other services.[416] An earlier version of the agreement, signed in 1983, was estimated to be worth up to $450 million to the minority community.[417] In fact, minority employment within the Burger King system had risen to forty-one percent by 1985, albeit mainly in low-level jobs.[418]

By late 1993, Burger King's affirmative action program had expanded into an aggressive, eight-point diversity plan designed to offer increased opportunities to minorities within the Burger King system.[419] The plan covers such areas as franchising, operations, employment, procurement, marketing and advertising, corporate contributions, and banking within the Burger King system.[420] The program is led by the Diversity Action Council, an organization formed by Burger King in December 1992 and the first of its kind in the fast food industry, which consists of corporate executives, minority franchisees, and minority business leaders such as the Rev. Willie T. Barrow, chair of the board of Operation PUSH.[421] As part of the plan, Burger King committed $100 million to support minority franchisees and suppliers over a five-year period,[422] with $10 million annually in development funds for qualified new or current minority

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414. *Burger King Announces New PUSH Covenant*, PR NEWSWIRE, Dec. 3, 1986, *available in* LEXIS, News Library, PRNEWS File.

415. *Elizabeth City State University Commends Burger King for Support of the African-American Community*, PR NEWSWIRE, May 6, 1990, *available in* LEXIS, News Library, PRNEWS File.

416. Also, as an extension of its voluntary agreement with PUSH, Burger King has invested $90,000 in a banking plan to assist black-owned banks and has presented endowments to several historical black colleges and universities to assist black students in their pursuit of higher education. *See Burger King Corp. Announces New Black Banking Plan*, PR NEWSWIRE, May 20, 1988, *available in* LEXIS, News Library, PRNEWS File; *Elizabeth City State University Commends Burger King for Support of the African-American Community*, *supra* note 415; *Elizabeth City State University Receives $50,000 Scholarship Endowment from the Burger King Corporation*, PR NEWSWIRE, Oct. 27, 1990, *available in* LEXIS, News Library, PRNEWS File.

417. *Burger King Minority Agreement Announced*, PR NEWSWIRE, Apr. 18, 1983, *available in* LEXIS, News Library, PRNEWS File (estimate of Jesse Jackson, leader of PUSH).

418. *Joint Covenant of Trust Between Burger King and PUSH*, PR NEWSWIRE, Oct. 10, 1985, *available in* LEXIS, News Library, PRNEWS File.

419. *Burger King Corporation Commits $100 Million to Support Minority Franchisees and Suppliers; Eight-Point Plan to Foster Diversity*, PR NEWSWIRE, Dec. 6, 1993, *available in* LEXIS, News Library, PRNEWS File.

420. *Id.*

421. *Id.*

422. *Id.*

franchisees, and an additional $10 million per year as start-up capital for minority suppliers to the Burger King system.[423] The programs continue, as Burger King has teamed up with a former Checkers franchisee in plans to build 125 new Burger King restaurants in inner-city, government-designated Empowerment Zones and Enterprise Communities.[424] The first new restaurants, designed especially to appeal to blacks, have been built in the inner-city areas of Baltimore, Chicago, Detroit, and Washington, D.C.[425]

All of these plans, though, have failed to earn many plaudits from the African-American community. *Black Enterprise* magazine, for example, does not list Burger King among the best franchisors.[426] In fact, Burger King continues to be accused of "economic racism," of redlining minority franchisees, and of wrongly terminating numerous minority-owned franchises.[427] For example, members of the Congressional Black Caucus have urged Burger King to stop the following alleged practices: "charg[ing] minority franchises enormous prices and rental fees for restaurants, remov[ing] good equipment and replac[ing] it with equipment that is either old or completely inoperative and refus[ing] to sell franchises to minorities in predominantly white areas [(i.e., redlining)]."[428] Burger King's efforts to increase its minority franchisees and employees may simply be part of the struggle to hold minority activists at bay and avoid any public relations

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423. *Id.*; Conroy, *supra* note 348, at C1 (also noting that Burger King's actions, instead of just promises, are "the exception, not the rule," according to many minority entrepreneurs).

424. The partnership between Burger King and La-Van Hawkins, the African-American head of Urban City Foods, will be the largest development venture of its kind undertaken by a fast-food franchisor. *Entrepreneur Forms Partnership with Burger King*, JET, Mar. 11, 1996, at 13; Louise Kramer, *Burger King, Hawkins Tap into the Inner-City Market*, NATION'S RESTAURANT NEWS, Mar. 4, 1996, at 3. It is estimated that the $170 million venture will create as many as 20,000 jobs in predominantly African-American communities. Alec Matthew Klein, *125 Inner-city Burger Kings; Hawkins and Chain to Open Restaurants in Empowerment Zones*, BALTIMORE SUN, Feb. 23, 1996, at C1.

425. *Entrepreneur Forms Partnership with Burger King*, *supra* note 424, at 13; T. Trent Gegax, *Fast-Food Fast Tracker: La-Van Hawkins Thrives by Tweaking a Formula*, NEWSWEEK, May 26, 1997, at 57. Hawkins' entity is to become a megafranchise: one business owning numerous franchises from the same franchise system. Although recent years have seen an increase in the number of megafranchises generally and also of black-owned megafranchises, these megafranchises still "are far more the exception than the rule—particularly among African Americans." Brown, *supra* note 6, at 62.

426. *See, e.g.*, *Franchisors Ranked by Black-Owned Units*, *supra* note 152; *B.E.'s 20 Best Franchises*, *supra* note 155, at 67.

427. *In Atlanta, a Call for a Boycott of Burger King Accused of 'Economic Racism' by African-American Leaders & Franchisees*, MIAMI DAILY BUS. REV., Jan. 12, 1995, at 1. Note that this boycott call came after Burger King's absolute legal victory over the various parties in the class actions discussed *supra* note 329.

428. *CBC Members Urge Burger King to Settle Minority Franchise Discrimination Dispute*, JET, Dec. 15, 1997, at 37, 37.

fiascoes[429] while the franchisor focuses on its primary target: *not* being the number one fast-food chain for minorities, but closing in on, and eventually overtaking, the overall industry leader, McDonald's.[430]

4. The "Nothing Special" Approach to Minority Recruitment

Whether a franchisor's minorities program is working may best be evinced by a very basic statistic: the long-term trend in number of operating minority franchisees. Of the previously discussed fast-food chains, (1) both Denny's and Shoney's fast growth in minority numbers has been dramatic, but long-term results remain to be seen, and the numbers are still low inasmuch as the initial level was so low, (2) Hardee's percentage of African-American franchisees still hovers at an almost infinitesimal level (below one percent), and (3) Burger King's black franchises have increased in number, but are still too low (3.5%) to gain strongly voiced minority support. Only the KFC program may have demonstrated substantial, long-term growth in minority numbers, with half of the 300 new KFC franchises awarded a few years ago being bought by minorities.[431] *Black Enterprise* magazine now ranks KFC sixth in the nation for its number of black-owned franchises.[432] Most important may be the evidence that KFC has

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429. Jelisavcic, *supra* note 321, at H6 (noting that "[c]harges of racism certainly get plenty of attention," that "lawyers handling [black franchisees'] redlining suits may do better outside the courtroom than inside," and that, as stated by Warren Traiger, a New York lawyer who defends redlining cases, "[t]he public relations value of bringing a lawsuit or claiming discrimination may accomplish what the plaintiffs want").

430. *See, e.g.*, Richard Gibson & Calmetta Y. Coleman, *How Burger King Finally Became a Contender*, WALL ST. J., Feb. 27, 1997, at B1 (noting that while Burger King's U.S. market share for 1996 remained less than half that of McDonald's—19.2% compared to 42.1%—sales had risen per store by 2.6% while McDonald's had fallen 3.3%); Yumiko Ono & Richard Gibson, *McDonald's Launches New Ads, Hoping to Tap Well of Goodwill*, WALL ST. J., Oct. 2, 1997, at B8 (reporting statistics of Technomic, Incorporated, of Chicago that McDonald's 1996 market share slipped to 41.9% while Burger King's rose to 19.2%). From the late 1980s, when Burger King franchisees saw "a system that didn't seem ever to get its act together" and when franchisees "were ready to give up on the chain," there has been a dramatic turnaround in favor of the Burger King system and its franchisees. Gibson & Coleman, *supra*, at B1. That is not the case for some other fast-food systems, including some large franchisors such as Hardee's. Jeffrey A. Tannenbaum, *Hardee's Franchisees Act to Sway Moves of New Owner*, WALL ST. J., Oct. 28, 1997, at B2. Many systems and individual units are likely to fail. Jeffrey A. Tannenbaum & Michael Selz, *McDonald's Price Cut: Entree of Woe for Weak Chains—Amid a Glut of Restaurants, Small Players Now Face Even Greater Pressure*, WALL ST. J., Feb. 27, 1997, at B4.

431. Barrionuevo, *supra* note 405, at D1.

432. *Franchisors Ranked by Black-owned Units*, *supra* note 152. Blacks, though, still owned only 3.02% of KFC's total units. *Id.* Moreover, a number of smaller franchised systems have a much higher percentage of black franchisees than does KFC. For example, O.P.E.N. America, Inc. (34.47%), Coverall North America, Incorporated (32.85%), Mister Softee, Incorporated (11.64%), and D & K Enterprises, Incorporated (10.98%), all have ranked among the top ten in number of black-owned units, with each of these four systems

taken strong measures to ensure minority franchises survive once they are purchased: KFC claims that ninety-two percent of minority-owned franchisees are still thriving ten years after start-up.[433] Most systems' franchisee success rates are probably much lower.[434]

McDonald's Corporation, a franchise system without any exceptional emphasis on minority recruitment, actually appears to have done a better job of adding and retaining African-American franchisees than other large franchisors with set affirmative action programs. The McDonald's Corporation has a different approach to minority recruitment: McDonald's offers no special program designed exclusively for minorities, yet it ranks number two in minority-owned franchises.[435] It has a far higher percentage of black-owned franchisees (8.2%) than do most other prominent franchisors.[436] All prospective McDonald's franchisees are eligible for the system's business facilities lease program through which the franchisor purchases the signs, equipment, and decor items and leases them to the franchisee for three years to reduce the franchisee's upfront costs.[437] Of course, just as McDonald's may have attracted new minority franchisees without much fanfare during the system's more profitable years, so a recent, comparatively poorer economic performance[438] may leave McDonald's, because it has no specialized minority programs, more vulnerable to a drop in minority recruitment.[439]

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having far fewer overall units, but a much higher percentage of black-owned units, than KFC. *Id.*

433. Barrionuevo, *supra* note 405, at D1.

434. *See* PURVIN, *supra* note 347, at 13 (citing "[r]ecent studies demonstrat[ing] that franchise failure rates are similar to, *or worse than*, failure rates of all business start-ups"); Timothy Bates, *Analysis of Survival Rates Among Franchise and Independent Small Business Startups*, J. SMALL BUS. MGMT., Apr. 1, 1995, at 26.

435. *Franchisors Ranked by Black-owned Units*, *supra* note 152.

436. *See id.* (listing much lower percentages for franchisors besides McDonald's among the top ten in number of black-owned units: Subway Sandwiches & Salads (2.98%), KFC (3.02%), Wendy's (1.88%), 7–Eleven (1.36%), and General Nutrition (2.37%)); *supra* Table 3.

437. *Help Is out There for Minority Restauranteurs; Organizations and Government Agencies Which Help Minorities in the Restaurant Business; Directory*, RESTAURANT BUS. MAG., July 1, 1992, at 81. Ford Motor Company likewise has a plan for which any prospective franchisee, black or white, is eligible. Kathy Jackson, *Ford Offers Assistance to Non-minority Prospects*, AUTOMOTIVE NEWS, Sept. 14, 1992, at 37 (noting that this private capital plan is more stringent, and charges higher interest rates, than Ford's minority development program). The Ford plan was developed because many white dealers believed that white candidates for dealerships could not receive anything even close to the level of financial support Ford furnishes black candidates. *Id.* Certainly, other franchisors' nonracial programs (e.g., McDonald's approach) may assist many minorities without alarming or irritating white franchisees or franchisee applicants, and thus forestall reverse discrimination claims.

438. Gibson & Coleman, *supra* note 430, at B1.

439. Whether business slowdowns or rapid growth disproportionately affect franchise minorities is unclear. Perhaps McDonald's recent troubles simply reach all aspects

5. Is a Small Franchisor Better for Minorities?

Despite all of their efforts at minority recruitment and retention, prominent fast-food franchisors and other large-scale systems may offer less opportunity to most potential franchisees, particularly minorities, than do less well-known operations. Perhaps less prestigious, but certainly within the means of far more franchise applicants, small-investment franchise chains are more attractive to franchisees who cannot, or will not, sink life savings of as much as several hundred thousand dollars into a risky business proposition.[440] These smaller franchises also attract applicants interested in a simpler business, one that a franchisor may provide as a turnkey operation.

One demonstration of the "small is better" approach is a booming franchise system, Coverall North America, Incorporated. Coverall is a janitorial franchise. It has start-up costs between $3600 and $37,100,[441] and the franchisor provides financing and a turnkey operation including equipment, supplies, and a customer base.[442] Coverall offers continual training to franchise owners and their employees at no additional cost.[443] Franchisees can bid on jobs themselves or pay outright for new contracts obtained for them by Coverall.[444]

In 1992, Coverall North America, Incorporated, took over the "top spot" in minority franchising.[445] Since then, Coverall has retained that "number one" ranking, as indicated by its total number of black-owned units, in every annual list by *Black Enterprise* magazine.[446] That Coverall dethroned mighty McDonald's Corporation from the top of the *Black Enterprise* franchise ratings is emblematic of the popularity and accessibility of low-cost, service-oriented franchises.

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of the franchise relationship (regardless of a franchisee's race or ethnicity). At the very least, such problems exacerbate the normal tensions between franchisor and franchisee. *See* Richard Gibson, *A Bit of Heartburn: Some Franchisees Say Moves by McDonald's Hurt Their Operations—Rapid Addition of Outlets Cuts Profits, They Gripe; New Manual Irks Others—Firm Plays Down Discord*, WALL ST. J., Apr. 17, 1996, at A1.

440. *See* H. Lee Murphy, *Opportunities for Women and Minorities: Franchisors Increasingly Offer Special Programs, Loans*, FRANCHISE TIMES, Apr. 1, 1997, at 3 (stating that "minorities typically have less capital and less business experience" and thus are "often drawn to companies with modest franchise fees and extensive training programs"; also noting that more and more franchisors will supply extra financing and mentoring).

441. *B.E.'s 20 Best Franchises*, *supra* note 155, at 67.

442. *Companies Offering Franchises*, THE FRANCHISE HANDBOOK, Winter 1996, at 43, 176.

443. Shelly Branch, *Tapping into Low-cost Franchising*, BLACK ENTERPRISE, Sept. 1, 1992, at 66.

444. *Id.*

445. Kevin D. Thompson, *Driving for Diversity*, BLACK ENTERPRISE, Sept. 1, 1992, at 49, *available in* 1992 WL 1128317.

446. *See, e.g.*, *B.E.'s 20 Best Franchises*, *supra* note 155; *Franchisors Ranked by Black-Owned Units*, *supra* note 152. Coverall retains its position as a leading franchisor for African Americans. Karen Gutloff, *15 Franchises for Under $50,000*, BLACK ENTERPRISE, Sept. 1, 1997, at 101.

B. The Future of Franchisor-initiated Affirmative Action

Should the franchisor's affirmative action efforts increase the practical burdens on a minority franchisee or franchise applicant alleging that the franchisor engaged in discriminatory practices? By analogy, in employment law it is precisely the opposite behavior—the failure to seek out minorities—that can haunt an employer charged with discriminatory practices.[447] As for franchising, the question of how a franchisor's proactive plans might affect the burdens of proof or evidence in a franchise discrimination case has not been addressed in a reported decision.

While the legal effect of franchising affirmative action plans is unclear, logically the practical effect is obvious: improvements in franchisor policies and procedures should ultimately lead to a decline in incidents of franchise discrimination. Unfortunately, a lessening of incidents may *not* cause a corresponding decline in the number of claims. For example, as happened in *Quarles v. General Motors Corp.*,[448] a black franchisee terminated for completely valid reasons could nonetheless dispute those reasons, ignore the franchisor's policy of helping African Americans, and proceed against the franchisor with a baseless discrimination action.

Despite the efforts underlying affirmative action programs, minorities may believe they are not treated properly. Minority franchisees often contend that franchisors are not committed to the franchisees' long-term success.[449] According to Otis Laird, an Indianapolis Hardee's franchisee, "you just don't get the feeling that they want to see me grow or that they really believe that my success is their success."[450] Some minorities go so far as to say that they are set up to fail.[451] Minority franchisees and industry observers thus contend that franchisors need to be more committed to creating an environment that not only attracts, but retains black franchisees.[452]

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447. *See, e.g.*, Kurtz et al., *supra* note 320, at 105 (noting, "it is more important than ever for employers to adhere to solid nondiscriminatory employment practices and to be able to document those policies").

448. 758 F.2d 839 (2d Cir. 1985) (discussed *supra* notes 120–24 and accompanying text).

449. *See* Prewitt, *Hardee's Renews*, *supra* note 152, at 9 (reporting about "a mystifying series of anecdotes that [black franchisees] claim, when they are taken together, show that the [franchisor] does not want them to grow"); *see also* Plaintiffs' Second Amended Class Action Complaint, Hall v. Burger King Corp., Civ. Action No. 890–620–CD–Kehoe, (S.D. Fla. filed Feb. 20, 1989) (same sort of allegations, but involving the Burger King Corporation).

450. Prewitt, *Hardee's Renews*, *supra* note 152, at 9.

451. *Id.*; Plaintiffs' Second Amended Class Action Complaint, Hall v. Burger King Corp., Civ. Action No. 890–620–CD–Kehoe.

452. Thompson, *supra* note 445. From 1993 to 1995, the International Franchise Association, the United States' largest and most significant franchise lobbying and

These criticisms of particular franchisors or of franchising generally, though, could be applied to the overall franchisor-franchisee relationship regardless of race, sex, or ethnicity. Moreover, nationwide public opinion surveys,[453] as well as key state or local votes such as the November 1996 California referendum favoring the elimination of state affirmative action programs,[454] seem to indicate little public or small business support for affirmative action programs. On a list of business priorities, "diversity" often is viewed as, at best, an unaffordable luxury.[455] Interviews indicate that over a third of larger businesses have affirmative action programs, while only one in eight small businesses have such programs.[456] Only fifteen percent of surveyed small business owners—a "small business" was defined as one with $2 million or less in business—favored affirmative action, while a majority believed affirmative action programs fail to benefit the small-business community.[457] Of the majority opposed to affirmative action, two-thirds favored its outright elimination.[458] Even former beneficiaries of affirmative action programs may turn against them.[459]

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educational organization, gathered pledges from more than 130 franchisors to boost their number of minority franchisees and vendors. Brown, *supra* note 6, at 64.

453. Rick Wartzman, *Clinton Is Still Struggling to Get Message Across to 'Angry White Males' Who Have Turned out*, WALL ST. J., Jan. 24 1995, at A24 (reporting on a *Wall Street Journal*/NBC News Poll that showed 61% of all adults favored the elimination of affirmative action based on race or gender in deciding admissions to state universities, hiring for government jobs, and awarding federal contracts, while only 32% opposed such a move).

454. Proposition 209, California Civil Rights Initiative (Californians Against Discrimination and Preferences, L.A., Cal.) (Cal. 1996) (adding Section 31 to Article I of the California Constitution). The electorate passed the initiative on November 5, 1996. *See* Edward W. Lempinen & Pamela Burdman, *Measure to Cut Back Affirmative Action Wins*, S.F. CHRON., Nov. 6, 1996, at A1. The operative language of the section reads: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." CAL. CONST. art. I, § 31(a).

455. Torres, *supra* note 149, at A12; *see also* Laura Gatland, *Management: Food Industry Group Opens Door to Diversity*, FRANCHISE TIMES, June 1, 1997, at 20 (acknowledging that many franchisors recognize the need to recruit minority franchisees, but concluding that numerous franchisors do not understand the need for diversity and think of it as "something that [only] affects someone else").

456. Torres, *supra* note 149, at A12.

457. *See, e.g.*, Tracey Rosenthal, *Survey Shows Little Support for Affirmative Action*, BUS. FIRST (Buffalo), Nov. 6, 1995, at 7.

458. *Id.*

459. *See, e.g.*, Albert R. Karr, *Major Beneficiary of Set-aside Policies Turns Against Them—Converse Construction Thrived with Affirmative Action, then Lost Minority Status*, WALL ST. J., July 3, 1995, at B4.

VIII. PROPOSALS

A. Required Disclosures to Prospective Franchisees

The FTC should amend its Franchise Rule[460] to require that the franchisor's mandatory disclosures to prospective franchisees include data about women and minorities in their franchise system.[461] While franchisors may wish to include statistics on employment and suppliers, to keep the task less onerous[462] the FTC could restrict the mandated information to figures on women and minorities who are franchisees. Just as some franchisees' names, addresses, and telephone numbers already must be provided to potential franchisees,[463] so the franchisor could easily furnish information including the names, addresses, and telephone numbers of female and minority franchisees.[464] Not only are the statistics probably already maintained by franchisors, but the FTC Rule has long required that numerous other figures be provided.[465]

These requirements pose very little, if any, burden on the franchisor. Even if the franchisor does not initially have information on each franchisee's minority status and sex, the franchisor already must provide so much information under the present FTC Rule that requiring this incidental, further information probably would add very little transactional cost to the marketing of franchises.[466]

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460. 16 C.F.R. § 436 (1997) (discussed *supra* note 13).

461. Others also have proposed the mandatory disclosure of the number of minority franchisees in a franchise system. *Minorities and Franchising: Hearing Before the House Comm. on Small Business*, *supra* note 252, at 9 (testimony of Susan P. Kezios, president and founder, Women in Franchising, Inc.); *see also Minority Franchising: Is Discrimination a Factor? Hearing Before the House Comm. on Small Business*, *supra* note 23, at 68 (testimony of Anthony W. Robinson, president, Minority Business Enterprise Legal Defense and Education Fund, Inc.) (calling for major franchise chains to have to present annual, detailed plans and progress reports on their efforts to improve both the numbers and financial standing of their minority franchisees).

462. Such record keeping may already be required by EEOC regulation, state law, judicial order, or a case settlement, or it may be corporate practice, anyway.

463. 16 C.F.R. § 436.1(a)(16)(iii) (1997).

464. Although the FTC Rule presently does not provide for franchisee requests to preserve their anonymity and not be disclosed to inquiring, potential franchisees, perhaps female or minority franchisees could provide special reasons why they should not be singled out for naming, and could, on request, have their names omitted from the list of female and minority franchisees.

465. 16 C.F.R. § 436.1(a)(16)(i)–(ii) (1997). The FTC Rule requires a statement disclosing the total number, for the end of the preceding fiscal year, of operating franchises and operating franchisor-owned outlets. *Id.* Other required statistics include the number of franchises for each of the following actions in the prior fiscal year: terminations, nonrenewals, and reacquisitions by the franchisor. *Id.* § 436.1(a)(16)(iv)–(vii) (1997).

466. Besides the information discussed *supra* note 465, required disclosures concern, among other things: franchisor trademarks and service marks, business experience, criminal and civil liabilities, bankruptcies, and audited balance sheets; franchisee payments,

Moreover, if the FTC did determine that such disclosures would be unduly burdensome on a substantial number of franchisors, then the FTC could promulgate a rule permitting franchisors to leave the women/minorities information out of the disclosure statement. That omission of information could take place if, for example, the total number of franchises for a franchised system is below, say, fifty, or if, for any sized franchise system, the franchisor includes a statement in bold, large print or with all-capital letters, declaring that the women/minorities information has been omitted and that the franchise applicant has the right to request such information from the franchisor. This notice would further state the method for obtaining the information, and that the franchisor, upon the applicant's request, must furnish the information within ten days or some other reasonable time frame given the circumstances.

Other information that should also be required by an amended FTC Rule, either via mandated disclosure or, at the very least, by another notice as to its ready availability, concerns possible redlining allegations.[467] The franchisor should have to share with potential franchisees whatever demographic data or similar information the franchisor possesses or otherwise has at its control, insofar as that material can be briefly summarized and excludes any trade secrets or other confidential business communications or privileged work product. The data, perhaps already collected by the franchisor,[468] are revealed in order to show what credence may be placed in redlining charges. The data could list and describe markets, average costs, education levels, wage scales, and various other economic information. Franchisors might also include records about applicants and franchisees.[469] Again, because the required data, in its most basic form, would be easy to gather, there should be relatively little burden on franchisors having to

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financing, training, and suppliers; site selection; franchise operation, termination, modification, repurchase, and assignment. For analysis of these and other FTC Rule requirements, see GARNER, *supra* note 140, at apps. A, B.

467. Commentators have recommended additional disclosures. For example, a former official of the franchisor, American Speedy Printing, who was also vice chairman of the International Franchise Association's minority committee, recommends that all franchisors be required to furnish "truth in lending," namely, accurate franchisee dropout rates, reasons for those dropouts, and profitability numbers per region and outlet. *Minorities and Franchising: Hearing Before the House Comm. on Small Business*, *supra* note 252, at 99 (statement of Andrew Petress, senior vice president for government relations, The PM Group, Brighton, Mich.).

468. Or, the data is otherwise easily available to the franchisor.

469. In one redlining lawsuit won by franchisee Cornelious Howard against franchisor BP, the court ordered BP to keep such information, namely, "records about the [franchise] applicants—who they are and what happens to their applications." Ernest Holsendolph, *Courts Seem Willing to Address Discrimination*, ATLANTA J.–CONST., Aug. 13, 1995, at G1. For BP, that approach may have occurred simply in response to the damages awards against BP, *see supra* notes 292–97 and accompanying text, without any other prodding necessary. *See* Holsendolph, *supra* note 294, at E12 (Although BP found the court holdings against it unfair, a BP spokeswoman stated that it had changed its behavior: "Since that time we have formalized our procedures for dealership applications, and we will be able to prove fairness in the way the stations are awarded.").

provide this information. Indeed, the data may serve to prevent or resolve a possible redlining case. Therefore, an amended FTC Rule may actually reduce transactional costs because the expenses associated with redlining, whether alleged or actual, are far higher than the transactional costs due to a mandatory disclosure regimen.

B. A Private System to Counter the Redlining of Franchises and the Poor Servicing of Redlined Communities

1. "High Risk" Franchises

For franchised businesses located in the inner city or other economically depressed areas, the risk of poor economic performance, if not failure, usually is much greater than the typical risks already present for an ordinary franchised business.[470] While redlining breeds issues of racial politics and justice—a volatile mixture—the principal complaint about redlining is *economic*: that minority franchisees, who often face serious problems of financing and other difficulties worse than those facing many white franchisees, are condemned by redlining to far poorer business opportunities than those afforded nonredlined, often experienced, white business owners. If anyone should have to overcome the economic obstacles created by redlining, one could argue that it should be the better established franchisees, *not* recently recruited, often less sure-footed and more financially strapped minority franchisees.

Because of the problems posed by running businesses in economically depressed areas, regardless of whether redlining in fact has occurred, franchisors should implement their own programs: ones not mandated by the government, but nonetheless admissible in terms of judging or defending any later redlining claims. These programs should concern two critical subjects: the "high risk" franchisee, and the "high risk" franchise. The former's risks revolve around problems directly associated with a particular franchisee, one with a higher than usual set of problems, potential or realized, in matters such as local marketing, business finance, industry experience, and work force skills.[471] The latter's risks concern particular communities: for instance, the local markets for labor, consumption, industry supplies, and money. A comparatively poor, uneducated, dispirited neighborhood is itself the major problem facing a franchisee operating in the high risk community.[472]

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470. The increased risk is certainly a major reason why franchising has been, as one franchisee advocate puts it, a predominantly "white, suburban phenomenon." Torres, *supra* note 149, at A12 (quoting Susan Kezios, founder of Women in Franchising, Inc.).

471. For more on this subject, see *infra* Part VIII.B.2.

472. For the federal procurement process, the Chairman of the U.S. Senate Committee on Small Business, Senator Christopher "Kit" Bond (R-Mo.), has introduced a bill to give small businesses in impoverished urban and rural zones a preference ahead of the preference presently given to minorities. Rodney Ho, *Electronic Welfare Payments*

To encourage the start-up of franchised businesses in high risk communities, franchisors—perhaps acting in concert with private lenders—could provide the new franchises with better financing arrangements, lower fee schedules, and other favorable terms designed to compensate for the shortcomings of that outlet. Again, eligibility for this assistance would be based on the franchise's location, such as in a community with a low per capita income and high per capita crime rate, not on the race or ethnicity of the prospective franchisee. Extraordinary disclosures should be made to prospective franchisees that might locate in a high risk market area. In return for such information and the extra assistance described above,[473] franchisors would be entitled to draft an explicit acknowledgment of the disclosures, which they could require prospective franchisees to sign.

The recipient of a high risk franchise who remains in good standing as a franchise could, over time, be awarded bonus franchises. Both concepts, bonus franchises and good standing, would be defined to meet the market conditions in that general industry (e.g., fast-food) and for that particular franchised system (e.g., Wendy's). To define "good standing" rather precisely, a franchisee would need to reach some relatively low threshold.[474] For example, the franchisee may only need to gross more sales or earn more profits than twice the number of franchisees going out of business[475] for that franchise system in any given year.

Alter Check Cashier's Role, WALL ST. J., May 13, 1997, at B2. The proposed urban zones would be limited to those census tracts in which most households have an income less than 60% of the metropolitan area's gross income. *Id.* The rural zones would be counties in which the median household income is less than 85% of the nonmetropolitan state median household income. *Id.*

Bond's proposal presumably would overcome what appears to be governmental favoritism towards wealthier areas. Two recent studies, one in Chicago and the other in Texas, indicate that the Small Business Administration ("SBA") is far more likely to lend money to businesses operating in higher-income areas than those in lower-income communities. Michael Selz, *Financing Small Business: Loan Effort Favors Firms in Wealthy Areas, Study Finds*, WALL ST. J., July 29, 1997, at B2. In the Chicago study, higher-income areas were favored at two to three times the rate of poorer areas for SBA loans to service firms, and in the manufacturing or wholesale sectors of the economy the poorer communities tended to receive only 60% of what would be their proportionate share of SBA loans. *Id. But see* Michael Selz, *Poor Areas Get Small-business Loans Proportionate to Population, Study Says*, WALL ST. J., Oct. 2, 1997, at B2 (reporting on the Federal Financial Institutions Examination Council's study of more than 2000 of the country's largest commercial banks and savings associations, which found that low-income areas receive small-business loans at the same rate as do wealthier areas).

473. For example, better financing terms, lower fee schedules, and other provisions.

474. It would be low in order to compensate for the franchise's comparatively poor locale or other high risks.

475. To give a more realistic account of the system's financial health, the term, "going out of business," would be defined broadly, to include, among other things, the abandonment or closing down of the franchisee's business operations, the sale of the franchised business at a loss, or the franchise's termination by the franchisor.

The resulting right to a "bonus franchise" would be a right of first refusal to acquire one or more additional franchises.[476] The franchisee could exercise its franchise acquisition rights if it pays the going rate, agrees to subject itself to the then-current franchise agreement, and otherwise follows all reasonable requirements imposed on other new or expanding franchisees.

For the above two matters—better franchise terms and eligibility for additional franchises—the key issue is good service to all communities and fair opportunities for all. Most customers, whether in high risk areas or low risk areas, probably do not know whether an outlet is in fact franchised,[477] who the owner/franchisee is, and, of course, the owner/franchisee's race, national origin, or sex. So what matters more than just boosting the number of minority-owned franchises is to avoid, or correct, the problems associated with redlining: poor service to impoverished communities and inadequate opportunities for those who wish to serve those communities. In either case, an emphasis on rectifying the redlining problems should lead incidentally to improvements in the number of minority-owned businesses. Given the demographics of the inner city, the suggested plan ultimately may have some of the effects of a race-conscious affirmative action program.[478] It does so in a constitutionally acceptable manner, however, because any overall disparity in favor of minorities would simply result from there being a high proportion of eligible minority franchisees in the high risk area. These potential franchisees might be favored over other, mainly white, applicants from less risky areas; but the preference could not be deemed reverse discrimination because any special assistance[479] to the former group is extended to its members not on account of their race or ethnicity, but due to their establishing or maintaining businesses in disadvantaged communities.

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476. The number of bonus franchises would depend on (1) how many new franchises the franchisor is adding, and (2) the franchise system's percentage of franchises that are in low risk areas compared to high risk locales. The rarer the high risk franchise, the more the franchisees for such high risk franchises should have rights of first refusal.

477. *See generally* Robert W. Emerson, *Franchisors' Liability when Franchisees Are Apparent Agents: An Empirical and Policy Analysis of "Common Knowledge" About Franchising*, 20 HOFSTRA L. REV. 609 (1992) (survey evidence that people ordinarily know very little about franchising, do not realize whether prominent national business chains are predominantly franchised, and usually do not know whether a local business is a franchised outlet).

478. In 1990, with respect to the total black and white populations, 57.3% of African Americans lived in the inner city, while only 25.8% of whites did. U.S. BUREAU OF THE CENSUS, 1990 CENSUS OF POPULATION: SOCIAL AND ECONOMIC CHARACTERISTICS (METROPOLITAN AREAS) 88 tbl.4 (113th ed. 1993).

479. In other words, unfair favoritism, according to plaintiffs in a reverse discrimination case.

2. Special Assistance Based on the Franchisee's Economic Circumstances

Special assistance to prospective or existing franchisees, when not based on the special circumstances related to high risk locations or markets, should be based simply on the economic status of the franchisee or prospective franchisee. Such assistance may favor a higher portion of minorities, assuming arguendo that a larger percentage of such groups has a lower income or net wealth than do the whites.[480] The aid, however, would not be a legally susceptible (under section 1981) preference based simply on race.[481] Indeed, some proponents of socioeconomic-class-based affirmative action programs argue that their true worth is not intrinsic, but as a surrogate for race-based affirmative action.[482]

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480. In 1995, 29.3% of all African Americans, 30.3% of all Hispanics, and 11.2% of all whites fell below the U.S. poverty line. U.S. BUREAU OF THE CENSUS, *supra* note 150, at 475 tbl.736. In an economic class scheme, while blacks and Hispanics would benefit far more on a percentage basis, the largest number of potential beneficiaries would be white, inasmuch as in sheer numbers, about two and a half times as many whites (if one includes Hispanic whites) are beneath the poverty line as are blacks. *Id.*

As for the higher levels of income, from which the pool of potential franchisees usually is drawn, whites greatly outdistance blacks and Hispanics. In 1995, for aggregate family income, the top 5% of white families averaged $127,196, while the top 5% of black and Hispanic families averaged only $84,744 and $82,380, respectively. *Id.* at 470 tbl.725. As of 1995, 14.8% of white households had an income level over $75,000, while only 6.2% of black households and 6.1% of Hispanic households exceeded $75,000. *Id.* at 465 tbl.717. While women's wages have moved closer toward that of men's wages (from an average of 63% in 1973 to 75% in 1997), African-American earnings, as a percentage of average white earnings, has fallen from 80.2% in 1973 to 76.5% in 1997. *Best Economy in a Generation?*, WALL ST. J., May 5, 1997, at A2. *But see* Boyce, *supra* note 332, at A2 (reporting that nonwhites, including African Americans, are rapidly catching up to whites in terms of home ownership, levels of education, incomes, and business ownership).

481. Increasingly, some franchisors offer alternative financing terms for prospective franchisees who cannot afford the usual upfront expenditures. Jeffrey A. Tannenbaum, *Focusing on Franchising: Alternative Terms Offered to Prospective Franchisees*, WALL ST. J., Feb. 4, 1997, at B2. For example, U.S. Franchise Systems, Incorporated, the franchisor of Microtel Inns, permits new franchisees to put $150,000 into a lease-to-buy Microtel franchise rather than the usual $600,000 in cash toward a $2.2 million franchise investment. *Id.* (also reporting that Domino's Pizza franchisees in Great Britain have a leasing choice, with experienced Domino's managers able to pay just $7500 upfront, one-tenth of the customary cash payment, and in return owing a 15%-of-sales rent on top of the royalties charge). Another example of an alternative arrangement is SRA International, Incorporated, an executive-recruiting office franchisor, which permits new franchisees to opt for a "flexible purchase" plan allowing $20,000 of the $35,000 initiation fee to be paid from revenue during the first few years of operations. *Id.*

482. Richard H. Fallon, Jr., *Affirmative Action Based on Economic Disadvantage*, 43 UCLA L. REV. 1913, 1947 (1996) (citing Frederick A. Morton, Jr., Note, *Class-based Affirmative Action: Another Illustration of America Denying the Impact of Race*, 45 RUTGERS L. REV. 1089 (1993)).

While racial preference affirmative action programs are highly controversial and divisive, virtually no one opposes preferences based on economic disadvantage.[483] Numerous commentators, including those against other affirmative action programs,[484] have endorsed these class-based preferences.[485] Indeed, a number of franchisors have such programs to assist minorities and other persons who face what is often the largest stumbling block to acquiring a franchise: insufficient financing.[486] While these programs grow in number and complexity, the resentment and possible litigation arising from these programs

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483. *Id.* at 1923. A few commentators, however, have criticized class-based programs for their avoidance of racial issues that, the commentators believe, must be addressed. *See, e.g.*, Morton, *supra* note 482. A more cogent criticism may be the practical difficulties of implementing a class-based system. *See* Deborah C. Malamud, *Class-based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847, 1850 (1996) (contending her article demonstrated that "considerable obstacles stand between the legal system and a technically adequate definition of economic inequality—and that achieving cultural adequacy will be even more difficult").

484. For example, those based on race.

485. *See, e.g.*, Antonin Scalia, *The Disease as Cure: "In Order to Get Beyond Racism, We Must First Take Account of Race,"* 1979 WASH. U. L.Q. 147, 156 ("I strongly favor...what might be called...'affirmative action programs' of many types of help for the poor and disadvantaged."); Clarence Thomas, *Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough*, 5 YALE L. & POL'Y REV. 402, 410–11 (1987) ("Any preferences given should be directly related to the obstacles that have been unfairly placed in those individuals' paths, rather than on the basis of race or gender, or on other characteristics that are often poor proxies for true disadvantage."); *see also, e.g.*, Mark Johnson, *Some Say Poverty, Not Race, Is the Issue—Class-based Plans Seen as Alternative*, RICHMOND TIMES–DISPATCH, July 7, 1995, at A1; Richard D. Kahlenberg, *Affirmative Action by Class*, WASH. POST, July 17, 1995, at A19.

486. Several commentators have cited insufficient financing as a major stumbling block for franchisees. *See* Brown, *supra* note 6, at 61–62 (reporting that franchisors fail to make any substantial effort to recruit or retain minority entrepreneurs because they believe minorities have no money); Conroy, *supra* note 348, at C1 (reporting the conclusions of Susan Kezios, president of a franchisee advocacy group, the American Franchisee Association and Women in Franchising: franchisors' foot-dragging over assisting minority franchise applicants stems from one major factor—most franchisors believe minorities lack capital, so they do not bother to recruit them); Kezios, *supra* note 260, at 451 (concluding, "the major obstacle to women and minorities seeking to own a franchised business is lack of access to capital"); Murphy, *supra* note 372 (discussing special financing programs at various franchisors such as American Leak Detection, Travel Network Limited, and ServiceMaster); Prewitt, *Hardee's Renews*, *supra* note 152 (stating that "[c]ommitments by some restaurant chains to diversify their franchise base with more minority operators are being thwarted by a chronic lack of capital on the parts of both franchisees and franchisors"). *But see* Barrionuevo, *supra* note 405, at D1 (quoting Harry Goldman, president of the Self-employment Advisory Foundation, who contends that often it is not inadequate finance but poor information that keeps minorities from becoming franchisees: Many minorities have the capital to become franchisees; "they are saying, 'Hey, I'm willing to pay if you [the franchisor] show me how to do it'").

seem less likely, as the nonparticipant franchisees or applicants are ineligible only because of their enhanced economic status, not because of their race or ethnicity.

The very flexibility of these financial assistance programs renders them more easily adopted and more easily abandoned. In any rapidly changing franchisor system, it is crucial that the franchisor retain its ability, within reason, to revise or outright cancel any special assistance programs it has initiated.[487] For example, one of the prime instigators of minority and financial assistance plans, Ford Motor Company, may soon enter into a series of partnerships with dealers and thereby sell cars and trucks directly to customers.[488] Because such a plan would revolutionize the way Ford and its dealers conduct business,[489] it could obviously impact ancillary programs such as those furnishing special financial assistance or affirmative action. Ford's ability to improve its delivery of goods and services via these new arrangements with dealers ordinarily should not be impeded by prior, good faith actions to assist franchisees or franchise applicants. In other words, ideas and programs must not be locked in place.

For franchising special assistance programs, the number of potential beneficiaries are far fewer than for employment or education programs. That affords the franchisor more opportunity to focus sharply any program designed to improve the franchisee applicant pool. Economics-based plans, run by franchisors instead of the government, can be narrow in scope,[490] which is perhaps the only way they will succeed, given the logistical and legal problems for broader plans or race-based programs.[491] While eligibility will be based on income and wealth, not race, the programs can go beyond finance to address as well most new minority franchisees' need to develop entrepreneurial skills and to acquire ongoing technical and managerial training.[492] Tightly drawn assistance programs will not

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487. Without such flexibility, franchisors may be deterred from instituting such programs in the future.

488. Angelo B. Henderson, *Ford Explores Idea of Joining Dealers: Becoming a Direct Seller Would Mean Tackling the Auto-retail Chains*, WALL ST. J., May 12, 1997, at A2.

489. The manufacturer-dealer relationship probably would no longer even be a franchise.

490. Some commentators, in fact, fault class-based programs for the very reason that they are much narrower in scope than race-based relief. *See, e.g.*, Fallon, *supra* note 482, at 1941. Many opponents of affirmative action, however, fear that class-based programs will operate as a ruse to continue race preferences. *See, e.g.*, G. Pascal Zachary, *Need, as a Substitute for Race Preferences, Is Just as Hot an Issue*, WALL ST. J., Apr. 10, 1997, at A1 (discussing programs involving university admissions, but the comments could be applied generally to any "affirmative action" programs, including those in franchising).

491. *See generally* Fallon, supra note 482.

492. Franchising business experts have concluded that the "lack of entrepreneurial skills and restricted access to quality technical and managerial training is a major reason for the lower gross sales [and smaller profit margins] of women- and minority-owned businesses" than of businesses owned by white males. Kezios, *supra* note 260, at 449.

remedy the huge societal problems associated with what has been termed the "underclass."[493] Indeed, the underclass probably is little represented among the people assisted by franchisor outreach programs designed to increase the number of minority franchisees.[494] Other programs, such as for fast-food employment opportunities,[495] may reach the underclass, but to be in the potential franchisee pool is, ipso facto, to have either never been in the underclass or to have already risen from its ranks.

All franchisee-assistance programs run in conjunction with the government or otherwise relying upon governmental programs or assistance (loan guarantees, lower interest rates, larger loans, even zoning favors) must not favor certain persons or give any preferences to particular aid applicants based on race, religion, or ethnicity. An increasingly strong line of court cases renders these programs (whether set-asides or labeled simply "affirmative action") easily subject to reverse-discrimination claims by disappointed, excluded white franchisees or franchise applicants.[496] For example, numerous legal challenges have gathered

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493. Professor Fallon defines the "underclass" as the group, "overwhelmingly black, that suffers the worst privations and dislocations of urban poverty, including joblessness, inferior schools, rampant drug abuse, pervasive violent crime, alienation, and despair." Fallon, *supra* note 482, at 1945; *accord* Roy L. Brooks, *The Ecology of Inequality: The Rise of the African-American Underclass*, 8 HARV. BLACKLETTER J. 1, 3–4 (1991) (noting that a sort of consensus definition has labeled the underclass as "poor people who live in a neighborhood or census tract with high rates of unemployment, crime, and welfare dependency"); William J. Wilson, *The Truly Disadvantaged Revisited: A Response to Hochschild and Boxill*, 101 ETHICS 593, 600–01 (1991) (defining the underclass as inhabitants of neighborhoods characterized by high rates of joblessness, "few legitimate employment opportunities, inadequate job information networks, and poor schools," with a resulting high level of crime and other deviant activities, such as drug use).

494. Brooks states, "Estimates of the size of the American underclass range from a high of sixty percent of the poverty class to a low of five percent." Brooks, *supra* note 493, at 4. With about one-third of all blacks, and only around one-eighth of all whites, falling below the poverty line, U.S. BUREAU OF THE CENSUS, *supra* note 150, at 475 tbl.736, that translates into a black underclass of between less than 2% and about 20% of the black population (for whites, it would lie somewhere between less than 1% and about 7.5% of the white population). If one accounts for there being a far greater total number of whites in the United States, with 67% of the total poor being white and 27% being black, *id.*, then the "underclass"—unless it is a distinctly African-American grouping—remains likely to be larger, in sheer numbers (not percentages), for whites than for blacks.

495. Most small businesses that open in the inner city, franchised or otherwise, are likely to hire workers from the immediate vicinity. Torres, *supra* note 149, at A12 (quoting Jim Weidman, a spokesman for the National Federation of Independent Businesses, a 60,000 member national association of small-business owners, who said that the small-business work force is extremely dependent on the business locale or the owner's race and ethnicity). Whether anyone in the neighborhood has the capital to own such a business, whether as a franchise or independently, is much more problematic.

496. *See, e.g.*, Paul M. Barrett, *Main Program for Minority Firms Faces Challenges in Federal Courts*, WALL ST. J., Nov. 22, 1995, at B8 (discussing suits filed in federal courts against the SBA's so-called 8(a) program of set-asides for minority-owned

steam against the Small Business Administration's 8(a) program.[497] The program classifies members of certain racial groups, such as African Americans, as presumptively socially disadvantaged, while people from other groups, such as whites, have no such presumption.[498] Only with a social disadvantage, and also an economic disadvantage,[499] can a business qualify for the 8(a) program. Courts have held, though, that "rights belong to individuals, not groups."[500] The presumptions built into set-aside programs, whether the Small Business Administration's 8(a) projects or other federal or state plans, seem destined to fall under the tightened scrutiny of courts, which term racial classifications "odious," "pernicious," and constitutionally suspect.[501] Those plans generally do not, and

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businesses). The plaintiff in one of the suits—a San Diego high-technology firm, Science Applications International Corporation—soon dropped its suit. *In Brief, supra* note 390, at 4. Others, however, continue. *See, e.g.*, C.S. McCrossan Constr. Co. v. Cook, 40 Cont. Cas. Fed. (CCH) ¶ 76,917 (D.N.M. Apr. 2, 1996), *available in* 1996 WL 310298 (denying a white-owned business' request for a preliminary injunction against enforcement of the 8(a) program but allowing its reverse-discrimination case to proceed).

Besides these lawsuits, the 8(a) program also faces increased congressional pressure to have it dismantled. Stephanie N. Mehta, *Meyers Seeks to End SBA Program for Minority Firms*, WALL ST. J., Apr. 18, 1996, at B2 (noting that Jan Meyers (R-Kan.), then the chairwoman of the House Committee on Small Business, proposed to eliminate the SBA's 8(a) program, which in 1995 funneled $5.2 billion in government contracts to minority-owned businesses, with over 90% of the contracts awarded without any bidding).

497. Small Business Act § 8(a), 15 U.S.C. § 637(a) (1994). An entirely separate issue is the economic efficacy and overall management of these governmental programs to assist small businesses and entrepreneurs. *See* Udayan Gupta, *Minority Entrepreneurship Program Faulted in Study: SSBIC Shortcomings Blamed on Inadequate Resources and SBA Management*, WALL ST. J., Apr. 21, 1995, at B2.

498. 13 C.F.R. § 124.105 (1997). Indeed, "it appears that it is virtually impossible to qualify for a preference as a 'socially and economically disadvantaged' individual, 15 U.S.C. § 637(a)(4)(A) (1994), without demonstrating membership in a minority group." Fallon, *supra* note 482, at 1931 n.55 (citing Charles V. Dale, *Compilation and Overview of Federal Laws and Regulations Establishing Affirmative Action Goals or Other Preferences Based on Race, Gender or Ethnicity*, [Aug.] Daily Lab. Rep. (BNA) No. 147, at D–46 (Aug. 1, 1995), and *Text of Affirmative Action Review Report to President Clinton*, [July] Daily Lab. Rep. (BNA) No. 139 (Special Supplement), at S–1 (July 20, 1995)).

499. To be "economically disadvantaged," an individual must not have a net worth over $250,000 upon entering the 8(a) program. 13 C.F.R. § 124.106(a)(2)(i) (1997).

500. *Repeal of Small Business Ethnic & Minority Set-asides: Hearings Before the House Comm. on Small Business*, 104th Cong. (1996), *available in* 1996 WL 10830984, at *20 (statement of Professor George R. La Noue).

501. *Id.* (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995)). Note, though, that these plans may not fall for several years. The lag between court rulings and their implementation can be considerable. Hilary Stout & Eva M. Rodriguez, *Government Contracts to Minority Firms Increase Despite Court's 1995 Curb on Affirmative Action*, WALL ST. J., May 7, 1997, at A20. Stout and Rodriguez report that, in the two years since *Adarand*, only one government set-aside program has been eliminated. *Id.* Indeed, they note, the portion of government contracts awarded under racial-preference programs has grown steadily during the Clinton Administration. *Id.* Even three years after the *Adarand*-led court trend against and governmental preferences based on race, *see supra* notes 119–28

perhaps cannot, meet the strict scrutiny test[502] barring racial preferences unless there is first a well-developed record of discrimination in that particular industry against members of the group that the affirmative action is meant to benefit.[503] *Adarand*,[504] *Croson*,[505] and many other recent holdings render unconstitutional any merely generic basis for supporting governmentally imposed affirmative action programs, such as "societal discrimination."[506] Mere underrepresentation of minorities is insufficient to justify a governmentally sponsored affirmative action plan.[507]

One commentator, specifically in order to avoid *Croson*, has proposed a private alternative to minority business set-asides: a completely privately formulated, financed, and operated system relying upon the use of contract provisions containing

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and accompanying text, the Clinton Administration continues to announce new programs intended to serve only minority-owned businesses. *See, e.g.*, Michael K. Frisby, *Gore Will Unveil Plans to Increase Aid for Black Businesses over Next 3 Years*, WALL ST. J., Feb. 10, 1998, at B2 (reporting on a program, to be administered by the SBA, that would provide $1.4 billion in loan guarantees for black entrepreneurs to expand operations or start new businesses; the goal is to greatly expand the allocations under this SBA race-specific funding—to $586 million by the year 2000, a dramatic jump from such funding in the past (e.g., $132 million in 1992, and $286 million in 1997)).

Administration officials acknowledge that the new rules meant to comply with *Adarand* substitute minority contractor price credits (as much as 10% on bid prices) for racial set-asides and are not expected to reduce the number of minority business contracts. Stout & Rodriguez, *supra*, at A20.

502. The Supreme Court has declared: "All racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand*, 515 U.S. at 227.

503. *Repeal of Small Business Ethnic & Minority Set-asides: Hearings Before the House Comm. on Small Business*, *supra* note 500, at *18 (contending that 8(a) is fatally flawed because its grant of presumptive eligibility for women and some minorities, and the corresponding ineligibility for whites and others, "is not intended as a remedy for any pattern or practice of discrimination in federal contracting"; further stating that no such record of discrimination exists).

504. 515 U.S. 200.

505. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

506. *See, e.g.*, *id.* at 496–97 (plurality) (declaring that, unlike specific, industry-particular, identified, past discrimination, "societal discrimination" is an inadequate basis for race conscious classifications); *see also* Monterey Mechanical Co. v. Wilson, 125 F.3d 702 (9th Cir. 1997); Engineering Contractors Ass'n of S. Fla. Inc. v. Metropolitan Dade County, 122 F.3d 895 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 1186 (1998); Contractors Ass'n of E. Pa., Inc. v. City of Philadelphia, 91 F.3d 586 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 953 (1997); Coral Contr. Co. v. King County, 941 F.3d 910, 917 (9th Cir. 1991).

507. *See* Barrett, *supra* note 134, at B1 (discussing a trio of recent rulings, in Miami, Philadelphia, and Columbus, Ohio, that strike down municipal affirmative action programs because the studies used to support them were "junk science").

broadly worded nondiscrimination obligations.[508] An entity akin to a credit rating agency would assign each party a grade or score that accounts for that business' history of involvement with minority and nonminority firms and represents its likely compliance with the nondiscrimination obligation.[509] The rating would be a factor in evaluating competing bids, and those with poor nondiscrimination compliance ratings would be at a competitive disadvantage.[510] The arrangement is thus neither a set-aside nor a quota, but simply harnesses competitive market forces by adding a nondiscrimination factor to the numerous other elements—such as price, performance time, warranties, and reputation for quality and service—considered when parties decide with whom to contract.[511] Whether such an arrangement could prove effective in a franchising context, both practically and legally, remains to be seen. Franchisors, the "crediting" agency, winning franchisees, and other parties would have to be capable of fending off the inevitable legal challenges from would-be franchisees or others who claim that the nondiscrimination factor, as implemented, violates their rights. It may be sheer folly to presuppose that such a complex arrangement could be free of any governmental involvement,[512] or that a government-free plan would not expose parties to all sorts of claims, such as section 1981, tortious interference with contractual relations, violation of state franchise statutes, and breach of the covenant of good faith and fair dealing.

The Supreme Court applied strict scrutiny analysis to the racial classification used by the City of Richmond in *Croson* because "there simply is no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."[513] While commentators have remarked upon the continuing vitality of some government-sponsored affirmative action,[514] despite recent court

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508. Robert E. Suggs, *Rethinking Minority Business Development Strategies*, 25 HARV. C.R.–C.L. L. REV. 101 (1990).

509. *Id.* at 106–07.

510. *Id.* at 107.

511. *Id.*

512. *Croson* and *Adarand* require such government uninvolvement.

513. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989). Note that *Croson*, and later *Adarand*, did not alter the longstanding distinction between a "strict scrutiny" standard applicable to race-based classifications and an "intermediate scrutiny" standard used for sex-based classifications. *See, e.g.*, Coral Constr. Co. v. King County, 941 F.2d 910, 930–31 (9th Cir. 1991) (reviewing *Croson* and holding that, unlike for racial preferences, sex-based affirmative action programs may be viewed under an intermediate scrutiny standard).

514. One commentator wrote, shortly after *Adarand*, "Strict scrutiny expresses a mood; it doesn't decide a case." Kenneth Jost, *After Adarand*, A.B.A. J., Sept. 1995, at 70, 71 (quoting Kenneth Karst). That thought, however, may express more a hope than an analysis. As cases come down after *Adarand*, it is clear that almost all government sponsored or supported affirmative action programs may be ruled unconstitutional, without much hesitancy on the part of a judiciary looking for the heightened legal proof needed to support racial preferences (a narrowly tailored, compelling state interest, based on clear evidence of past discrimination).

rulings,[515] it is clearly social and political forces—no longer the judiciary—that are the driving forces behind both private and public measures to preserve affirmative action.[516] Ironically, while the courts may succeed in effectuating a dramatic reduction in government-run affirmative action programs, the private sector appears to be as committed as ever to its own affirmative action plans.[517]

The franchisor-franchisee relationship is generally a private, arms-length, contractual transaction and, as such, does not implicate *Croson* because the *Croson* decision only applies to cases involving state actors (such as state agencies, universities, or city governments) or a branch of the federal government. Thus, without the state action necessary for invoking the equal protection clause of the U.S. Constitution,[518] a franchisor may institute a set-aside program like the affirmative action program at issue in *Croson* and not be subject to the high level of scrutiny to which the City of Richmond was subjected in *Croson*.

Even if there is no government connection, preferences for certain franchisees/franchise applicants should be pursued carefully. They still constitute a potential problem under section 1981, state statutes, as well as common law claims.[519] The better approach is to base any assistance on the applicant's economic needs, on other objective criteria, and on the high risk nature of certain locations or markets.[520] Emphasis on a particular racial or ethnic category appears likely to be viewed with increasing skepticism, not just as wrong or counterproductive but as simply irrelevant.[521] Of necessity, American society

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515. *See* Neal Devins, Adarand Constructors, Inc. v. Pena *and the Continuing Irrelevance of Supreme Court Affirmative Action Decisions*, 37 WM. & MARY L. REV. 673 (1996).

516. *Id.* at 679.

517. *See* Edelman, *supra* note 346, at 257–58; Fisher, *supra* note 352, at 269–72; *supra* notes 348–52 and accompanying text.

518. U.S. CONST. amend. XIV, § 1.

519. For example, interference with contract is a potential claim if the franchisor forces the existing franchisee to sell its franchise not to a white bidder (in hand, at a good price) but to a possible minority bidder whose ultimate offer never materializes or otherwise is not as remunerative to the existing franchisee.

520. While race-based, government-supported programs are judged by a strict scrutiny standard, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995), affirmative action plans based on economic disadvantage are subject merely to a rationality review, "the most relaxed judicial scrutiny." *Id.* at 212–13.

521. For a contrary view, see, for example, Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 148–50 (1976). Hiss argues that racial or other social groups have "a distinct existence apart from [their] members" and that members' "well-being or status is in part determined by the well-being of the group." *Id.* at 148. Fiss believes that interpretation of the Equal Protection Clause should not focus upon antidiscrimination principles, but upon protection of "specially disadvantaged groups," most notably blacks. *Id.* at 150. He contends that "redistributive measures are owed to the [African-American 'group'] as a form of compensation." *Id.* For Hiss, the focus must not be the protection of individuals *as individuals*, but as members of a group. Policy makers should, therefore, turn away from antidiscrimination concepts to seek the elimination or

rapidly moves from what has been an almost exclusively bipolar, racial orientation (blacks and whites) to a recognition of the nation's multiracial complexity.[522] That movement should cause even more difficulty for traditional race-preference programs, which may be viewed as mired in unduly restrictive race classifications and assumptions and thereby tied to increasingly inaccurate percentages and conclusions. As America becomes more multiracial, the old, narrow classifications become outdated. On the other hand, if the number of groups and the allocated percentages are expanded and updated, respectively, to reflect our present situation, that will drastically reduce the historical significance of these preference programs, render the programs even more divisive, and create systems ever more intricate and mazelike—too complex to retain the citizenry's and businesses' understanding, let alone support.[523]

IX. CONCLUSION

In the 1970s, franchise regulation began in response to numerous abuses by franchisors. In their attempts to find solutions, legislatures and courts have focused their attention on the motives of the parties to the franchise agreement. More important than motives, though, are results. A struggling franchisee, minority or nonminority, typically worries intensely about his profits and losses while perhaps not even having time to consider what the franchisor's actual intentions have been.

The bottom line may be that it is not a franchisor's intentional misconduct, but simple inertia, a contentment with present arrangements and an emphasis on upfront costs and short-term profits, that keeps franchisors from recruiting and retaining more minority franchisees. If enough other suitable candidates actively seek franchises, many franchisors will not expend the extra

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amelioration of laws and practices that aggravate or perpetuate the subordinate position of a "specially disadvantaged group." Needless to say, Fiss' theories have been either ignored or outright rejected by the courts.

522. *See, e.g.*, M. Elaine Mar, *Secondary Colors: The Multiracial Option*, HARV. MAG., May–June 1997, at 19 (discussing the dramatic increase in interracial marriages and of offspring who are multiracial; reporting on how the "other" race category grew 45% from the 1980 census to the 1990 census, and then numbered 3.2% of annual births; noting that a new, multiracial census category could accelerate the process whereby people refuse to classify themselves as members of one particular race).

523. Senator Hubert Humphrey (D-Minn.), the principal sponsor of the Civil Rights Act of 1964, affirmed that the law's protection of opportunities is intended to benefit individuals, not groups:

> [O]ur standard of judgment in the last analysis is not some group's power...but an *equal* opportunity for *persons*. Do you want a society that is nothing but an endless power struggle among organized groups? Do you want a society where there is no place for the independent individual? I don't.

Morris Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312, 1322 (1986) (quoting Senator Humphrey).

effort needed to assist minority franchisees. In short, they see no need to change anything.

Even with an ostensibly winning program in place, the expanding franchisor and its franchisees cannot afford to lose focus on business economics: the franchise relationship is not meant to be parasitic, but symbiotic. Thus, ordinarily, franchise applicants must bring to the bargaining table, and the ultimate franchise relationship, certain attributes such as industry experience and capital. While the minority franchise candidate, in particular, may seek mentoring,[524] money, management skills, and overall business training and experience, the franchisor often seeks an entirely different sort of franchisee: one who "provides his own investment capital, prior [industry] experience, and local market knowledge."[525] In return, the franchisor provides "a proven business format."[526] The franchisor-franchisee "combination of business know how, market knowledge, capital, and manpower" is a "recipe for success," but whenever "any one of these ingredients is missing, success cannot be achieved."[527] If a franchisor determines that its business needs require it to "team up with" a well-financed, experienced franchisee rather than train and finance minority franchise candidates, that decision—allegedly a business necessity—is, according to franchisors, "not adopted to abandon minorities, but [is] just a fact of economic reality."[528]

Under all of the regulatory schemes affecting franchising, dealing with discrimination claims remains problematic. Franchisors must realize that any decision they make regarding termination or nonrenewal of a franchise may be second-guessed by a court of law deciding a discrimination claim. While affirmative action programs are controversial, society has reached a broad consensus that not only accepts, but applauds legal actions against provable discrimination; even white jurors opposed to so-called preference programs (i.e., affirmative action) will not hesitate to punish discrimination.[529] Therefore, the rise

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524. *Minorities and Franchising: Hearing Before the House Comm. on Small Business*, *supra* note 252, at 9 (testimony of Susan P. Kezios, President and Founder, Women in Franchising, Inc.) ("The minority community comes to franchise business ownership with the intention of finding a mentor from whom they can learn entrepreneurship.").

525. *Id.* at 43 (testimony of John A. Cuellar, vice president, general counsel and secretary, Southwest Cafes, Inc.).

526. *Id.*

527. *Id.*

528. *Id.* at 45.

529. Holsendolph, *supra* note 294, at E12 (The article quotes franchisee attorney Gary Kessler, who stated, "I think people see affirmative action and discrimination differently. Affirmative action may be controversial, but I have found juries very offended at proven discrimination, even white juries judging the complaint from a black person."). In a discrimination case brought by attorney Kessler on behalf of a black BP dealer, an all-white jury found in the dealer's favor and awarded him over one million dollars. Rankin, *supra* note 295, at D2. Likewise, in a recent case brought by a black man denied a Re/Max franchise, an all-white jury found in his favor. McKeown, *supra* note 146, at A1.

in discrimination claims has proven very damaging to franchisors. Even if ultimately found to be baseless, these claims may sabotage irretrievably a franchise system's reputation.

If minorities are to be treated differently than other franchisees or potential franchisees because of their past mistreatment, or in order to improve marketplace diversity, or for any number of other reasons besides the correction of specific discrimination against them by a particular franchisor, then franchising parties may do so through private affirmative action plans or other such arrangements, not lawsuits. Such plans may not necessarily have anything to do with a cause of action, but simply concern the ordinary problems of franchisees. The focus would be on assisting persons who accept high risk franchises in heretofore poorly served communities, and aiding franchise applicants whose own economic circumstances make them higher risks than usual for the franchisor choosing new franchisees.

The suggested approach—emphasizing outreach to serve poor communities and to assist risky franchisees, rather than focusing on lawsuits—is not intended to belittle or ignore the possible effects of past or present institutional or systemic discrimination. Obviously, the mistreatment of many groups, some far worse than others, has been abysmal. As a result of that history of injustice, for example, there is substantial support for the idea that a society that once subjected African Americans to the atrocities of slavery and then legally mandated segregation should remain compelled to remedy the immense wrongs it once perpetrated and perpetuated.[530] Rather, the suggested approach rests on a belief that individual wrongdoing and societal wrongs are fundamentally different. Any business entity or individual that engages in discrimination is, and should be, subject to legal action and court-ordered sanctions. However, the most effective methods for addressing historic, economic, or social wrongs arise outside of the courtroom. In the business setting, *societal* wrongs against members of an aggrieved group are generally better understood and corrected via discussion and negotiations—private agreements—rather than attention-grabbing lawsuits. If there really is not much to a minority franchisee's case alleging discrimination by a franchisor, that case is bound to stir resentment and often resistance by the franchisor, many nonminority franchisees, and perhaps even other minority franchisees. The effect may be to dampen the chances for effective, long-term growth in minority opportunities within that franchised system. Instead of lawsuits, a better approach often is to seek a franchisor's acknowledgment of certain social responsibilities (in particular, to women and minorities) as part of a broad compact with the community it serves.

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530. For insight into this history of injustice, see, for example, TAYLOR BRANCH, PARTING WATERS (1988); GEORGE M. FREDERICKSON, WHITE SUPREMACY (1981); A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR (1978); JAMES H. JONES, BAD BLOOD (1981); WINTHROP D. JORDAN, WHITE OVER BLACK (1968); RICHARD KLUGER, SIMPLE JUSTICE (1975).

A series of required disclosures to prospective franchisees should make it less likely that franchisors use publicity gestures, instead of facts, to indicate how they are doing in terms of selecting and retaining minority franchisees. These disclosures, in turn, should include information making it far more difficult for failing franchisees to allege later that they were misinformed and discriminated against when they had significant information before them and presumably made informed decisions based on that data. If there remain serious problems inadequately addressed by the present case law, legislation, standard franchise agreement provisions, and privately developed programs assisting high risk franchises and undercapitalized franchisees, the problems may then be considered more comprehensively, and intelligently, by courts and legislatures. At that point, the judicial or legislative remedies should be more focused on solutions, not rhetoric.

In the meantime, in the absence of stronger public or private systems for reaching out to minorities without committing reverse discrimination, allegations of franchise discrimination usually operate in a factual and legal vacuum that immensely favors public relations posturing, economic power plays, and guesswork disguised as facts. This Article recommends reforms to help alleviate that situation. If additional reforms prove necessary, the presently suggested improvements should provide future courts, legislatures, franchisors, and franchisees the background for serious consideration and understanding of what, in fact, remains to be done.