

1985

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Recommended Citation

Heaney, Gerald W., "Busing, Timetables, Goals, and Ratios: Touchstones of Equal Opportunity" (1985). *Minnesota Law Review*. 1379.
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Busing, Timetables, Goals, and Ratios: Touchstones of Equal Opportunity

Hon. Gerald W. Heaney*

INTRODUCTION

Powerful voices in the land are calling for an end to affirmative action as a means of achieving equality of opportunity for black Americans in education and employment. These voices decry, in particular, the use of "busing" as a tool to integrate schools and the use of "goals, timetables, and ratios" to achieve equality in employment. Many in the executive, legislative, and judicial branches of government hear the voices and are persuaded. Others who hear and reject the siren call are unwilling to speak. The black community itself is divided.

This Article examines in detail the history of discrimination against blacks in employment and education in the Eighth Circuit and concludes that race-conscious remedies are still necessary if discrimination and its effects are to be eliminated. Part I reviews the early history of slavery and traces the story of that evil institution from 1719, when the first slaves were

* Judge, United States Court of Appeals for the Eighth Circuit. I express my gratitude to my secretaries, Elda E. Ignatius and Mary L. Bibbey, and to my law clerks, Louis P. Smith, Edward T. Wahl, Gary R. Ostos-Irwin, and Dean A. Rindy for their assistance in research and writing.

This Article is dedicated to the memory of the late Judge Jacob Trieber, United States District Judge for the Eastern District of Arkansas from 1900 to 1927. A pilgrim in the cause of equal opportunity for blacks, Judge Trieber was the first judge to hold that discrimination against blacks in employment is illegal. *United States v. Morris*, 125 F. 322 (E.D. Ark. 1903). One year later, in *Hodges v. United States* (unreported, 1904), Judge Trieber reaffirmed this position by upholding the United States's power to prosecute several individuals who forced eight blacks to quit their jobs at a local sawmill by threatening them with great bodily harm. The United States Supreme Court reversed, 203 U.S. 1 (1906), and decades of discrimination followed.

Judge Trieber was born in Germany in 1853 and immigrated with his parents to St. Louis, Missouri, sometime after 1865. In 1868, he and his parents moved to Helena, Arkansas, where he became a leader in business, Republican politics, and the law. In 1900, he was appointed United States District Judge for the Eastern District of Arkansas by President McKinley, a position in which he served with great distinction until his death in 1927.

brought to the Eighth Circuit states, to the Emancipation Proclamation. It notes the short-lived gains made by blacks during the brief period of Reconstruction and shows how those gains were eliminated by a series of Supreme Court decisions, by Jim Crow laws, and by congressional and executive inaction in the face of blatant discrimination and racism.

Part II reviews the historic decisions of the Supreme Court and of the Court of Appeals for the Eighth Circuit that held that black Americans had suffered discrimination as a class. It notes the vigorous resistance to the decisions and concludes that courts were compelled to become increasingly specific with respect to remedies. Only with specificity by the courts, and only after Congress had passed the Civil Rights Act of 1964, did blacks begin to receive decent educations and to have opportunities to work in jobs from which they had been excluded for more than 250 years.

Part III studies the reaction that is increasingly evident, both within government and without, as blacks begin to compete with whites in the job market and as white students are increasingly left with the alternatives of attending either integrated public schools or private academies. A few members of the academic community have provided the intellectual underpinnings for this reaction by arguing that race-based remedies offend the Constitution by preferring black Americans to white Americans. They have popularized this reaction by focusing on the most effective techniques used to desegregate schools (busing) and to open job opportunities (goals, timetables, and ratios). This Article concludes that if American society is to preserve its democracy, there is no alternative but to continue the efforts to eliminate racism and to renew the commitment to those techniques that are beginning to bring equality of opportunity to black Americans.

I. A HISTORICAL OVERVIEW OF RACIAL DISCRIMINATION IN THE EIGHTH CIRCUIT

A. SLAVERY AND RECONSTRUCTION, 1719-1874

The roots of racial discrimination in the states that now constitute the Eighth Circuit¹ can be traced to the introduction of slaves in Missouri in 1719.² Although slaves were held in

1. These states are Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.

2. 2 L. HOUCK, A HISTORY OF MISSOURI FROM THE EARLIEST EXPLORA-

much of the Eighth Circuit from 1719 to 1865, slavery grew most rapidly in the Circuit's two slave states of Arkansas and Missouri.³ By 1860, slaves comprised 25.6% of the population of Arkansas and 10.0% of the population of Missouri.⁴

Even before the region became United States territory, its law lent support to racial discrimination. In 1724, Louis XV of France issued the *Code Noir*, the first slave code for the colony of Louisiana, a vast area that included Arkansas and Missouri.⁵ Although less severe than the state codes that followed it, the *Code* placed the full force and effect of the law behind racial discrimination. Under the *Code*, slaves were prohibited from leaving the master's plantation without a pass, carrying arms, assembling unlawfully, assaulting their masters, owning property, engaging in business, or marrying.⁶ Not only were slaves subject to severe punishment for violations of the *Code*,⁷ they were not allowed to prevent the sale or abuse of themselves or

TIONS AND SETTLEMENTS UNTIL THE ADMISSION OF THE STATE INTO THE UNION 240 (1974); cf. O. TAYLOR, *NEGRO SLAVERY IN ARKANSAS* 3 (1958) (stating that slaves were first brought to Arkansas in 1720); Violette, *The Black Code in Missouri*, 6 MISS. VALLEY HIST. A. PROC. 287, 288 (1913) (suggesting that the first black slaves were brought to Missouri in 1735). See generally H. TREXLER, *SLAVERY IN MISSOURI 1804-1865* (32 Johns Hopkins U. Stud. in Hist. & Pol. Sci. No. 2, 1914) (discussing the nature and development of slavery in Missouri); Sampson & Breckenridge, *Bibliography of Slavery and Civil War in Missouri*, 2 MO. HIST. REV. 233.

3. BUREAU OF THE CENSUS, *NEGRO POPULATION OF THE UNITED STATES, 1790-1915*, 57 (1918) [hereinafter cited as *NEGRO POPULATION*]. For Iowa, the high point of slavery came in 1840, when 16 slaves lived in the state. *Id.*; see also Pelzer, *The Negro and Slavery in Early Iowa*, 2 IOWA J. HIST. & POL. 471 (1904) (discussing slavery in Iowa). For Nebraska, the peak came in 1860, when the census reported 15 slaves. *NEGRO POPULATION*, *supra*, at 57. For Minnesota, the census never reported any slaves. See *id.* Studies on black slaves in Minnesota, however, report that a few slaves were held in the state. Appel, *Slavery in Minnesota*, 5 MINN. HIST. BULL. 40, 40-43 (1923); Spangler, *The Negro In Minnesota*, in 20 PAPERS READ BEFORE THE HIST. & SCI. SOC'Y OF MANITOBA SERIES III 13, 19 (1965). The census bureau reported no blacks, slave or free, in North or South Dakota before the Civil War, *NEGRO POPULATION*, *supra*, at 57, and there are apparently no works on slavery in either state.

4. There were 111,115 black slaves in Arkansas and 114,931 black slaves in Missouri. *NEGRO POPULATION*, *supra* note 3, at 57. Only a minority of families in each state actually owned slaves. *Id.* at 56.

5. O. TAYLOR, *supra* note 2, at 14-17; Violette, *supra* note 2, at 288.

6. Violette, *supra* note 2, at 288-301; see also *Gregley v. Jackson*, 38 Ark. 487, 490 (1882) ("There were no valid marriages amongst [the slaves]. . ."); O. TAYLOR, *supra* note 2, at 64 (" . . . the slave had no legal right even to the clothes on his back [H]e could make no valid contract, nor could he either sue or be sued.").

7. See generally G. STROUD, *A SKETCH OF THE LAWS RELATING TO SLAVERY* (2d ed. 1856) (1st ed. 1827).

their family members.⁸ They were denied education, in practice if not by force of law,⁹ and in general were given the minimum in housing, clothing, food, and medical care.¹⁰ The basic contours of the *Code Noir* remained in effect in Arkansas and Missouri until the 1820's and 1830's, when both states entered the union as slave states.¹¹

Increasing racism¹² and defensiveness against northern abolitionists, however, led Missouri and Arkansas to strengthen their slave codes between 1820 and 1865.¹³ Amendments restricted association among slaves, travel without a pass, engaging in any business without a license, and obtaining an education.¹⁴ New laws strengthened the power of citizen patrols established to enforce the codes,¹⁵ and the penalties for vi-

8. *Id.* at 82; see also *Merrill v. Dawson*, 17 F. Cas. 86, 104 (C.C.D. Ark. 1846) (No. 9469) (offspring of slaves belong to owner of the mother), *aff'd sub nom.* *Fowler v. Merrill*, 52 U.S. (11 How.) 375, 396 (1850).

9. O. TAYLOR, *supra* note 2, at 187-88; H. TREXLER, *supra* note 2, at 83-84. See generally H. BOND, *THE EDUCATION OF THE NEGRO IN THE AMERICAN SOCIAL ORDER* 21 (1966) (estimating that by 1860 "in the slave states, hardly more than 5% of the Negro population [slave or free] possessed the simplest tools of learning"); G. STROUD, *supra* note 7, at 133-45 (detailing denial of education to blacks in slave states); C. WOODSON, *THE EDUCATION OF THE NEGRO PRIOR TO 1861*, 151-78 (1919) (detailing opposition to education of blacks).

10. R. KLUGER, *SIMPLE JUSTICE* 27-28 (1976); O. TAYLOR, *supra* note 2, at 131-49; see also G. STROUD, *supra* note 7, at 16 (detailing the minimal legal requirements, if any, to provide slaves with food and clothing).

11. Violette, *supra* note 2, at 302. See generally Trexler, *supra* note 2; Trieber, *Legal Status of Negroes in Arkansas Before the Civil War*, 3 *ARK. HIST. A.* 175-83 (1911).

12. One commentator stated: "Basic to slavery in the South—and only in the South, for this was not true elsewhere in the world or in history—was the firm conviction that the Negro belonged to another and inferior species." M. KONVITZ, *A CENTURY OF CIVIL RIGHTS* 11 (1961). One standard history textbook describes the growth of the racist justification of slavery: "Never before had the justification of human bondage been presented with so much moral fervor and in such elaborate detail as in the antebellum South." J. BLUM, E. MORGAN, W. ROSE, A. SCHLESINGER JR., K. STAMPP & C. WOODWARD, *THE NATIONAL EXPERIENCE: A HISTORY OF THE UNITED STATES TO 1877*, 256 (3d ed. 1973) [hereinafter cited as *NATIONAL EXPERIENCE*]; see also G. MYRDAL, *AN AMERICAN DILEMMA* 83-112 (1962) (studying the development of racist beliefs among the white population); T. WILSON, *THE BLACK CODES OF THE SOUTH* 13-42 (1965) (describing the changing attitude of the white population toward slaves and free blacks).

13. Trieber, *supra* note 11, at 178-79; Violette, *supra* note 2, at 310-16.

14. Trieber, *supra* note 11, at 178-79; Violette, *supra* note 2, at 305-16. The main sections of the antebellum slave code of Arkansas may be found at *ARK. STAT. ch. 153, §§ 1-64* (1848).

15. O. TAYLOR, *supra* note 2, at 209-11; Trieber, *supra* note 11, at 177 ("[T]he patrol was authorized to inflict summarily, without the judgement of any court or magistrate, not exceeding twenty lashes on any slave. . .").

ulations of the codes were increased.¹⁶ Under the amendments, whites could be imprisoned if they traded or associated with blacks or even suggested that blacks were not racially inferior.¹⁷

During this time, the Missouri and Arkansas legislatures also passed some of the most hostile laws in the nation restricting free blacks.¹⁸ Free blacks could not vote, serve on juries, testify against whites, or keep guns.¹⁹ A mosaic of laws restricted, and in some instances eliminated, both educational²⁰ and employment²¹ opportunities. By 1847, both Missouri and Arkansas had laws prohibiting the entrance of free blacks into

16. Trieber, *supra* note 11, at 179-80; Violette, *supra* note 2, at 306.

17. M. KONVITZ, *supra* note 12, at 6-7, 11-12; cf. T. STAPLES, RECONSTRUCTION IN ARKANSAS, 1862-74, 333 (109 Colum. U. Stud. in Hist., Econ. & Pub. L. 1923) (noting that after the war, claims by whites that blacks were their equals led to "a storm of protest and vituperation"). See generally G. STROUD, *supra* note 7, at 248-56 (detailing laws prohibiting speech or publication by whites that promotes equality or questions white supremacy).

18. O. TAYLOR, *supra* note 2, at 237-58; Trieber, *supra* note 11, at 178-79, 181-82; Violette, *supra* note 2, at 307-16.

19. E.g., ARK. CONST. of 1861, art. II, § 21 (only "free white men" and Indians had the right to keep and bear arms); *id.* art. IV, § 2 (1861) (only "free white male citizen[s] of the Confederate States of America" had the right to vote); MO. CONST. of 1820, art. III, § 10 ("every free white male citizen" has the right to vote); O. TAYLOR, *supra* note 2, at 253-55; Trieber, *supra* note 11, at 176-83; Violette, *supra* note 2, at 310-15 (free blacks needed a license to own a gun in Missouri). For numerous other denials of rights to free blacks in Arkansas by 1861, see the 1861 Arkansas Constitution, which limits its entire bill of rights, including the right to trial by jury and the right to counsel, to "free white men." See ARK. CONST. OF 1861, art. II.

20. See, e.g., G. STROUD, *supra* note 7, at 133-45; O. TAYLOR, *supra* note 2, at 187; H. TREXLER, *supra* note 2, at 83; C. WOODSON, *supra* note 9, at 151-78; Violette, *supra* note 2, at 314.

21. See generally C. WESLEY, NEGRO LABOR IN THE UNITED STATES, 1850-1925, 69-86 (1927) (detailing employment restrictions on free blacks).

From an early date, both Arkansas and Missouri required free blacks to have a license and to pay a bond just to remain in the state. O. TAYLOR, *supra* note 2, at 244-45; Violette, *supra* note 2, at 311-14. A free black who moved from one county to another had to reregister. Violette, *supra* note 2, at 312. These licensing laws were often used to prevent free black artisans from competing with white labor. See C. GREENE & C. WOODSON, THE NEGRO WAGE EARNER 15-16 (1930).

The early slave code in the Arkansas and Missouri territories prohibited free blacks from selling anything to slaves on the Mississippi River. Violette, *supra* note 2, at 309. An Arkansas law prohibited the hiring of any free black in or about any place selling liquor, including employment such as sweeping or bringing in water. Trieber, *supra* note 11, at 180. Another Arkansas act prohibited captains and owners of steamboats from employing free blacks on their boats. *Id.* at 182. In 1843, Missouri passed a law fining anyone who would hire or harbor a free black. Violette, *supra* note 2, at 313. For general discussions of the wide range of such statutes in the South, see C. WESLEY, *supra*, at 81-83,

the state, and any free black who wished to remain in the state had to obtain a license and pay a bond.²² A Missouri law of 1859 placed a wide range of restrictions on free blacks and provided for summary trials without juries for blacks who could not prove that they had legally entered the state before 1847.²³ Although fewer free blacks resided in Arkansas in 1850 than in any slave state other than Texas,²⁴ a bill was introduced in Arkansas that year to expel what the *Arkansas State Democrat* called "this worse than useless population."²⁵ The bill was narrowly defeated, chiefly because a majority of the legislators believed that free blacks were citizens of the United States and therefore had a right to remain in Arkansas.²⁶

This barrier was removed by the decision in *Dred Scott v. Sandford*,²⁷ in which the United States Supreme Court,²⁸ affirming a district court of the Eighth Circuit,²⁹ ruled that blacks, free or slave, were not citizens of the United States.³⁰ Chief Justice Taney placed the Court's imprimatur on racism when he wrote that blacks were "beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect . . ."³¹

and T. WILSON, *supra* note 12, at 38-41 (noting prohibitions on free blacks owning shops or hawking goods).

In Arkansas and Missouri, free blacks between the ages of 7 and 20 (Missouri) or 21 (Arkansas) were hired out as apprentices, apparently without any choice of the area of apprenticeship. They were forbidden to work side by side with whites, so their opportunities were limited. Trieber, *supra* note 11, at 179; Violette, *supra* note 2, at 312-13. An 1859 Arkansas act further provided that the proceeds of the free black's apprenticeship would be used to ship the free black out of the state after age 21 on threat of sale into slavery. Trieber, *supra* note 11, at 181. Free blacks could be hired out into temporary enslavement for failure to pay fines, the license bond, or taxes. Trieber, *supra* note 11, at 179; Violette, *supra* note 2, at 312. Laws in some southern states also permitted hiring out to satisfy private judgments. T. WILSON, *supra* note 12, at 38-40.

22. O. TAYLOR, *supra* note 2, at 244-45; Violette, *supra* note 2, at 313-14.

23. Violette, *supra* note 2, at 314-15.

24. NEGRO POPULATION, *supra* note 3, at 57.

25. O. TAYLOR, *supra* note 2, at 255.

26. *Id.*

27. 60 U.S. (19 How.) 393 (1857).

28. *Id.*

29. The case was tried before a jury in the Circuit Court of the United States for the district of Missouri, then brought up by writ of error to the Supreme Court. There is no published lower court opinion. Catterall, *Some Antecedents of the Dred Scott Case*, 30 AM. HIST. REV. 56, 70 (1925).

30. 60 U.S. at 406-23.

31. *Id.* at 407. The courts of Arkansas and Missouri endorsed such racism

Spurred on by this decision, a committee of prominent Arkansas citizens called for the expulsion of the "free Negro so worthless and depraved an animal," characterized by "immorality, filth, and laziness."³² The Arkansas legislature promptly complied, enacting a bill ordering all free blacks under seven and over twenty-one out of the state on threat of sale into slavery.³³ Free blacks between seven and twenty-one were to be hired out to the highest bidder and then, after age twenty-one, shipped out of the state.³⁴ Further manumission of slaves was also prohibited. The extent to which the law was enforced is unclear; in any event, its operation was suspended a year later when Arkansas joined the Confederacy.³⁵

On September 23, 1862, President Abraham Lincoln announced the Emancipation Proclamation, which freed the approximately four million slaves held in the Confederate states.³⁶ Although the proclamation applied to Arkansas, a Confederate state, and not to Missouri, a Union state,³⁷ the postwar developments pertaining to blacks in each state were

the same year. See, for example, *Pendleton v. State*, 6 Ark. 509, 512 (1844), in which the Arkansas Supreme Court upheld the constitutionality of an 1843 Arkansas law prohibiting free blacks from entering the state by holding that free blacks were not citizens of the United States. The court said in dicta: "The two races, differing as they do in complexion, habits, conformation and intellectual endowments, could not nor ever will live together upon terms of social or political equality. A higher than human power has so ordered it" In an 1859 ruling, the court gave further insight into its view: "Slavery . . . has its foundation in an *inferiority of race*. There is a striking difference between the *black* and *white* man, in intellect, feelings and principles. In the order of providence, the former was made inferior to the latter; and hence the bondage of the one to the other." *Ewell v. Tidwell*, 20 Ark. 136, 144 (1859) (emphasis in original).

For an example of a Missouri case along the same line, see *Douglass v. Ritchie*, 24 Mo. 177, 180 (1857) (Slaves are "*things*," not "persons." "They [are] not the subjects of civil rights, and of course [are] incapable of owning property or contracting legal obligations; they and all that appertained to them [belong] to their master, and they [are] under his dominion.") (emphasis in original.)

32. O. TAYLOR, *supra* note 2, at 256. The committee of prominent citizens included two future governors, one of whom was an Arkansas Supreme Court justice at the time.

33. *Id.* at 257.

34. *Id.*

35. *Id.* at 257-58.

36. NATIONAL EXPERIENCE, *supra* note 12, at 344-45.

37. *Id.* Missouri, bitterly divided between unionists and confederates, sent 30,000 troops to the Confederate Army and representatives to the Confederate government, but it remained officially a union state. *Id.* at 328.

similar. Missouri freed its 115,000 slaves on January 12, 1865.³⁸

From 1865 to 1866 most former slave states either enacted new black codes or kept in force prewar codes designed to discriminate.³⁹ Arkansas and Missouri did not enact new black codes in 1865 or 1866, but substantial portions of the states' restrictive prewar codes remained in effect until 1867 and 1868.⁴⁰

Congress responded to this de jure racial discrimination by passing twelve civil rights laws and proposing the thirteenth, fourteenth, and fifteenth amendments to the Constitution.⁴¹ The Civil Rights Act of 1866,⁴² perhaps the most far-reaching of the reconstruction-era acts, overturned *Dred Scott v. Sandford*⁴³ and guaranteed blacks the protections of citizenship and the "full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens."⁴⁴ The Act provided for federal enforcement and "punished private persons or officials who obstructed its execution."⁴⁵ From 1872 to 1875, Congress debated a powerful civil rights bill intended to assure full equality for blacks, in-

38. Williams, *The Development of the Negro Public School System in Missouri*, 5 J. NEGRO HIST. 137, 138 (1920).

39. T. WILSON, *supra* note 12, at 61-115.

Blacks were forced to attend segregated schools. See, e.g., MO. CONST. of 1865, art. IX, § 2 (allowing separate schools); MO. GEN. STAT. ch. 46, § 20 (1866) (requiring separate schools); MO. GEN. STAT. ch. 48, § 13 (1866) (same). Interracial marriage was forbidden. See, e.g., Act of Feb. 6, 1867, No. 32, § 2, 1866-1867 Ark. Stat. 98, 99 (prohibiting interracial marriage); see also B. REAMS, JR. & P. WILSON, SEGREGATION AND THE FOURTEENTH AMENDMENT IN THE STATES: A SURVEY OF STATE SEGREGATION LAWS 1865-1953, 353-54 (1975) (prepared for the United States Supreme Court in re *Brown v. Board of Education of Topeka*) (noting that interracial marriage or sexual relations was prohibited in Missouri before the Civil War). In Arkansas and other states, blacks convicted of misdemeanors could be leased out to counties. See, e.g., ARK. STAT. §§ 2049, 2060, 2071 (1921).

40. W. PARRISH, MISSOURI UNDER RADICAL RULE, 1865-1870, 106-39 (1965); T. WILSON, *supra* note 12, at 61-115.

41. M. BERGER, EQUALITY BY STATUTE: THE REVOLUTION IN CIVIL RIGHTS 6-8 (1967); see also M. KONVITZ, *supra* note 12, at 41-70 (detailing postwar amendments and civil rights legislation). In 1865, the first of twelve civil rights laws created the Bureau of Refugees, Freedmen, and Abandoned Lands, commonly known as the Freedmen's Bureau. NATIONAL EXPERIENCE, *supra* note 12, at 359. In its five years of operation, it spent \$3.5 million to help open 4239 schools for southern blacks, employing 9307 teachers and instructing 247,333 pupils (only about 6% of the former slave population). H. BOND, *supra* note 9, at 29.

42. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1981 (1982)).

43. 60 U.S. (19 How.) 393 (1856).

44. Civil Rights Act of 1866, ch. 31, 14 Stat. 27, 27.

45. M. BERGER, *supra* note 41, at 6.

cluding the elimination of school segregation.⁴⁶ The original intent of the bill, however, "was frustrated by the ambiguous racial views of Republican moderates and by Northern opinion."⁴⁷ As finally passed in 1875, the bill declared that "all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement,"⁴⁸ and forbade the exclusion of blacks from jury duty.⁴⁹ Inadequate enforcement provisions weakened the law, however, and its meaning was rendered unclear when Senator Sumner's proposal for school integration was quietly dropped.⁵⁰

The Radical Republicans, who controlled the governments in Arkansas and Missouri, enacted a number of statutory and constitutional provisions to complement the federal civil rights laws.⁵¹ Although black children attended white schools in

46. NATIONAL EXPERIENCE, *supra* note 12, at 377; Kelly, *The Congressional Controversy over School Segregation, 1867-1875*, 64 AM. HIST. REV. 537, 548-63 (1959).

47. NATIONAL EXPERIENCE, *supra* note 12, at 377.

48. Act of Mar. 1, 1875, ch. 114, 18 Stat. 335, 336 (codified at 8 U.S.C. §§ 44-45 (1946), superceded in 1948 at 62 Stat. 683, 696, 863, codified at 18 U.S.C. § 243 (1982)). In 1873, Arkansas had adopted a similar civil rights law. *See infra* note 51.

49. M. BERGER, *supra* note 41, at 7.

50. NATIONAL EXPERIENCE, *supra* note 12, at 377; *see also* Kelly, *supra* note 46, at 562-63 (commenting that the new law had little meaning without the integrated school clause).

51. Compare ARK. CONST. of 1868, art. I, §§ 1-25 (granting protections to "all persons" or all "citizens") with ARK. CONST. of 1861, art. II, §§ 1-21 (granting protections only to "free white men"). *See also* T. WILSON, *supra* note 12, at 114-15 (describing an 1867 Arkansas "[a]ct to declare the rights of persons of African descent," which provided that the laws of Arkansas were applicable to all persons without distinction of race or color with five exceptions: blacks could not marry or have sexual relations with whites, vote at elections, serve on juries, attend school with whites, or serve in the militia); ARK. DIG. STAT. §§ 578-593 (1903) (enacted 1873 Ark. Acts 15) (broad civil rights bill prohibiting discrimination by private actors in a wide range of facilities but containing meager enforcement provisions). This latter law was apparently never enforced after the conservatives regained control in 1874. It is not cited in any Arkansas case and was repealed in 1907. Act of May 13, 1907, act 303, 1907 Ark. Acts 728.

Similar developments occurred in Missouri. *See* W. PARRISH, *supra* note 40, at 106-38. Radical Republicans passed a number of laws aimed at creating some degree of equality for blacks. *See, e.g.*, MO. CONST. of 1865, art. I, § 1 (giving equal right to enjoyment of basic civil rights for "all men"); *id.* art. I, § 2 (prohibiting slavery); *id.* art. I, § 3 ("That no person can, on account of color, be disqualified as a witness; or be disabled to contract . . . or be subjected, in law, to any other restraints or disqualifications in regard to any personal rights . . ."); Mo. St. Convention, Ordinance to Protect Emancipated Negroes from

some counties in Missouri during Reconstruction,⁵² a bill that would have integrated all the schools of the state was defeated in the state legislature.⁵³ By 1868, both Missouri⁵⁴ and Arkansas⁵⁵ had statutes requiring segregated schools. At least during early Reconstruction, these laws contemplated separate but equal schools,⁵⁶ but by the end of Reconstruction, black schools were already unequal and there was growing evidence that the cost of two separate school systems was unacceptably high.⁵⁷ During the next eighty years, the school segregation laws gave

Apprenticeship (January 12, 1865), in J. MO. ST. CONVENTION 282 (1865) (prohibiting apprenticeship or bounding out of blacks "except in pursuance of such laws as the General Assembly of this State may hereafter enact"). See generally W. PARRISH, *supra* note 40, at 106-38 (describing the situation of blacks in postwar Missouri). In 1867, in response to discrimination against blacks on public conveyances and elsewhere, a comprehensive civil rights bill was proposed in the Missouri legislature. W. PARRISH, *supra* note 40, at 112. One of its proponents, Issac H. Sturgeon, President of the North Missouri Railroad, argued that allowing blacks to ride in street cars would soon wear away prejudice against blacks. *Id.* The bill, however, was defeated. Moreover, when the conservatives regained control, they successfully proposed a new constitution that did not contain the civil rights provisions of the previous constitution. Compare MO. CONST. of 1865, art. I, §§ 1 & 3 (state bill of rights protections extended without regard to race) with MO. CONST. of 1875, art. II (these provisions are eliminated).

52. Williams, *supra* note 38, at 147.

53. *Id.* Louisiana, Minnesota, Rhode Island, and South Carolina passed statutory or constitutional provisions prohibiting segregated schools. See LA. CONST. of 1864, art. 141; S.C. CONST. of 1868, art. X, § 10; 1864 Minn. Laws ch. IV; 1866 R.I. Pub. Laws ch. 609. These laws were not enforced, however, and South Carolina and Louisiana changed their laws to require the segregation that had already developed in practice. LA. CONST. of 1898, art. 248; S.C. CONST. art. XI, § 7 (1895).

54. See MO. GEN. STAT. ch. 46, § 20 (1866); *id.* at ch. 48, § 13.

55. See Act of Feb. 6, 1867, No. 35, § 5, 1866-1867 Ark. Acts 98, 100.

56. See, e.g., MO. CONST. of 1865, art. IX, § 2 (school funds to be appropriated without regard to color). See generally Williams, *supra* note 38 (discussing the black public school system in Missouri from 1865 to 1915).

57. Williams, *supra* note 38, at 147-52. In 1873, the Missouri cities, towns, and villages that reported schools for blacks reported an average monthly salary of \$87.72 for male teachers and \$46.64 for female teachers in white schools, while their counterparts in black schools earned an average monthly salary of \$46.70 and \$40.00, respectively. *Id.* at 152. Another substantial inequality existed in counties with fewer than 15 blacks of school age. Until 1874, these children were generally denied an education, because there were no black schools and they could not attend white schools. Thereafter, Missouri began to develop union school concepts that provided segregated education for these children. *Id.* at 147-48. By the 1870's, many black schools in the South had facilities equivalent to those for whites. See H. BOND, *supra* note 9, at 86. The schools for both races were quite poor. *Id.* at 85-86. The high cost of two separate school systems, however, contributed to the crash in enrollment when the conservatives regained control. See *id.* at 90 (detailing enrollment decline).

legitimacy to segregation and discrimination and spawned many other laws requiring segregation where custom had not already done so.

B. THE *PLESSY* ERA: SEPARATE AND UNEQUAL, 1874-1954.

1. The Reaction to Reconstruction

By 1875, the postwar civil rights movement had ended.⁵⁸ Conservative Democrats returned to power throughout the South, including Arkansas and Missouri,⁵⁹ and began to overturn Reconstruction-era policies. While all but a few ex-Confederates were granted amnesty and enfranchised, blacks were increasingly disenfranchised through intimidation, poll taxes, and strict requirements for voting, including literacy and property ownership.⁶⁰ Prosecutions for federal civil rights violations decreased sharply after the Presidential Compromise of 1876 effectively transferred enforcement of civil rights laws to the states.⁶¹ The economic depression of the 1870's and 1880's reinforced racist reaction to reconstruction—whites everywhere were unwilling to share social, economic, or educational equality with blacks.⁶²

This reaction was aided by a series of Supreme Court decisions that weakened the Reconstruction-era constitutional amendments and overturned several sections of the civil rights laws. In the *Slaughter-House Cases*,⁶³ the Court limited severely the fourteenth amendment by holding that the amendment's privileges and immunities clause did not protect the

58. NATIONAL EXPERIENCE, *supra* note 12, at 377-78.

59. *Id.* at 376; T. STAPLES, *supra* note 17, at 402-41.

60. E. FRAZIER, THE NEGRO IN THE UNITED STATES 156-57 (1957); CITIZENS' COMM'N ON CIVIL RIGHTS, AFFIRMATIVE ACTION TO OPEN THE DOORS OF JOB OPPORTUNITY, A POLICY OF FAIRNESS AND COMPASSION THAT HAS WORKED 31 (June 1984) [hereinafter cited as CITIZENS' COMM'N].

61. M. BERGER, *supra* note 41, at 8 (In 1873, annual federal prosecutions for violations of the civil rights laws reached a peak of 1,271. By 1878, this number had dropped to 25.); CITIZENS' COMM'N, *supra* note 60, at 31.

62. Professor E.F. Frazier describes this reaction as the "rise of the poor whites." He notes that the emerging industrialists craftily appealed to the racial prejudice of poor whites to encourage them to vote against the poor whites' own economic interests. E. FRAZIER, *supra* note 60, at 156-57, 426-27. Similarly, Professor Horace Mann Bond notes how, for example, the poor quality of white schools was blamed on the existence of black schools, rather than on inadequate funding for both. H. BOND, *supra* note 9, at 92-115; *see also* E. FRAZIER, *supra* note 60, at 426 ("The demagogic leaders of the poor whites attributed their inadequate schools to the fact that money had been wasted in the education of the Negro.").

63. 83 U.S. (16 Wall.) 36 (1872).

privileges and immunities of state citizenship.⁶⁴ In *United States v. Cruikshank*,⁶⁵ the Court invalidated an indictment under section six of the Civil Rights Act of 1870⁶⁶ and held that the fourteenth amendment did not reach private acts of discrimination.⁶⁷ In *United States v. Harris*,⁶⁸ the Court declared the criminal conspiracy section of the Ku Klux Klan Act of 1871⁶⁹ unconstitutional.⁷⁰

In the *Civil Rights Cases*,⁷¹ one of its most far-reaching decisions, the Court fostered segregation by striking down two provisions of the Civil Rights Act of 1875 that prohibited segregation in places of public accommodation.⁷² Although the thirteenth amendment gave Congress the power to abolish "all badges and incidents of slavery,"⁷³ the Court held that "social" discrimination and segregation did not constitute such "badges

64. *Id.* at 74. Justice Field, joined by Chief Justice Chase and Justices Swayne and Bradley, dissented. Justice Field noted that, since the rights of national citizenship were already protected by the supremacy clause, U.S. CONST. art. VI, cl. 2, the majority opinion improperly rendered the fourteenth amendment privileges and immunities clause useless:

If this inhibition . . . only refers, as held by the majority. . . , to such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage.

83 U.S. at 96 (Field, J., dissenting). Instead, Justice Field noted, the legislative history and public debates concerning the privileges and immunities clause indicated that the clause was designed to have "profound significance." *Id.* (Field, J., dissenting). "[T]he amendment," Justice Field wrote, "refers to the natural and inalienable rights which belong to all citizens . . ." *Id.* (Field, J., dissenting). Justice Bradley and Justice Swayne also wrote long and vigorous separate dissents.

65. 92 U.S. 542 (1875).

66. *Id.* at 548; see Civil Rights Act of 1870, ch. 114, § 6, 16 Stat. 140, 141 (codified as amended at 18 U.S.C. § 241 (1982)); *United States v. Williams*, 341 U.S. 70, 72-82 (1951) (tracing history and discussing scope of 18 U.S.C. § 241). The Court also concluded that all 16 counts "lack[ed] the certainty and precision required by the established rules of criminal procedure." *Cruikshank*, 92 U.S. at 559.

67. See 92 U.S. at 554-55.

68. 106 U.S. 629 (1882).

69. REV. ST. § 5519 (1878), reprinted in 3 U.S. COMP. ST. § 5519 (1901) (repealed 1909).

70. 106 U.S. at 635-44.

71. 109 U.S. 3 (1883).

72. *Id.* at 8-11. The Court also held that the enforcement powers of § 5 of the fourteenth amendment reached no further than the state action limits of § 1. 109 U.S. at 19.

73. *Id.* at 20.

of slavery."⁷⁴ Justice Harlan, in a dissent that rebutted arguments once again used today against affirmative action,⁷⁵ wrote:

It is, I submit, scarcely just to say that the colored race has been the special favorite of the laws. The statute of 1875, now adjudged to be unconstitutional, is for the benefit of citizens of every race and color. What the nation, through Congress, has sought to accomplish in reference to that race, is—what had already been done in every State of the Union for the white race—to secure and protect rights belonging to them as freemen and citizens; nothing more. It was not deemed enough "to help the feeble up, but to support him after." The one underlying purpose of congressional legislation has been to enable the black race to take the rank of mere citizens. The difficulty has been to compel a recognition of the legal right of the black race to take the rank of citizens, and to secure the enjoyment of privileges belonging, under the law, to them as a component part of the people for whose welfare and happiness government is ordained.⁷⁶

Justice Harlan's objections, however, were lost on most of his judicial colleagues. Courts in the Eighth Circuit and throughout the country quickly joined the majority of the Supreme Court and held that, although blacks might be entitled to a rough form of equality with whites in principle, they could not rely on the law to enforce equality in practice. In *Lehew v. Brummell*,⁷⁷ for example, the Missouri Supreme Court considered white parents' request for an injunction to prevent four black children from attending white schools. The court upheld the injunction⁷⁸ even though the district made no provision for black students. The black students were thus forced to travel over three and one-half miles to an adjoining district, whereas no white student travelled more than two miles.⁷⁹ In dicta, the court noted:

There are differences in races . . . some of which can never be eradi-

74. *Id.* at 24-25. Eighty-six years later, in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), the Court, although not expressly overruling *Harris*, held that "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." *Id.* at 440-41.

75. See, e.g., *infra* text accompanying note 511.

76. 109 U.S. at 61 (Harlan, J., dissenting). Although Justice Harlan is often cited as a proponent of the same "color-blind" remedies currently argued for by Assistant Attorney General William Bradford Reynolds, see N.Y. Times, May 30, 1983, § 1, at 6, col. 1, the majority opinion in the *Civil Rights Cases* also takes the view that, in principle, blacks were equal to whites before the law, 109 U.S. at 25. Unlike Justice Harlan, however, the majority expressed the view that it is not the role of government to regulate society to further equal treatment in practice. *Id.* at 18-19, 22.

77. 103 Mo. 546, 15 S.W. 765 (1891).

78. *Id.* at 553, 15 S.W. at 767.

79. *Id.* at 547-48, 15 S.W. at 766.

cated. . . . If we cast aside chimerical theories and look to practical results, it seems to us it must be conceded that separate schools for colored children is a regulation to their great advantage. . . . The fact that the two races are separated for the purpose of receiving instruction deprives neither of any rights. It is but a reasonable regulation of the exercise of the right.⁸⁰

Similarly, in *Younger v. Judah*,⁸¹ the Missouri Supreme Court relied on the *Civil Rights Cases*⁸² in holding that the fourteenth amendment did not prohibit a theater owner from reserving the better seats exclusively for whites.⁸³ Preferential treatment of whites, the court said, "accords with the custom and usage prevailing in this state. Such custom has the force and effect of law"⁸⁴

2. The Separate-But-Equal Doctrine in Education

In 1896, the Supreme Court ensured segregation and inequality for successive generations of blacks when it held in *Plessy v. Ferguson*⁸⁵ that "separate but equal" rail facilities did not violate the thirteenth or fourteenth amendments. The "separate but equal" language was a misnomer, however, because the Court indicated that equality in principle but not in practice was all that could be expected:

The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.⁸⁶

80. *Id.* at 551-52, 15 S.W. at 766.

81. 111 Mo. 303, 19 S.W. 1109 (1892); *see also* 35 CENTRAL L.J. 269 (1892) (containing annotation discussing similar cases).

82. 109 U.S. 3 (1883).

83. 111 Mo. at 308-09, 19 S.W. at 1110.

84. *Id.* at 312, 19 S.W. at 1111.

85. 163 U.S. 537 (1896). The case arose when Homer Plessy, who was one-eighth black, boarded a white coach and refused to leave. He was charged with violating Louisiana's separate coach law, lost a challenge to its constitutionality, and petitioned the Supreme Court for review. *Id.* at 538-40.

86. *Id.* at 544.

The Court also quoted the Supreme Judicial Court of Massachusetts, which had held that

when this great principle [of equality before the law] comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion, that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same function and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law for their maintenance and security.

The school segregation laws in effect throughout the South gave the *Plessy* Court much precedent for segregation and little precedent for equality.⁸⁷ By 1896, over forty years of experience with these "separate but equal" school laws demonstrated that separate schools for blacks—in the Eighth Circuit and elsewhere—were unequal and inadequate.⁸⁸ Moreover, as Justice Harlan's fiery dissent noted, even if the separate facilities were physically equal, "[t]he arbitrary separation of citizens, on the basis of race . . . is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution."⁸⁹

For over sixty years after *Plessy*, the Supreme Court and the Eighth Circuit frequently reiterated the separate-but-equal theory. In *McCabe v. Atchison, Topeka & Santa Fe Railway*,⁹⁰ the Eighth Circuit Court of Appeals considered an Oklahoma statute that mandated segregated railway facilities without requiring identical facilities for the races.⁹¹ Noting that "[p]ractical considerations, which are potent in reaching a correct interpretation of any statute, cannot be ignored in applying the principle of equality of service to the two races in Oklahoma,"⁹² the court upheld the statute. It concluded that "equality of service between the two races in Oklahoma contemplates substantial similarity of service, and this only when conditions and circumstances under which it is required are substantially the same."⁹³ Judge Sanborn, in dissent, criticized the majority's holding that the separate-but-equal coach law

Id. (quoting *Roberts v. City of Boston*, 59 Mass. 198, 206 (1849)).

87. See B. REAMS & P. WILSON, *supra* note 39; see also H. BOND, *supra* note 9, at 84-115 (noting solidification of segregated social structure after Reconstruction); H. BULLOCK, *A HISTORY OF NEGRO EDUCATION IN THE SOUTH: FROM 1619 TO THE PRESENT* 37-39 (1967) (noting that state laws gave Southern whites a means to reestablish the traditional positions of blacks). See generally Savage, *The Legal Provisions for Negro Schools in Missouri from 1865 to 1890*, 16 J. NEGRO HIST. 309 (1931).

88. See generally H. BOND, *supra* note 9, at 92-115 (documenting increasingly disproportionate funding); H. BULLOCK, *supra* note 87, at 176-85 (observing that disparity between the two school systems became apparent by 1910, manifested by shorter terms for black students and lower expenditures for black schools); E. FRAZIER, *supra* note 60, at 429-49 (noting that the educational provisions and expenditures for black children were inferior to those for white children).

89. 163 U.S. at 562 (Harlan, J., dissenting).

90. 186 F. 966 (8th Cir. 1911), *aff'd*, 235 U.S. 151 (1914). Oklahoma was included in the Eighth Circuit at that time.

91. The statute required equal but not identical facilities. 186 F. at 970-71.

92. *Id.* at 971.

93. *Id.*

provided blacks adequate equality before the law:⁹⁴

This separate coach law of the state of Oklahoma, with its specious requirement that the separate coaches or compartments it requires shall be "equal in all points of comfort and convenience," . . . defies the spirit, defeats the purpose, violates the express prohibition of the fourteenth amendment, is unconstitutional and void.⁹⁵

Within three years of *Plessy*, the Supreme Court applied the separate but equal doctrine to a pair of school cases. In *Cumming v. Richmond County Board of Education*,⁹⁶ the county board of education had terminated funding for a black public high school for "economic reasons"⁹⁷ while taxing the county to subsidize a white high school.⁹⁸ Nonetheless, the Court held that this was not a constitutional violation. Writing for a unanimous Court, Justice Harlan emphasized that the federal government should not interfere with management of state systems of education and taxation "except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land."⁹⁹ Similarly, in *Berea College v. Kentucky*,¹⁰⁰ a divided Supreme Court¹⁰¹ upheld a Kentucky statute that made it a criminal violation to maintain an integrated college. Berea College, a private institution, was willing to provide the opportunity for blacks and whites to attend college together, but the state and the Supreme Court would not allow it.¹⁰²

Backed by precedents from the nation's highest court, Missouri courts condoned segregated state schools of disparate

94. *Id.* at 977 (Sanborn, J., dissenting).

95. *Id.* at 983 (Sanborn, J., dissenting).

96. 175 U.S. 528 (1899).

97. *Id.* at 532. Justice Harlan assumed as valid the state court finding that the termination was not rooted in racial animus and concluded that, because the establishment of high schools is purely discretionary and because the plaintiffs had elected the wrong remedy in requesting an injunction to close the white schools, the funding disparity was not a violation. *Id.* at 544-45.

98. *Id.* at 531.

99. *Id.* at 545.

100. 211 U.S. 45 (1908).

101. Justices Harlan and Day dissented.

102. 211 U.S. at 53-55. Justice Harlan, dissenting, attacked the majority for the artificial distinction it drew in implicitly approving integrated teaching by natural persons but not by corporations. *Id.* at 60-65 (Harlan, J., dissenting). He then argued that the Court should have addressed the main issue presented, namely, whether blacks and whites may learn together in Kentucky. *Id.* at 65-67 (Harlan, J., dissenting). In adjudging the statute void, Justice Harlan invoked higher principles of natural law, arguing that the Almighty gave "[t]he capacity to impart instruction to others . . . for beneficent purposes." *Id.* at 67 (Harlan, J., dissenting). Justice Harlan also regarded the statute as a violation of the fourteenth amendment right to enjoy one's faculties and to use them lawfully. *Id.* at 67-78 (Harlan, J., dissenting).

quality. In *State ex rel. Hobby v. Disman*,¹⁰³ the Missouri Supreme Court considered a request for a writ of mandamus to compel the transfer of black students to a white school on the ground that the appearance, construction, and arrangement of the black schools were deficient.¹⁰⁴ Although the court determined that the black school lacked an auditorium and a cafeteria steam table and had a small playground and separate buildings,¹⁰⁵ it decided that these shortcomings were either insignificant or not racially motivated and concluded that the plaintiffs had not demonstrated that "substantially the same conditions as to physical facilities do not generally exist" in the white district.¹⁰⁶ To the court, "equality" in separate schools meant substantial equality.¹⁰⁷

Litigation over Missouri's system of higher education reached the same result. In *State ex rel. Toliver v. Board of Education of St. Louis*,¹⁰⁸ the Missouri Supreme Court reversed a black plaintiff's successful attempt to transfer from a black teacher's college to the state's white counterpart. Although the court conceded the disparate quality of the schools' laboratories and noted some differences in facilities, library, and curriculum, it minimized these differences and concluded that the facilities were substantially equal.¹⁰⁹

The impact of the *Plessy* doctrine on black education is well documented.¹¹⁰ In 1916, the United States Department of

103. 250 S.W.2d 137 (Mo. 1952).

104. *Id.* at 138.

105. *Id.* at 139-40.

106. *Id.* at 141.

107. *Id.*

108. 360 Mo. 671, 230 S.W.2d 724 (1950).

109. *Id.* at 680, 230 S.W.2d at 730.

In *Bluford v. Canada*, 32 F. Supp. 707 (W.D. Mo. 1940), *appeal dismissed*, 119 F.2d 779 (8th Cir. 1941), state officials refused to admit a black female applicant to Missouri's graduate journalism school. Although the state had not provided comparable programs for black students, the court held that it would sustain the state's motion to dismiss unless the petitioner amended her petition to allege that she had requested a graduate journalism program at the state's black university and that the black university had had time to develop such a program. 32 F. Supp. at 710-11. Although the state court followed the Supreme Court's analysis set out in *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 346-51 (1938), the practical result would have been no black journalism school at all or a one-woman black program, neither of which could offer the black applicant equal opportunity.

110. Professors Reams and Wilson discuss the school segregation laws and selective other segregation laws in 37 states, including all of the present Eighth Circuit states except North and South Dakota. By 1900, segregated schools for blacks were required by law in 19 of those 37 states, including Ar-

Interior published a comprehensive study of black education in sixteen southern states, the District of Columbia, and Missouri.¹¹¹ The report concluded that "[t]he Negro schoolhouses are miserable beyond all description"¹¹² and that separate schools fostered misunderstanding and stigmatized blacks as inferior.¹¹³ Separate but equal education was indeed unequal.¹¹⁴

kansas and Missouri. See B. REAMS & P. WILSON, *supra* note 39, at 9 (Alabama); *id.* at 27 (Arkansas); *id.* at 41-42 (California); *id.* at 68-71 (Delaware); *id.* at 90 (Florida); *id.* at 115 (Georgia); *id.* at 166-67 (Indiana); *id.* at 186 (Kansas); *id.* at 202 (Kentucky); *id.* at 262 (Maryland); *id.* at 295-99 (Michigan); *id.* at 335 (Mississippi); *id.* at 351 (Missouri); *id.* at 493 (North Carolina); *id.* at 564-66 (South Carolina); *id.* at 604 (Tennessee); *id.* at 630-31 (Texas); *id.* at 690 (Virginia); *id.* at 703 (West Virginia). Some of these states had prohibited segregated schools during Reconstruction but provided for them after the Supreme Court gave the green light in the *Civil Rights Cases* and the *Slaughterhouse Cases*. See, e.g., *id.* at 225-26 (Louisiana); *id.* at 564-65 (South Carolina). New York and Pennsylvania did not require segregated schools, but the law permitted them. *Id.* at 418-23, 538-39. In these states, and in many others such as New Jersey, *id.* at 399, segregated schools developed in practice. See generally Jackson, *The Development and Character of Permissive and Partly Segregated Schools*, 16 J. NEGRO EDUC. 301 (Summer 1947). Segregation was required in Ohio until 1887, when a law was passed prohibiting segregated schools. B. REAMS & P. WILSON, *supra* note 39, at 510-11. This mere prohibition of segregation in principle, without provisions for desegregation in practice, was ineffective, and segregation in Ohio schools continued. *Id.* at 501-18. Iowa also provided for separate schools for blacks until after the Civil War. At that time, the state ratified the fourteenth amendment under what Reams and Wilson suggest was a conviction that the amendment would prohibit school segregation. *Id.* at 175-76.

111. BUREAU OF EDUC., DEP'T OF INTERIOR, NEGRO EDUCATION: A STUDY OF THE PRIVATE AND HIGHER SCHOOLS FOR COLORED PEOPLE IN THE UNITED STATES (Bulletin Nos. 38-39, 1916 (2 vols.)) [hereinafter cited as 1916 BUREAU OF EDUC. STUDY].

112. 1 *id.* at 24.

113. 1 *id.* at 1-7; 2 *id.* at 9-11, 24.

114. The study noted that in 1912, expenditures on teachers' salaries in elementary schools were \$10.32 per white student but only \$2.89 per black student. 2 *id.* at 9. These states, in 1912, spent \$6,429,991 for secondary or higher schools for whites but only \$355,720 for blacks. 2 *id.* at 11. The latter figure was 5.5% of the total spent for whites, even though blacks were over 29% of the population in these states. 2 *id.* at 9. The 16 southern states combined had only 64 public high schools for blacks, 1 *id.* at 37; 2 *id.* at 15, even though in 10 of these states combined there were 1,238 public high schools for whites, 1 *id.* at 37. Opportunities for blacks to obtain college, professional, industrial, agricultural, or teacher training were minimal. 2 *id.* at 16-20. The inadequacy of educational facilities for blacks is also reflected in the literacy rates: in 1912, 33% of the black population was illiterate, whereas only 7.7% of the white population was illiterate. 2 *id.* at 9.

In Arkansas, in 1912-1913, \$12.95 was spent per white child for teachers' salaries but only \$4.59 per black child. 2 *id.* at 107. Seven percent of whites were illiterate, whereas 26.4% of blacks were illiterate. 2 *id.* Although there were 99,383 black children aged 6 to 14 in Arkansas in 1912-1913, only about

From 1915 to 1951, inequality, inadequacy, and racism in the schools grew.¹¹⁵ For many years, however, the courts refused to recognize the statistics that confirmed the inequities in the *Plessy* doctrine.¹¹⁶

58% attended school. 2 *id.* at 110. In contrast, over 80% of school-age whites attended school. 2 *id.* In the entire state, there were only five public high schools for blacks, instructing only 360 students. 2 *id.* No black institutions were adequately equipped for college, trade, agricultural, or teacher training. 2 *id.* at 110-12.

Although the situation in Missouri in 1910-1915 was better, black schools were still inadequate. Over 17% of Missouri blacks aged 10 and above were illiterate, NEGRO POPULATION, *supra* note 3, at 425, compared to a 2.9% illiteracy rate for native whites of the same age, *id.* In 1910, only 54.7% of Missouri's black children aged 6 to 20 attended schools. *id.* at 391. Only one third of all black children lived in areas with well-established public school systems. 2 1916 BUREAU OF EDUC. STUDY, *supra* note 111, at 379. By 1915, the disparity in expenditures between white and black students was small, Williams, *supra* note 38, at 165 (expenditures on black schools 96% of those on white schools), but the maintenance of separate school systems fostered racism and was expensive. 1 1916 BUREAU OF EDUC. STUDY, *supra* note 111, at 107; 2 *id.* at 9-11, 24. Although Missouri led most other former slave states in education programs, the state lagged behind typical northern and western states in school expenditures, *see* E. FRAZIER, *supra* note 60, at 437, school attendance, *see* NEGRO POPULATION, *supra* note 3, at 391, and literacy rates, *see id.* at 430.

115. Because so many excellent studies of this period are available, only a brief review is made here. In 1939-1940, the former slave states spent \$58.69 on schooling for each white child but only \$18.82 for each black child. E. FRAZIER, *supra* note 60, at 437. Black school facilities were worth, on average, one-fourth the value of white facilities. H. BULLOCK, *supra* note 87, at 182. In 1929, teachers in black schools earned about two-thirds as much as teachers in white schools; by 1950, the proportion had risen to 85%. *Id.* at 181. In 1939-1940, the average school term for blacks was 156 days; for whites, it was 173.5 days. E. FRAZIER, *supra* note 60, at 447. In 1930, 16.3% of blacks aged 10 and above were illiterate, whereas only 1.8% of native-born whites were illiterate. 2 BUREAU OF THE CENSUS, 15TH CENSUS OF THE UNITED STATES: 1930 POPULATION 1219 & table 1 (1933).

In Arkansas, in 1930, blacks composed 25.5% of the school population but received only 10.2% of educational outlays. H. BOND, *supra* note 9, at 169. In Arkansas, in 1950, whites completed a median of 8.7 years in school, whereas nonwhites completed only 5.6 years. BUREAU OF THE CENSUS, 1960 STATISTICAL ABSTRACT 111 (table 143). In 1947, 11% of nonwhites aged 14 and above were illiterate, whereas only 1.8% of native whites in that age group were illiterate. BUREAU OF THE CENSUS, 1954 STATISTICAL ABSTRACT 124 (table 138).

In 1930, one typical southern state (North Carolina) spent almost \$200,000 dollars more to transport white students—much of it to maintain segregation—than it spent in total on teachers' salaries for the 190,817 black school children enrolled in the state. H. BOND, *supra* note 9, at 165. In 1954-1955, on the eve of the *Brown I* and *Brown II* decisions, .001% of school-age blacks in the lower South attended school with whites. B. REAMS & P. WILSON, *supra* note 39, at 484.

116. Yale historian C. Vann Woodward points out that the Southern segregation laws, with the exception of the path-breaking school segregation laws, began to develop only in the late 1880's. They were made possible by Supreme

The separate-but-equal doctrine was devastating for black

Court decisions and responded to the growing political influence of poor whites, who increasingly came into contact with blacks under conditions which did not clearly indicate white superiority. C. VANN WOODWARD, *ORIGINS OF THE NEW SOUTH 1877-1913* (1951); C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1955).

Spurred on by the Supreme Court's approval of the separate-but-equal doctrine, former slave states, including Arkansas and Missouri, enacted numerous statutes to require segregation in places where custom had not already done so—on streetcars, buses, and railroads and in waiting rooms, prisons, mental health institutions, and entertainment facilities. The racism behind these statutes is perhaps best reflected in an Arkansas statute, which provided that no bunk, bed, bedding, or other furnishing once used by a black prisoner could be subsequently assigned for the use of a white prisoner. ARK. STAT. ANN. § 46-145 (1947) (repealed, 1969 Ark. Gen. Acts 1646, 1672 (1st ex. sess. 1968)).

Reams and Wilson list a number of other, nonschool segregation statutes in the 37 states studied. They note, however, that most of the segregation laws were local and are not readily obtainable. B. REAMS & P. WILSON, *supra* note 39, at 229; see also J. GREENBERG, *RACE RELATIONS AND AMERICAN LAW* (1959) (discussing discrimination in public accommodations, interstate travel, elections, employment, education, housing, criminal and domestic law, and the armed forces); Note, *The Matter of Racial Differences and Local Police Legislation*, 5 LOY. L. REV. 73 (1949) (discussing local police ordinances requiring segregation and providing preferential treatment for whites). This was the case in Arkansas and Missouri. In St. Louis, Missouri, for example, voters passed a referendum in 1916 requiring city blocks to remain segregated. Usher, *Negro Segregation in St. Louis*, 6 NEW REPUBLIC 176, 176-77 (Mar. 18, 1916). By 1948, segregation by custom in Missouri was so pervasive that a court took judicial notice of the fact. See *Frank v. Herring*, 240 Mo. App. 425, 434, 208 S.W.2d 783, 788 (1948).

State laws filled out the picture by requiring segregation in state facilities and in other areas where custom was not sufficient to ensure complete segregation. The number of Arkansas and Missouri statutes legally requiring segregation peaked in the 1940's and 1950's. Most of these statutes remained on the books until the 1970's. See, e.g., ARK. STAT. ANN. §§ 6-801 to -816 (1973 Supp.) (enacted, 1957 Ark. Acts 271; repealed, 1975 Ark. Gen. Acts 1626) (state sovereignty commission set up to oppose implementation of *Brown*); ARK. STAT. ANN. §§ 7-401 to -404 (1947) (enacted, 1923 Ark. Gen. Acts 62; repealed, 1967 Ark. Gen. Acts 566, 568) (establishing all-black tuberculosis sanatorium for all black TB patients); ARK. STAT. ANN. § 46-122 (1947) (enacted, 1909 Ark. Acts 1133, 1134; repealed, 1969 Ark. Gen. Acts 1646, 1672 (1st ex. sess. 1968)) (only whites allowed to guard white convicts); ARK. STAT. ANN. § 46-137 (1947) (enacted, 1943 Ark. Acts 312; repealed, 1969 Ark. Gen. Acts 1646, 1672 (1st ex. sess. 1968)) (requiring segregation of first offenders); ARK. STAT. ANN. § 46-144 (1947) (enacted, 1903 Ark. Acts 160; repealed, 1969 Ark. Gen. Acts 1646, 1672 (1st ex. sess. 1968)) (separate cells required for black and white convicts); ARK. STAT. ANN. § 46-145 (1947) (enacted, 1903 Ark. Acts 160; repealed, 1968 Ark. Gen. Acts 1646, 1672 (1st ex. sess. 1968)) (no bed, bunk, beddings, or other furnishing ever used by black convict to be used by white convict); ARK. STAT. ANN. § 46-146 (1947) (enacted, 1903 Ark. Acts 160; repealed, 1969 Ark. Acts 1646, 1672 (1st ex. sess. 1968)) (handcuffing white and black prisoners together prohibited); ARK. STAT. ANN. § 52-625 (1947) (enacted, 1919 Ark. Acts 107; repealed, 1973 Ark. Gen. Acts 842, 845) (coal mines required to maintain sepa-

Americans. It was not until the 1930's and 1940's that courts

rate wash houses for different races); ARK. STAT. ANN. §§ 55-104 to -105 (1947) (enacted, ARK. REV. STAT. ch. 94, § 4 (1837); repealed, 1973 Ark. Gen. Acts 842-845) (marriages of whites with blacks or part-blacks void; person knowingly conducting such marriage guilty of misdemeanor); ARK. STAT. ANN. §§ 73-1218 to -1221 (1947) (enacted, 1891 Ark. Acts 15, 15-16 and 1893 Ark. Acts 200; repealed, 1973 Ark. Gen. Acts 842, 845) (railroads required to segregate trains, waiting rooms, and facilities); ARK. STAT. ANN. §§ 73-1614 to -1619 (1947) (enacted, 1903 Ark. Acts 178; repealed, 1973 Ark. Gen. Acts 842) (segregated electric and street railroads); ARK. STAT. ANN. §§ 73-1747 to -1750, 73-1752 to -1753 (1947) (enacted, 1937 Ark. Acts 433; repealed, 1973 Ark. Acts 842, 845-46) (segregation of races required on buses); ARK. STAT. ANN. § 76-1119 (1947) (enacted, 1913 Ark. Acts 1238; repealed, 1973 Ark. Gen. Acts 842, 846) (segregation of white and black convicts on county highway projects required); ARK. STAT. ANN. § 80-509(c) (1947) (enacted, 1931 Ark. Acts, 476, 532; never repealed) (segregation of races required in public schools of state); ARK. STAT. ANN. § 80-518 (1960) (enacted, 1875 Ark. Acts 54, 80; found unconstitutional when used to maintain segregated schools, *Aaron v. Cooper*, 261 F.2d 97 (8th Cir. 1958)) (private high school may be taught in public building); ARK. STAT. ANN. §§ 80-544 to -547 (1960) (enacted, 1959 Ark. Acts 2000, 2000-01 (2d ex. sess. 1958); repealed, 1973 Ark. Gen. Acts 842, 846) (authority to close the schools if integration is required by federal authorities); ARK. STAT. ANN. §§ 80-1519 to -1524 (1960) (enacted, Ark. Initiative Measure 1956, No. 2; held unconstitutional in *Dove v. Parham*, 181 F. Supp. 504 (E.D. Ark.), *aff'd*, 282 F.2d 256 (8th Cir. 1960)) (pupil placement law enacted to avoid school desegregation); ARK. STAT. ANN. § 80-1530 (1947) (enacted, 1959 Ark. Acts 1827, 1831-32; never repealed) (no child required to enroll in integrated school); ARK. STAT. ANN. §§ 84-2724 to -2726 (1947) (enacted, 1937 Ark. Acts 826; repealed, 1973 Ark. Gen. Acts 842, 846) (track establishments required to segregate races); Act of Sept. 12, 1958, act 5, 1959 Ark. Act 2004 (2d ex. sess.) (pro rata share of state funds ordinarily allocable to public schools payable to private schools when public schools closed to block desegregation). For examples of statutory discrimination other than segregation, see ARK. STAT. ANN. § 41-806 (1947) (enacted, 1911 Ark. Pub. Acts 295; repealed, 1973 Ark. Gen. Acts 842, 845) (concubinage between white and black made a felony, punishable by up to one year in prison at hard labor for each offense).

Segregation-related constitutional provisions remaining into the 1950's and 1960's include ARK. CONST. amend. 44 §§ 1-4 (giving assembly power to prevent desegregation under guise of protecting states' rights and providing that any public employee who assists integration may be sent to prison). For additional segregation-related statutes from earlier years, see ARK. DIG. STAT. § 12474 (1937) (putting the authority of the state behind the customary practice of segregation and discrimination: "Any person, firm, company or corporation ejecting any white or colored patron for refusing to sit in the seats so designated shall not be liable for damages in any of the courts of this State."); ARK. DIG. STAT. § 13679 (1937) (tax assessor to indicate races); ARK. DIG. STAT. § 807 (1921) (requiring segregated industrial schools); ARK. DIG. STAT. §§ 2601-2605 (1921) (making mixed race concubinage a felony and providing that any white woman who gives birth to part-black child is *prima facie* guilty of felony); Act of Feb. 17, 1913, No. 59, § 2, 1913 Ark. Acts 180, 180-82 (providing, without mention of blacks, that whites may join in petition for granting of liquor license); ARK. DIG. STAT. § 7536 (1903) (granting authority to establish segregated teacher college).

There are fewer Missouri segregation statutes. See *supra* note 54 and ac-

took the first meager steps to redress inequality and discrimination. The refusal to take affirmative steps to eliminate discrimination meant that blacks as a class made little or no progress in education until *Brown v. Board of Education*.¹¹⁷

3. The Separate and Unequal Doctrine in Employment

The *Plessy* doctrine of separate but equal not only institutionalized segregation in education, it also perpetuated racial discrimination in employment.¹¹⁸ At the end of the Civil War, many Radical Republicans recognized the need to address racial discrimination in employment.¹¹⁹ A postwar study of conditions in the south reported that private and public discrimination in the employment of blacks was recreating a system of peonage little removed from slavery.¹²⁰ To help remedy this problem, five days after the official certification of the thirteenth amendment, the Civil Rights Act of 1866 was introduced in Congress.¹²¹ Two phrases of section one of the bill were aimed in part at racial discrimination in employment.¹²² The first, now 42 U.S.C. § 1981, provided that blacks "shall have the

comparing text (school segregation statute); MO. REV. STAT. §§ 3361, 4651 (1939) (miscegenation a penal offense); MO. REV. STAT. § 9390 (1939) (segregation in colony for feebleminded); MO. REV. STAT. § 10474 (1939) (local authorities may segregate races at playgrounds, libraries, and public parks); MO. REV. STAT. § 10632 (1939) (segregated teachers' institute); MO. REV. STAT. § 9477 (1929) (same).

117. See *infra* notes 175-82 and accompanying text.

118. See generally G. BANCROFT, *THE AMERICAN LABOR FORCE: ITS GROWTH AND CHANGING COMPOSITION* (1958); BUREAU OF THE CENSUS, *THE SOCIAL AND ECONOMIC STATUS OF THE BLACK POPULATION IN THE UNITED STATES: AN HISTORICAL VIEW, 1790-1978*, 55-81 (Current Population Reports, Special Studies, series p-23, No. 80, 1979) (detailing black labor, employment, and business conditions from 1890 to 1975); E. FRAZIER, *supra* note 60; C. GREENE & C. WOODSON, *supra* note 21; 1 H. HILL, *BLACK LABOR AND THE AMERICAN LEGAL SYSTEM* (1977); E. RUDWICK, *BLACK WORKERS AND ORGANIZED LABOR* (1971); S. SPERO & A. HARRIS, *THE BLACK WORKER* (1931); C. WESLEY, *supra* note 21; Anderson, *Economic Patterns in Black America*, in NATIONAL URBAN LEAGUE, *THE STATE OF BLACK AMERICA* 1 (1982); Harris, *Education and the Economic Status of Negroes in the United States*, in 100 YEARS OF EMANCIPATION 129 (Rand McNally Public Affairs Series 129, 1964); Maslow & Robison, *Civil Rights Legislation and the Fight for Equality, 1862-1952*, 20 U. CHI. L. REV. 363, 394 n.163 (1953) (collecting authorities).

119. 1 H. HILL, *supra* note 118, at 65-77; Larson, *The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment*, 7 HARV. C.R.-C.L. L. REV. 56, 60 (1972).

120. 1 H. HILL, *supra* note 118, at 65-66.

121. 1 *id.* at 65.

122. 1 *id.*; Larson, *supra* note 119, at 60 (discussing the Supreme Court's acceptance of this conclusion in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 427 (1968)).

same right . . . to make and enforce contracts."¹²³ The second, now 42 U.S.C. § 1982, provided that blacks "shall have the same right . . . to inherit, purchase, lease, sell, hold, and convey real and personal property, as is enjoyed by white citizens."¹²⁴ Congress later reenacted the Act of 1866, after the fourteenth amendment was ratified, to remove any doubt of its constitutionality and to provide for criminal penalties for any violations.¹²⁵ Other statutes arguably addressing employment discrimination were enacted;¹²⁶ enforcement, however, was nonexistent. Of the 7,312 criminal prosecutions federal authorities brought under the new civil rights laws from 1870 to 1897,¹²⁷ none of the reported cases involved employment discrimination.¹²⁸ In 1913, over a quarter of a million blacks were still held as illegal slaves on Southern farms.¹²⁹

123. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (reenacted, Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140, 144, codified at § 1977 of the Revised Statutes of 1874, currently codified at 42 U.S.C. § 1981); *see also* Runyon v. McCrary, 427 U.S. 160, 168 n.8 (1976) (legislative history indicates that 42 U.S.C. § 1981 is drawn from both § 16 and § 18 of the 1870 act).

124. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (reenacted, Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140, 144, codified at § 1978 of the Revised Statutes of 1874, currently codified at 42 U.S.C. § 1982). *See generally* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 422 n.28 (1968) (42 U.S.C. § 1982 is derived from § 1 of the 1866 Act). Although § 1982 today has little relevance to employment discrimination, it had great relevance to this problem in the predominately agricultural society of 1866. *See, e.g.,* United States v. Morris, 125 F. 322 (E.D. Ark. 1903) (holding that the right to lease and cultivate land is protected by § 1 of the Civil Rights Act of 1866).

125. Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140, 144.

126. In 1871, Congress passed the Klu Klux Klan Act, ch. 22, 17 Stat. 13 (1871). Section 1 of the law (currently codified at 42 U.S.C. §§ 1983, 1985, (1986)) could have been used to address racial discrimination in employment, as it has been since the late 1960's, but it was not. *See* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 678-97 (2d ed. 1983).

127. Maslow & Robison, *supra* note 118, at 370 (citing DAVIS, THE FEDERAL ENFORCEMENT ACTS, STUDIES IN SOUTHERN HISTORY AND POLITICS, 223-24 (1914) (study of the administration of the Reconstruction Era federal civil rights laws)). Between 1871 and 1875, 3654 of these prosecutions were brought. *See also supra* note 61.

128. Because almost all of these prosecutions were unreported, however, it is unclear whether employment discrimination cases were brought. Many of the reported cases involve the lynching of blacks, *see, e.g.,* United States v. Cruikshank, 92 U.S. 542 (1876) (invalidating indictment for lynching of blacks who attempted to assemble peacefully), or attempts to reenslave blacks, *see, e.g., In re Turner*, 24 Fed. Cas. 337 (C.C.D. Md. 1867) (No. 14,247) (two days after Maryland adopted constitutional provision abolishing slavery, a young black girl was bound to her former master as an "apprentice").

129. W. DuBois, *The Rural South*, 13 PUBLICATIONS AM. STATISTICAL A. 80, 81 (1912). Professor Charles H. Wesley briefly described the Arkansas race riots of 1919, in which hundreds of blacks, working virtually as slaves under pe-

Although nearly 1.2 million blacks had secured employment in the manufacturing, mining, and transportation industries by 1900,¹³⁰ gains by blacks in employment were gradually eliminated by increasingly overt racial discrimination that the courts claimed they were powerless to redress. Between 1881 and 1900, there were at least fifty strikes by white workers against the hiring of blacks.¹³¹ Many employers established preferential hiring policies for whites¹³² and two-tiered wage scales with lower pay for blacks.¹³³ Unions routinely refused to

onage systems, were murdered when they attempted to gain freedom. C. WESLEY, *supra* note 21, at 286-87. Many of the blacks were then prosecuted for attempting to defend themselves, and many agreed to return to slavery to avoid prosecution. *Id.* In Georgia in 1921, eleven black laborers were murdered by a forced labor camp owner in order to prevent the peonage camp from being discovered by federal officers. *Id.* at 287; C. GREENE & C. WOODSON, *supra* note 21, at 209. In *Smith v. United States*, 157 F. 721 (8th Cir. 1907), the court upheld the convictions of nine whites who operated a forced labor camp for blacks in Missouri. The black laborers were kept in a guarded cell at night and forced to work all day while armed guards stood by. *Id.* at 727-28.

Often, however, prosecutions against individuals who enslaved blacks were unsuccessful. For example, in *Clyatt v. United States*, 197 U.S. 207 (1905), the Supreme Court upheld the constitutionality of the Anti-Peonage Act of 1867, ch. 187, 14 Stat. 546 (currently codified at 42 U.S.C. § 1994), but overturned *Clyatt's* conviction for enslaving a black on the ground that, although *Clyatt* had enslaved the black, he had not returned the black to slavery as alleged by the indictment because the black had not previously been a slave, *Clyatt*, 197 U.S. at 218-22.

130. Worthman & Green, *Black Workers in the New South, 1865-1915*, in 2 KEY ISSUES IN THE AFRO-AMERICAN EXPERIENCE 47, 52 (N. Huggins ed. 1971). During the 40 to 50 years after emancipation, blacks were well-represented in the trades and crafts, especially in the South. C. GREENE & C. WOODSON, *supra* note 21, at 168-85. By 1910, 15% of all carpenters, 35% of all brick masons, and 38% of all plasterers were black. Worthman & Green, *supra*, at 53. Increasingly after 1900, however, discrimination against blacks by employers, unions, educational institutions, and white competitors, anxious to take over work formerly done by blacks, forced blacks out of the skilled trades. C. GREENE & C. WOODSON, *supra* note 21, at 178-85. For example, some cities refused to hire contracting firms that employed blacks. *See, e.g., id.* (noting that Richmond, Virginia, threatened to take a job from a white contractor "because he employed Negro workmen").

131. 1 H. HILL, *supra* note 118, at 15.

132. *See, e.g.,* 1 H. HILL, *supra* note 118, at 15 (noting that white labor unions forced employers to hire whites only).

133. The Final Report of President Franklin D. Roosevelt's Fair Employment Practice Committee indicates: "In July 1942 hourly entrance rates of adult male common laborers averaged 47.4 cents per hour for Negro workers as compared with 65.3 cents per hour for white workers. Examples of differentials in such industries as iron and steel, meat packing, fertilizer, manufacturing and leather, and for various occupations are numerous enough to base a conclusion that discrimination exists at all wage levels." Fair Employment Practice Committee, Final Report XII (June 28, 1946).

admit black workers.¹³⁴ The vast majority of blacks were restricted to menial, nonsupervisory jobs.¹³⁵

In 1903 came the first published opinion to uphold a prosecution against individuals who practiced racial discrimination in employment. In *United States v. Morris*,¹³⁶ the defendants were indicted¹³⁷ for conspiring to prevent blacks, on account of their race, from leasing or cultivating farmland in Arkansas. The United States Attorney claimed that the ability to earn a living free from racial discrimination by private actors was a right secured by the thirteenth amendment and section one of the Civil Rights Act of 1866.¹³⁸ United States District Judge Jacob Trieber agreed. He noted that the Civil Rights Act of 1866 had been passed under authority of the thirteenth amendment and that the amendment properly granted Congress the power to legislate against public or private interference with an individual's enjoyment of fundamental rights "if the deprivation of these privileges is solely on account of his race or color."¹³⁹

That same year, in *Hodges v. United States*,¹⁴⁰ the United States Attorney brought another indictment for racial discrimi-

134. 1 H. HILL, *supra* note 118, at 16-20.

135. See NEGRO POPULATION, *supra* note 3, at 529-51 (table 22); see also C. GREENE & C. WOODSON, *supra* note 21, at 204-05 & diagram 10 (in 1910, nearly 80% of all gainfully employed blacks were employed in agriculture or domestic and personal service). In 1910, although over 10% of the United States adult population was black, less than 1/2% of all supervisory or managerial employees in manufacturing, mining, oil and gas, and building and hand trades were black. NEGRO POPULATION, *supra* note 3, at 529-51 (table 22). Even in agriculture, in which they had extensive experience and expertise and constituted nearly 23% of the workforce, blacks constituted less than 4% of all supervisory or managerial employees. See *id.* at 506 (table 6). In the public sector, less than 2% of all police and firefighters were black. See *id.* at 551 (table 22). In seven southern states, including Arkansas (where blacks constituted more than one-fourth of the population), there was not one regular black police officer. G. MYRDAL, *supra* note 12, at 543 n.2; see also *id.* at 535 ("Practically all public officials in the South are whites. The principle is upheld that Negroes should not be given positions of public authority even on a low level."). Several states had laws prohibiting the hiring of blacks to positions in which they might have authority over whites. Maslow & Robison, *supra* note 118, at 387 n.131. For example, ARK. STAT. ANN. § 46-122 (1947) provided that only white men could be hired to guard white convicts at state prison camps.

136. 125 F. 322 (E.D. Ark. 1903).

137. The defendants were indicted under REV. ST. § 5508, reprinted in 3 U.S. COMP. ST. § 5508 (1901) (currently codified as revised at 18 U.S.C. § 241 (1982)). See also *supra* note 66.

138. 125 F. at 322.

139. *Id.* at 330.

140. 203 U.S. 1 (1906), overruled, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443 n.78 (1968).

nation in employment in the Eastern District of Arkansas. Eight blacks had been hired at a local sawmill. Shortly thereafter, a violent crowd of armed whites marched on the mill and demanded that the blacks quit or be fired. After the blacks quit, a grand jury indicted three of the whites.¹⁴¹ Judge Trieber confirmed the United States's power to prosecute the action, and the defendants were convicted, fined, and imprisoned. The United States Supreme Court reversed, holding that section 1 of the Civil Rights Act of 1866 was unconstitutional as applied, because the thirteenth amendment did not empower Congress to make it a federal offense for private individuals to prevent blacks from performing employment contracts.¹⁴² The defendants argued that if the section protected blacks but not whites from employment discrimination, then it was an improper form of reverse discrimination against whites.¹⁴³ If the section protected all individuals regardless of race from employment discrimination, then it improperly granted the federal government powers that were reserved to the states.¹⁴⁴ In reversing the convictions, the Supreme Court noted that the blacks' only remedy must be under state law.¹⁴⁵ Arkansas had at the time a civil rights law,¹⁴⁶ passed by Radical Republicans in 1873, that might have been used to redress employment discrimination against blacks, but the Arkansas legislature repealed it within a year of the *Hodges* decision.¹⁴⁷

Justices Harlan and Day, dissenting in *Hodges*, asserted that the proponents and ratifiers of the thirteenth amendment

141. As in *Morris*, the defendants were indicted under REV. ST. § 5508, reprinted in 3 U.S. COMP. ST. § 5508 (1901) (currently codified as revised at 18 U.S.C. § 241(1982)).

142. *Hodges*, 203 U.S. at 7. One year later, the Court, on the authority of *Hodges*, once again summarily reversed an unreported racial discrimination action upheld by Judge Trieber. *Boyett v. United States*, 207 U.S. 581 (1907).

143. *Hodges*, 203 U.S. at 8. The reverse discrimination argument has always been the key argument of those who oppose civil rights laws. In the Civil Rights Cases, 109 U.S. 3 (1883), the Court indicated that protecting blacks against discrimination would improperly make blacks the "special favorite of the laws." *Id.* at 25. Justice Harlan, despite the invocation of his name by the modern proponents of the reverse discrimination argument, asserted that it was cynical to suggest that blacks were the special favorite of the laws when the law had brutally discriminated against them for years and whites had actually been the special favorite of the laws. *Id.* at 61; see also *supra* note 76 and accompanying text.

144. *Hodges*, 203 U.S. at 8, 16, 18-19.

145. See *id.* at 14-15.

146. ARK. STAT. §§ 578-593 (1904).

147. Act of May 13, 1907, act 303, 1907 Ark. Acts 728.

had intended that it have an "affirmative operation"¹⁴⁸ to protect blacks from discrimination in private or public employment.¹⁴⁹ Denying blacks federal protection against those who aim to deprive them of constitutional rights would, the dissenters suggested, result in blacks' becoming a permanent subclass of society, unable to earn an adequate living.¹⁵⁰

Justice Harlan's prediction proved correct. Discrimination against blacks became so intensive and widespread that many scholars describe the period from 1900 to 1940 as the nadir of civil rights for blacks.¹⁵¹ The law, in effect, became an affirmative action policy for whites.¹⁵²

4. The Beginning of the End

The second third of the century brought slow but definite progress against racial discrimination in education and employment. In 1934, the first meager steps to redress inequality in education were taken when the NAACP began a coordinated attack against segregation in education.¹⁵³ In light of the glaring inequality of segregated schools, the initial plan was to chal-

148. 203 U.S. at 29.

149. *Id.* at 29-30, 37-38.

150. *Id.* at 29-30, 36-38.

151. R. KLUGER, *SIMPLE JUSTICE* 84-91 (1976); see also M. KONVITZ, *supra* note 12, at 155-251 (noting judicial tolerance of segregation in public accommodations, employment, education, and housing in the period, despite the existence of state civil rights laws).

152. For example, much New Deal legislation institutionalized existing job discrimination and excluded workers in the main black industries (agriculture, domestic labor) from wage and hour regulations. 1 H. HILL, *supra* note 118, at 95-100; see also *id.* at 96 (collecting studies).

In 1933, the first policy of nondiscrimination on the basis of race in federal employment was established. Unemployment Relief Act of 1933, ch. 17, 48 Stat. 22, repealed by Act of Sept. 16, 1966, Pub. L. No. 89-554, § 8(c), 80 Stat. 378, 648 (as part of codification of 5 U.S.C.). This policy, however, only applied to jobs created under the Act. In 1940, this prohibition was extended by executive order to other areas of federal employment. Exec. Order No. 8587, 3 C.F.R. 303, 304 (Supp. 1940). Many states had previously adopted laws prohibiting discrimination in government employment, and sometimes in private employment, on the basis of race, religion, or national origin. Bonfield, *The Origin and Development of American Fair Employment Legislation*, 52 IOWA L. REV. 1043, 1051-61 (1967). These laws were the first of many failed experiments with the "color-blind" employment discrimination remedies once again being advocated today. See *id.* Despite the assertion of equality for blacks in principle, in practice increasing government involvement in the economy perpetuated discrimination. See H. HILL, *supra* note 118, at 96-100.

153. See generally R. JACK, *HISTORY OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE* 63-78 (1943) (brief history of NAACP fight to end segregation in education).

lenge the inequality rather than the unconstitutionality of segregation. The NAACP first focused on graduate and professional schools. In *Missouri ex rel. Gaines v. Canada*,¹⁵⁴ the Court was required to decide whether Missouri's refusal to admit the black petitioner to the state's all-white law school without providing a separate law school for blacks violated the equal protection clause.¹⁵⁵ The Supreme Court held that it did and ordered that the petitioner be admitted.¹⁵⁶

Twelve years later, in *Sweatt v. Painter*,¹⁵⁷ the Court went one step further by holding that the black petitioner was entitled to attend the previously all-white University of Texas Law School instead of Texas's hastily developed law school for blacks because the black law school was unequal.¹⁵⁸ Although the Court declined to invalidate the separate-but-equal doctrine,¹⁵⁹ it suggested that certain intrinsic elements made the black law school so inherently unequal that equality could never be obtained.¹⁶⁰

In 1949, a federal district court in Arkansas, in *Pitts v. Board of Trustees of DeWitt Special School District*,¹⁶¹ approved a black petitioner's request for declaratory and injunctive relief from grossly unequal school facilities.¹⁶² Black students in the area attended Class C schools, whereas whites attended Class A schools, which had better qualified teachers and superior libraries.¹⁶³ Black students were transported to school in a converted Army ambulance driven by one of the

154. 305 U.S. 337 (1938).

155. *Id.* at 342-43.

156. *Id.* at 352.

157. 339 U.S. 629 (1950).

158. *Id.* at 634.

159. *Id.* at 636.

160. *Id.* at 634. These elements included the "reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige." *Id.*

On the same day the Court decided *Sweatt*, it ruled in *McLaurin v. Oklahoma State Regents for Higher Education*, 339 U.S. 637 (1950), that Oklahoma could not treat 68-year-old black graduate student George McLaurin differently from white students by seating him alone outside the classroom, on an obscure library mezzanine, and in a separate cafeteria. *Id.* at 639-41. The Court held that McLaurin had been "handicapped in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and in general, to learn his profession." *Id.* at 641.

161. 84 F. Supp. 975 (E.D. Ark. 1949).

162. *Id.* at 980-81.

163. *Id.* at 980.

students,¹⁶⁴ and young black children attended an elementary school without running water or toilet facilities.¹⁶⁵ The school year for blacks was shorter than for whites, and the school building for blacks was worth 4.2% of the value of the white building.¹⁶⁶ The district court granted the relief requested¹⁶⁷ but noted the necessity of proceeding "slowly and with great care."¹⁶⁸ The court gave the defendants "a reasonable time" to provide black students with substantially equal educational facilities.¹⁶⁹

The first effort to reverse the trend of preferential treatment for whites in employment came in the 1940's as some states and municipalities began to enact fair employment laws.¹⁷⁰ Unfortunately, these laws lacked enforcement mechanisms and were merely public statements calling for a voluntary end to employment discrimination.

Federal efforts of the period also proved weak. In response to reports of widespread discrimination in defense industries, President Franklin D. Roosevelt issued Executive Order No. 8802, which established the federal Fair Employment Practices Committee (FEPC).¹⁷¹ Roosevelt's orders, however, like the similar orders of Presidents Truman, Eisenhower, and Kennedy,¹⁷² were merely "public relations pronouncements"¹⁷³ documenting widespread employment discrimination against

164. *Id.* at 979.

165. *Id.* at 980.

166. *Id.*

167. *Id.* at 988.

168. *Id.* at 980-82.

169. *Id.* at 981.

170. Bonfield, *supra* note 152, at 1047, 1051, 1061-78; Maslow & Robison, *supra* note 118, at 392-99. See generally R. BARNETT & J. GARAI, *WHERE THE STATES STAND ON CIVIL RIGHTS* (1962) (state-by-state survey of civil rights laws, including employment laws). At the state level, "New York adopted the first statute that according to current conceptions would constitute a modern fair employment Act" in 1945. Bonfield, *supra* note 152, at 1071. "By the end of 1959, sixteen states had fair employment laws substantially modeled on the 1945 New York Act." *Id.* at 1073.

171. Over the next four years, black employment in defense industries increased from 3% to 8%. SEE CITIZEN'S COMM'N, *supra* note 60, at 33-44.

172. The orders of Presidents Roosevelt, Truman, Eisenhower, and Kennedy have been thoroughly discussed in other articles. See Goldstein, *The Importance of the Contracted Compliance Program: Historical Perspective*, reprinted in *Oversight Hearings on the OFCCP's Proposed Affirmative Action Regulations: Hearings Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 98th Cong., 1st Sess. 453-500 (1983) [hereinafter cited as *1983 Hearings*]; CITIZEN'S COMM'N, *supra* note 60, at 32-38; 1 H. HILL, *supra* note 118, at 373-81; Maslow & Robison, *supra* note 118, at 393 n.160.

blacks. Little actually changed for the black worker as a result of the orders.

The 1960 report of President Eisenhower's FEPC acknowledged the failure of voluntary efforts to end employment discrimination and stated that affirmative action to redress discrimination against blacks was needed, because, in addition to the problem of overt discrimination, "*the indifference of employers to establishing a positive policy of nondiscrimination hinders qualified applicants and employees from being hired and promoted on the basis of equality.*"¹⁷⁴ Shortly after taking office, President John F. Kennedy issued Executive Order No. 10925, which called for "affirmative action to enforce" equal employment opportunity for blacks. The opponents of racial discrimination were not satisfied with the limited force of the order, however, and successfully called for enactment of the comprehensive Civil Rights Act of 1964.

II. AN ERA OF AFFIRMATIVE ACTION IN EDUCATION AND EMPLOYMENT, 1954-1980

A. SCHOOL DESEGREGATION

1. The Freedom-of-Choice Era: From *Brown* to *Green*

In *Brown v. Board of Education*,¹⁷⁵ the Supreme Court initiated a new era¹⁷⁶ in civil rights by declaring that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."¹⁷⁷ The Court delayed until the following term, however, the question of appropriate relief. In *Brown II*,¹⁷⁸ the Court remanded the pending cases to the district courts "[b]ecause of

173. See, e.g., 1 H. HILL, *supra* note 118, at 380 (noting limited scope of President Eisenhower's executive orders).

174. CITIZENS' COMM'N, *supra* note 60, at 36 (emphasis in original).

175. 347 U.S. 483 (1954).

176. See R. KLUGER, *SIMPLE JUSTICE* x (1975). See generally J. WILKINSON, *FROM BROWN TO BAKKE* (1979); Kurland, *Brown v. Board of Education Was the Beginning*, 1979 WASH. U.L.Q. 309 (1979) (historical discussion and summary of principal Supreme Court school desegregation cases).

177. 347 U.S. at 495. On the same day, the Court decided *Bolling v. Sharpe*, 347 U.S. 497 (1954), which relied on the fifth amendment to eliminate segregation from District of Columbia schools. The Court held that segregated education "imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause." *Id.* at 500. Although the fifth amendment has seldom since been the focus of desegregation litigation, *Bolling* must be recognized, with *Brown*, as a harbinger of vast social change.

178. *Brown v. Board of Educ.*, 349 U.S. 294 (1955).

their proximity to local conditions and the possible need for further hearings."¹⁷⁹ Although the Supreme Court's decision to make the district courts responsible for desegregation had the salutary effect of preserving local autonomy and drawing on the remedial insight of local school officials, it often had the unfortunate drawbacks of delay and unsympathetic supervision. In retrospect, the Supreme Court may also have erred in authorizing incremental desegregation starting with the high schools, where courts and planners anticipated less resistance to integration.¹⁸⁰ The Court, in effect, granted opponents time to circumvent the intent of *Brown*. With the exception of the Little Rock case,¹⁸¹ the Supreme Court did not hear another school desegregation case for eight years after *Brown*.¹⁸²

A few communities achieved desegregation without court order;¹⁸³ most, however, tried to prevent desegregation, sometimes in defiance of local governments. Delay was the rule, and speed the exception. *Brewer v. Hoxie School District No. 46*¹⁸⁴ is a typical case. The public schools of Lawrence County, Arkansas, served about 1,000 white and twenty-four black students in the state-required segregated facilities. Without waiting for repeal of the state law, the county school board initiated its own desegregation plan after *Brown II*. Those opposed to desegregation, however, intimidated the black students and the school board through trespass at the schools, threats, and inflammatory speeches at rallies in which speakers condoned violent opposition and called for mass resistance.¹⁸⁵ Thus, in a dispute over the attendance of only twenty-four

179. *Id.* at 299.

180. See, e.g., W. HAWLEY, R. CRAIN, L. ROSSELL, M. SMYLLIE, R. FERNANDEZ, J. SCHOFIELD, R. TOMPKINS, W. TRENT & M. ZLOTNIK, *STRATEGIES FOR EFFECTIVE DESEGREGATION* 52-54 (1983); Hawley, *Achieving Quality Integrated Education—With or Without Federal Help*, 64 PHI DELTA KAPPAN 334, 335 (1983).

181. *Cooper v. Aaron*, 358 U.S. 1 (1958).

182. *Goss v. Board of Educ.*, 373 U.S. 683 (1963); *McNeese v. Board of Educ.*, 373 U.S. 668 (1963).

183. Rural desegregation in large consolidated school districts may have largely been a matter of economics; economies of scale in facilities and transportation were too great to be ignored for these sparsely populated districts with limited tax bases. Thus, for example, the communities of Charleston, Sheridan, and Fayetteville, Arkansas, integrated before the rupture at Little Rock. See J. Vervack, *Road to Armageddon: Arkansas and Brown v. Board of Education, May 17, 1954 to September 2, 1957*, 15-17 (1978) (unpublished M.A. thesis, University of Arkansas).

184. 238 F.2d 91 (8th Cir. 1956).

185. *Id.* at 93.

black students, school for hundreds of students was temporarily discontinued and attendance severely curtailed.¹⁸⁶

The battle over public school segregation was truly joined, however, in Little Rock.¹⁸⁷ Three days after *Brown I*, the Little Rock School Board announced its intent to study the methods and implications of desegregation, and in the spring of 1955, a few days before *Brown II*, the board announced a freedom-of-choice desegregation plan that was to start with the high school senior class in the 1957-1958 school year.¹⁸⁸ The district court approved the plan noting that it would "lead to an effective and gradual adjustment of the problem."¹⁸⁹ The court of appeals, finding an "unqualified basis" for this conclusion, affirmed.¹⁹⁰ Problems, however, continued. In the fall of 1957, public opposition to desegregation in Little Rock escalated as Arkansas Governor Orval E. Faubus declared white schools "off limits"

186. *Id.* at 94. At trial, the district court enjoined the trespasses, threats, and intimidation. *Hoxie School Dist. No. 46 v. Brewer*, 137 F. Supp. 364, 365-66 (E.D. Ark. 1956).

187. Desegregation in Little Rock may be traced through the reported case law. *Aaron v. Cooper*, 143 F. Supp. 855 (E.D. Ark. 1956), *aff'd*, 243 F.2d 361 (8th Cir. 1957); *Aaron v. Cooper*, 2 RACE REL. L. REP. 934-41 (E.D. Ark. 1957), *aff'd sub nom.* *Thomason v. Cooper*, 254 F.2d 808 (8th Cir. 1958); *Aaron v. Cooper*, 156 F. Supp. 220 (E.D. Ark. 1957), *aff'd sub nom.* *Faubus v. United States*, 254 F.2d 797 (8th Cir. 1958); *Aaron v. Cooper*, 163 F. Supp. 13 (E.D. Ark.), *rev'd*, 257 F.2d 33 (8th Cir.), *aff'd sub nom.* *Cooper v. Aaron*, 358 U.S. 1 (1958); *Aaron v. Cooper*, 261 F.2d 97 (8th Cir. 1958); *Aaron v. Cooper*, 169 F. Supp. 325 (E.D. Ark. 1959); *Aaron v. McKinley*, 173 F. Supp. 944 (E.D. Ark. 1959), *aff'd sub nom.* *Faubus v. Aaron*, 361 U.S. 197 (1959) (per curiam); *Aaron v. Tucker*, 186 F. Supp. 913 (E.D. Ark. 1960), *rev'd sub nom.* *Norwood v. Tucker*, 287 F.2d 798 (8th Cir. 1961); *Clark v. Board of Educ.*, 369 F.2d 661 (8th Cir. 1966), *reh'g denied*, 374 F.2d 569 (8th Cir. 1967); *Clark v. Board of Educ.*, 426 F.2d 1035 (8th Cir. 1970), *cert. denied*, 402 U.S. 952 (1971); *Clark v. Board of Directors*, 328 F. Supp. 1205 (E.D. Ark. 1971), *aff'd in part, rev'd in part sub nom.* *Clark v. Board of Educ.*, 449 F.2d 493 (8th Cir. 1971), *cert. denied*, 405 U.S. 936 (1972), *aff'd*, 471 F.2d 656 (8th Cir. 1972) (mem.); *Davis v. Board of Educ.*, 328 F. Supp. 1197 (E.D. Ark.), *aff'd in part, rev'd in part*, 449 F.2d 500 (8th Cir. 1971), *aff'd*, 635 F.2d 730 (8th Cir. 1980), *on remand*, 520 F. Supp. 108 (E.D. Ark. 1981), *aff'd*, 674 F.2d 684 (8th Cir.), *cert. denied*, 459 U.S. 881 (1982); *Clark v. Board of Educ.*, 705 F.2d 265 (8th Cir. 1983); *Little Rock School Dist. v. Pulaski County Special School Dist. No. 1*, 560 F. Supp. 876 (E.D. Ark. 1983); *Little Rock School Dist. v. Pulaski County Special School Dist. No. 1*, 584 F. Supp. 328 (E.D. Ark. 1984); *Little Rock School Dist. v. Knight*, 725 F.2d 690 (8th Cir. 1983) (mem.); *Little Rock School Dist. v. Pulaski County Special School Dist. No. 1*, 738 F.2d 82 (8th Cir. 1984). See generally U.S. COMM'N ON CIVIL RIGHTS, SCHOOL DESEGREGATION IN LITTLE ROCK, ARKANSAS (1977) (general history of the Little Rock litigation with summary of plans proposed and of community responses).

188. *Aaron*, 163 F. Supp. at 15.

189. *Aaron*, 143 F. Supp. at 866.

190. *Aaron*, 243 F. 2d at 364.

to blacks and called out the National Guard to bar the admittance of nine black students to Little Rock Central High School.¹⁹¹ President Eisenhower responded by dispatching federal troops to guarantee the admittance of the black students. The troops stayed for the remainder of the school year. The district court enjoined Governor Faubus from using the Arkansas National Guard to obstruct or interfere with court orders,¹⁹² and the Eighth Circuit affirmed.¹⁹³

In the face of the public hostility, local officials sought postponement of the freedom-of-choice desegregation plan in February 1958. The district court reviewed the evidence of incidents of tension and disruption and found that, in the interest of whites and blacks, a "peaceful interlude" was necessary, requiring the suspension of the desegregation plan for two and one-half years.¹⁹⁴ The Eighth Circuit Court of Appeals reversed, emphasizing that the constitutional rights of a minority cannot yield to practical objections or mob veto.¹⁹⁵ In what is still its strongest language to date, the Eighth Circuit, through Judge M.C. Matthes, declared that "*the time has not yet come in these United States when an order of a Federal Court must be whittled away, watered down, or shamefully withdrawn in the face of violent and unlawful acts of individual citizens in opposition thereto.*"¹⁹⁶

Local opposition to desegregation continued, however.¹⁹⁷ Opponents secured a state injunction to prevent the opening of the "partially integrated high schools" of Little Rock.¹⁹⁸ The federal district court set aside the injunction and the Eighth

191. *Cooper*, 358 U.S. at 9.

192. *Aaron*, 156 F. Supp. at 226-27.

193. *Faubus*, 254 F.2d at 806-08.

194. *Aaron*, 163 F. Supp. at 32.

195. *Aaron*, 257 F.2d at 40.

196. *Id.* (italics in original).

197. Many whites opposed any desegregation and their opposition took the form of law. In November 1956 voters of the state of Arkansas adopted three initiatives: a state constitutional amendment directing the legislature to oppose in every constitutional manner the *Brown* mandates; a resolution of interposition calling on all states and citizens to adopt a constitutional amendment preventing federal involvement in public education; and a pupil-assignment law. See *Aaron*, 257 F.2d at 35. In January 1957 the state legislature established a State Sovereignty Commission, relieved school children of compulsory attendance in desegregated schools, required prointegration organizations to register and report to the State Sovereignty Commission, and authorized local school districts to spend school funds to defend integration litigation. *Aaron*, 163 F. Supp. at 15.

198. *Thomason*, 254 F.2d at 808.

Circuit affirmed. Later that year, however, the Arkansas legislature empowered Governor Faubus to close the schools in 1958-1959. After the federal courts found the act unconstitutional,¹⁹⁹ the school board attempted to lease the system to a segregated private school. This move was also nullified by the courts.²⁰⁰ Under increasing court pressure to desegregate, the school board tried various pupil assignment techniques²⁰¹ and its freedom-of-choice plan to stall true desegregation.²⁰² Not until 1971, after the Supreme Court's decisions in *Raney*²⁰³ and *Green*,²⁰⁴ was significant progress made toward integrating the Little Rock public schools.²⁰⁵

199. *Aaron*, 173 F. Supp. at 952.

200. *Aaron*, 261 F.2d at 108.

201. *Clark*, 426 F.2d at 1038-40.

202. *Id.* at 1035.

203. *Raney v. Board of Educ.*, 381 F.2d 252 (8th Cir. 1967).

204. *Green v. County School Bd.*, 391 U.S. 430 (1968).

205. When the Eighth Circuit court reconsidered the Little Rock cases years later en banc, *Clark v. Board of Educ.*, 449 F.2d 493 (8th Cir. 1971), it reviewed a plan approved by the district court that involved pairing, clustering, and contiguous and noncontiguous zoning for integration. Grades 6 through 12 were to be desegregated by transporting students to their respective schools according to age group. Elementary integration was to be delayed for one more year. The black parents argued that the plan needlessly delayed elementary integration and placed an unequal share of the transportation burden on black students; the board contended that elementary integration should be delayed for a longer period and that the board should not be compelled to transport students who live more than two miles from their schools. *Id.* at 495.

The court of appeals stated that it was "reassured by the board's declaration that all secondary schools will be thoroughly integrated as to faculty, class composition and extracurricular activities, and that the school administration will be sensitive to the aspirations of black students." *Id.* at 496. It approved the construction of a new building that was planned for a white neighborhood in 1970; it found that "the school will be completely integrated under the District Court plan," but it cautioned that future construction must receive advance approval by the district court. *Id.* The court also stated that nondiscriminatory reassignment criteria for integration of faculty and staff could no longer be delayed and that elementary schools must be unitary by the following year. *Id.* at 497-99. Although the court had declined in its previous review either to require or forbid busing, *Clark*, 426 F.2d at 1046, the court now affirmed the district court's busing order, requiring "the district to furnish transportation to secondary students assigned to a school more than two miles from their homes," *Clark*, 449 F.2d at 499. It also approved an exception to that policy for students who continued to attend the secondary school closest to their homes. *Id.*

The most recent development in the Little Rock saga occurred on November 19, 1984, when the United States District Court for the Eastern District of Arkansas entered an order consolidating the Little Rock school district with the Pulaski County and Northern Little Rock school districts. The district court found that consolidation was necessary because each of the school dis-

The limitations of *Brown II*'s remedies for integrating public schools are evident in many Eighth Circuit cases during this period. The Supreme Court counseled no specific remedial tool, and district and appellate courts continued to rely on voluntary measures, including freedom-of-choice plans, to achieve desegregation. In *Norwood v. Tucker*,²⁰⁶ the Eighth Circuit Court of Appeals evaluated the operation of pupil placement methods under Arkansas's law, which had previously been held facially valid.²⁰⁷ The court enjoined local officials from manipulating pupil placement to perpetuate segregation,²⁰⁸ but it let stand the concept of freedom-of-choice plans as long as school boards "take affirmative steps, on their own initiative" to facilitate and accomplish operation of the school district on a non-discriminatory basis.²⁰⁹

districts was engaging in practices that tended to resegregate each of the districts. Little Rock School District v. Pulaski County Special School Dist. No. 1, 597 F. Supp. 1220, 1222-26 (E.D. Ark. 1984).

206. 287 F.2d 798 (8th Cir. 1961).

207. See *Parham v. Dove*, 271 F.2d 132 (8th Cir. 1959). Arkansas's pupil placement laws, ARK. STAT. ANN. §§ 80-1519 to -1524 (1960) (set out in *Dove v. Parham*, 176 F. Supp. 242, 244 n.4 (E.D. Ark. 1959)), provided criteria by which local boards of education or superintendents could assign or transfer their pupils. The Eighth Circuit found that, on the face of the statute, "there is no basis to say, in legal construction, that the Act is designed, or that it can only operate, to maintain segregation and to prevent integration in a school system." *Parham*, 271 F.2d at 136 (footnote omitted).

208. *Norwood*, 287 F.2d at 806.

209. *Id.* at 809 (quoting *Aaron*, 169 F. Supp. at 337) (emphasis added by *Norwood* court).

In *Clark*, 369 F.2d at 665, the Eighth Circuit court stated: "We do not believe that a general attack on the constitutionality of the 'freedom of choice' method of ending school segregation is well taken at this time." See also *Raney v. Board of Educ.*, 381 F.2d 252, 256 (8th Cir. 1967) (school building construction not enjoined; substantial integration steps shown), *rev'd on other grounds*, 391 U.S. 443 (1966); *Yarbrough*, 380 F.2d at 964-66 ("meaningful start" toward desegregation made); *Kemp I*, 352 F.2d at 21 ("freedom of choice" generally acceptable but has "fatal faults" as used here).

In *Kelley v. Altheimer*, Ark. Pub. School Dist. No. 22, 378 F.2d 483 (8th Cir. 1967), the Eighth Circuit approved one freedom-of-choice plan. Until the plan was initiated in 1965-1966, Altheimer, which was 67% nonwhite, operated totally racially segregated schools. Black and white students were educated in separate building complexes and transported in separate buses on duplicative routes. When pupils were given a choice of schools, little changed. During the first year, six blacks out of a total of 1,408 students selected white schools, and no whites transferred. During the second year, 47 blacks transferred while the number of white transferees remained at zero. The plaintiffs sought to enjoin the construction of new segregated facilities, student and staff segregation, and racial discrimination. The district court declined to invalidate the plan. *Id.* at 487-88. The Eighth Circuit approved freedom-of-choice plans in principle, but ruled that the free choice must be real—a choice between schools, not between

The promise of freedom-of-choice plans was never fulfilled. In *Kemp v. Beasley (Kemp II)*,²¹⁰ the Eighth Circuit Court of Appeals reviewed the freedom-of-choice desegregation plan of El Dorado, Arkansas, and concluded that there was "an apparent failure by both parties to cooperate in carrying out the mandate of this court for an immediate and efficacious plan of desegregation."²¹¹ After three years of operation,²¹² a combined junior and senior high school and six elementary schools remained wholly black.²¹³ The Court warned that "transitional periods . . . are no longer meaningful excuses for school boards ordered to get on with their task of equal education for all."²¹⁴ Although the school board had pledged a "biracial bus system," only two of twenty-one buses were "integrated" in the then-current school year.²¹⁵

black and white schools. The court ordered that the board of education provide students with either an annual choice or a racially neutral assignment, that it refrain from interfering with this choice, and that it desegregate faculty and staff. *Id.* at 489.

The court also ordered changes in the district's transportation system and desegregation in the planning and construction of school facilities. *Id.* at 496-97, 499. It noted that school bus systems were a "principal factor in perpetuating school segregation in many areas of the South." *Id.* at 497. By running two school buses on the same roads to pick up neighbors of different races for different schools, the school wasted money and discouraged desegregation. The court ended this practice and directed the formulation of a new busing plan. *Id.* at 499. In addition, the court called for reliance on recently published Department of Health, Education, and Welfare (H.E.W.) guidelines, 45 C.F.R. pt. 80 (1966), promulgated under Title VI of the Civil Rights Act of 1964, *see* 42 U.S.C. § 2000d-1 (1964), and the Court stressed that the district court was to retain jurisdiction "so that the goal of a desegregated, non-racially operated school system is rapidly and finally achieved." *Kelley*, 378 F.2d at 489.

Acceptance of freedom-of-choice plans was accompanied by the rejection of the oft-cited dictum that the Constitution does not require integration. *Kemp v. Beasley (Kemp I)*, 352 F.2d 14, 21 (8th Cir. 1959) (rejecting dictum of *Briggs v. Elliott*, 132 F. Supp. 776, 777 (E.D.S.C. 1955)). This position accords with those in other circuits, *Walker v. County School Bd.*, 413 F.2d 53, 54 (4th Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970); *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 861-73 & n.58 (5th Cir. 1966), *cert. denied*, 389 U.S. 840, *aff'd on reh'g*, 380 F.2d 385, 389 & n.2 (5th Cir. 1967) (en banc), and the Supreme Court, *Green v. County School Bd.*, 391 U.S. 430, 437 (1968); *see also Kemp v. Beasley*, 389 F.2d 178, 182 (8th Cir. 1968) (*Kemp II*) (affirmation of Eighth Circuit position); *Yarbrough v. Hulbert-West Memphis School Dist.*, 380 F.2d 962, 967 (8th Cir. 1967) (same).

210. 389 F.2d 178 (8th Cir. 1968).

211. *Id.* at 180 (footnotes omitted).

212. *Id.* at 183.

213. *Id.*

214. *Id.* at 181.

215. *Id.* at 185-86.

2. Toward More Effective Remedies: From *Green* to *St. Louis*

The Supreme Court's reversals in *Raney v. Board of Education*²¹⁶ and *Green v. School Board of New Kent County*²¹⁷ sounded the death knell for freedom-of-choice desegregation plans. In refusing to accept freedom-of-choice plans as a constitutional remedy, the Supreme Court in *Green* ruled that good faith efforts at desegregation were inadequate. Henceforth, courts should only approve plans "that [promise] realistically to work, and [promise] realistically to work now."²¹⁸ The *Green* Court evaluated rural desegregation efforts in a Virginia county populated by equal numbers of blacks and whites living in integrated neighborhoods. The New Kent County School Board maintained segregated schools until 1965,²¹⁹ when it initiated a freedom-of-choice plan. In striking down the 1965 plan, the Court noted that, although 115 black children had elected to transfer in the third year of the plan, eighty-five percent of the black students remained in all-black schools and white students had unanimously declined to transfer.²²⁰ The Court refused to approve a simply racially neutral plan. In *Raney*, the Court likewise noted that, after three years of "freedom-of-choice," no whites had transferred and over eighty-five percent of the blacks remained in segregated schools. The Eighth Circuit Court of Appeals was unduly conservative, the Court concluded, in deciding that the adequacy of the plan had not been challenged in the district court;²²¹ on the contrary, the merits had been tested and, in the Court's opinion, the plan perpetuated a dual school system.²²²

Despite the trend away from freedom-of-choice plans, such a plan was approved in *Kemp v. Beasley (Kemp III)*.²²³ The Eighth Circuit found that progress in desegregation was heart-

216. 391 U.S. 443, 446 (1968).

217. 391 U.S. 430 (1968).

218. *Id.* at 439 (emphasis in original).

219. *Id.* at 433. The Pupil Placement Act, VA. CODE. §§ 22.232.1-12 (1964), authorized the state's Pupil Placement Board to supervise voluntary transfers, but no blacks applied for transfer to the New Kent white schools until 1964. *Green*, 391 U.S. at 433. Virginia's Pupil Placement Act was repealed by Act of Apr. 5, 1966, ch. 590, 1966 Va. Acts 867.

220. *Green*, 391 U.S. at 441.

221. *Raney*, 391 U.S. at 447.

222. *Id.*

223. 423 F.2d 851 (8th Cir. 1970).

ening.²²⁴ Two high schools and two junior high schools were no longer racially identifiable, and faculty integration was proceeding.²²⁵ Segregation persisted in the elementary schools, however, and the court ordered immediate action there because "[a]ll deliberate speed' for desegregation is no longer constitutionally permissible."²²⁶ The court also pointed out that it had not passed on the neighborhood school concept, it had not found that busing was a constitutional imperative, and it had not ruled that precise racial percentages were required.²²⁷

With the weak constitutional foundation of freedom-of-choice desegregation plans exposed in *Green* and *Raney*, the need for effective remedies to combat school segregation was immediate. *Swann v. Charlotte-Mecklenburg Board of Education*²²⁸ provided the district courts with the remedial tools for effective desegregation. Although noting that, "[a]s with any equity case, the nature of the violation determines the scope of the remedy,"²²⁹ the Supreme Court in *Swann* established four specific remedies to achieve school desegregation: ratios, busing, alteration of attendance zones, and optional majority-to-minority transfers.

The *Swann* Court, in approving the district court's use of the seventy-one to twenty-nine percent ratio in integrated schools, stated that courts should use ratios as a "starting point" in the process of shaping desegregation remedies.²³⁰ It concluded that ratios were rooted in an awareness of the racial composition of the school system as a whole.²³¹ The Court also approved the use of busing as a remedial tool. Although it declined to formulate rigid guidelines for student transporta-

224. *Id.* at 858 ("The District has come a long way and it has done so, apparently, with little sign of any resegregation tendency.").

225. *Id.* at 856. High school advances were accomplished by pairing and transportation, whereas the junior high schools benefited from freedom of choice.

226. *Id.* at 857. In another case from the *Green* period, the Eighth Circuit also emphasized its unwillingness to tolerate further delays. In *Christian v. Board of Educ.*, 440 F.2d 608 (8th Cir. 1971), the court considered plaintiffs' complaint of dilatory response by the school district to plaintiffs' interrogatories which, they alleged, would have confirmed impermissible patterns of pupil assignment. The court agreed, declaring that "plaintiffs seeking vindication of their constitutional rights in cases of this nature need to have quick and accurate information." *Id.* at 612.

227. *Kemp III*, 423 F.2d at 857.

228. 402 U.S. 1 (1971).

229. *Id.* at 16.

230. *Id.* at 25.

231. *Id.*

tion,²³² it noted that thirty-nine percent of the nation's public school children rode buses to school in 1969-1970²³³ and concluded that "[t]he importance of bus transportation as a normal and accepted tool of educational policy"²³⁴ was apparent.

The Court in *Swann* also approved the remedial alteration of attendance zones as part of an overall desegregation plan. Acknowledging that such plans "may be administratively awkward, inconvenient, and even bizarre,"²³⁵ it observed that some remedies must go beyond "racially neutral" attendance policies: "When school authorities present a district court with a 'loaded game board,' affirmative action in the form of remedial altering of attendance zones is proper to achieve truly non-discriminatory assignments."²³⁶ Finally, the Court approved an "optional-majority-to-minority transfer" provision²³⁷ in the district court's desegregation plan that alleviated the problems of concentrations of minority group members in certain neighborhoods and the relative scarcity of whites for integrating the schools. The "one-race school," the Court said, is not in and of itself "the mark of a system that still practices segregation by law."²³⁸ The Court noted, however, that school officials bear the burden of justifying the existence of such schools.²³⁹

After *Swann*, the Supreme Court's path was more circuitous and its support for the legacy of *Brown* less apparent. In

232. *Id.* at 29.

233. *Id.*

234. *Id.* For the states comprising the Eighth Circuit, telephone interviews with state school officials confirm that in 1982-1983 approximately 1.6 million students (or 55% of those enrolled) were transported to school at a cost of approximately \$318 million. Of this total, the number transported for desegregation is small and is comparable with national statistics that show that less than three percent of students are bused for desegregation purposes. Days, *Turning Back the Clock: The Reagan Administration and Civil Rights*, 19 HARV. C.R.-C.L. L. REV. 309, 321 (1984).

235. *Swann*, 402 U.S. at 28.

236. *Id.*

237. *Id.* at 26.

238. *Id.*

239. The Eighth Circuit has explored *Swann's* remedial aspects in several cases. In *Yarbrough v. Hulbert-West Memphis School Dist. No. 4*, 457 F.2d 333, 335 (8th Cir. 1972), the Eighth Circuit explicitly approved racial ratios. The plan approved by the district court called for a 30% minimum of the minority race in each school, whether white or black, with monthly transfers to preserve this ratio. The Eighth Circuit affirmed but limited transfers to once per semester. *Id.* at 335. It distinguished *Swann's* proscription of fixed ratios by stating that the ratio was simply a minimum threshold beyond which no school could fall. *Id.*

Milliken v. Bradley (Milliken I),²⁴⁰ the Court emphasized the importance of local autonomy in controlling school operations²⁴¹ and declared that the extent of the remedy for segregation is limited by the extent of the constitutional violation.²⁴² Although this emphasis seems contrary to *Brown's* central teaching, several elements of the *Milliken I* remedy, including the breadth of the consolidation involved, the involuntary nature of the consolidation, and the relatively slight evidence of interdistrict violations, distinguish *Milliken I* from other interdistrict cases that seem to track *Brown* more closely. In addition, decisions such as *Dayton Board of Education v. Brinkman (Dayton I)*,²⁴³ *Pasadena City Board of Education v. Spangler*,²⁴⁴ *Washington v. Davis*,²⁴⁵ and *Village of Arlington Heights v. Metropolitan Housing Corp.*²⁴⁶ suggest that the Supreme Court was reevaluating desegregative remedies through its definition of constitutional violations themselves. In these cases and others, the Court formulated a requirement of segregative intent as a predicate to such civil rights actions.²⁴⁷ This reevaluation was apparent in 1973 in the Supreme Court's first northern de jure discrimination case, *Keyes v. School District No. 1*.²⁴⁸ Although *Keyes* was the first nonunanimous decision since 1954, the Court agreed that de jure segregation in one part of the city was "a predicate for a finding of the existence of a dual school system."²⁴⁹

Despite the ambiguous messages of these decisions, the Supreme Court soon renewed its support for effective desegregation in *Milliken II*.²⁵⁰ The *Milliken II* Court reviewed the

240. 418 U.S. 717 (1974).

241. *Id.* at 741-42.

242. *Id.* at 744.

243. 433 U.S. 406 (1977).

244. 427 U.S. 424 (1976).

245. 426 U.S. 229 (1976).

246. 429 U.S. 252 (1977).

247. In *Washington v. Davis*, 426 U.S. 229 (1976), the Supreme Court analogized the case at bar to school desegregation cases in which the courts adhere to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause. The essential element of *de jure* segregation is "a current condition of segregation resulting from intentional state action."

Id. at 240 (citing *Keyes v. School Dist. No. 1*, 413 U.S. 189, 205 (1973)).

248. 413 U.S. 189 (1973).

249. *Id.* at 201.

250. 433 U.S. 267 (1977).

criteria that govern the exercise of equitable remedial powers²⁵¹ and approved wide-ranging remedial and compensatory educational programs to overcome deficiencies in educational opportunities for minorities.²⁵² These programs included in-service training for teachers and administrators, guidance and counseling programs, revised testing procedures, and a remedial reading and communication skills program.²⁵³ In authorizing these programs, the Court declared that "[p]upil assignment alone does not automatically remedy the impact of previous, unlawful educational isolation; the consequences linger and can be dealt with only by independent measures. . . . The root condition shown by this record must be treated directly by special training at the hands of teachers prepared for that task."²⁵⁴

In addition to broadening the remedies themselves, the Court also loosened its "segregative intent" restriction on remedies. In *Columbus Board of Education v. Penick*²⁵⁵ and *Board of Education v. Brinkman (Dayton II)*,²⁵⁶ the Court returned to federal district and appellate courts a broader discretion to define constitutional violations. In *Columbus*, the Court found it "well within the requirements of *Washington v. Davis* and *Arlington Heights*"²⁵⁷ for the district court to infer segregative intent from "[a]dherence to a particular policy or practice, 'with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system.'"²⁵⁸ Concerning the breadth of remedy, the Supreme Court quoted and approved the district court's observation that "[a]ctions and omissions by public officials which tend to make black schools blacker necessarily have the reciprocal effect of making white schools whiter."²⁵⁹

During this period of uncertain direction from the Supreme Court, the Eighth Circuit Court of Appeals decided a series of cases that imposed broad remedies, including its first northern desegregation case. Through policy decisions on education, housing, highway construction, and zoning, segregation

251. *Id.* at 280-81.

252. *Id.* at 282; see also *id.* at 272 & n.5 (briefly describing educational components).

253. *Id.* at 272.

254. *Id.* at 287-88.

255. 443 U.S. 449 (1979).

256. 443 U.S. 526 (1979).

257. *Columbus Bd. of Educ.*, 443 U.S. at 465.

258. *Id.*

259. *Id.* at 466 n.16.

had found its way into cities and suburbs of the north, and its presence triggered a new generation of litigation. The first of these cases involved the Omaha public schools. In the Eighth Circuit's first review of the Omaha case, *United States v. School District of Omaha*,²⁶⁰ the court recounted the nature of the evidence of school segregation: although twenty percent of the district's 60,502 school children were black, over half attended schools that were over eighty percent black, whereas nearly three-fourths of the white students attended schools that were over ninety-five percent white.²⁶¹ In addition, the court cited evidence of segregated faculty,²⁶² deteriorating black facilities,²⁶³ and a two-tiered school construction program.²⁶⁴ In fact, thirty-seven of thirty-nine new schools built from 1951 to 1973 were predominantly one-race schools.²⁶⁵ Nebraska had not been a slave state, and neither it nor Omaha had enforced racism by statute as had Arkansas and Missouri.²⁶⁶ Nevertheless, the school district was liable for *intentionally* segregating schools, the court reasoned, because "a presumption of segregative intent arises once it is established that school authorities have engaged in acts or omissions, the natural, probable and foreseeable consequence of which is to bring about or maintain segregation."²⁶⁷

To aid the development and implementation of a desegregation plan, the court of appeals devised several policy guidelines. Reassignment of students attending integrated schools was to be avoided, the court held, because "[i]t makes little sense to reassign students now attending integrated schools in their neighborhood to schools in other sections of the city."²⁶⁸ The plan should not increase black enrollments above twenty-

260. 521 F.2d 530 (8th Cir.), *cert. denied*, 423 U.S. 946 (1975).

261. 521 F.2d at 533.

262. *Id.* at 537-38.

263. *Id.* at 544-45.

264. *Id.* at 543.

265. *Id.* at 543.

266. *See, e.g., supra* note 116.

267. 521 F.2d at 535-36.

268. *Id.* at 547. The court defined integrated schools as those schools with black enrollments between 5% and 35%. *Id.* Recent studies suggest that after schools are desegregated, urban housing patterns also show progress toward desegregation. *See, e.g.,* D. Pearce, R. Crain & R. Farley, *Lessons Not Lost: The Effect of School Desegregation on the Rate of Residential Desegregation in Large Cities* 2-3, 18-20 (1984) (unpublished paper) (communities with city-wide desegregation experienced significant decreases in housing segregation, increases in neighborhood stabilization, and changes in real estate marketing practices).

five percent in schools where black enrollments were then below that threshold. The court noted that "[t]his policy will discourage the labeling of additional schools as 'black,' [and] will hopefully discourage 'white flight,'"²⁶⁹ thus furthering integration in the district. In schools with black enrollment between twenty-five and thirty-five percent, attendance policies were not to "significantly" increase the black-to-white ratio and in no event were to allow it to exceed thirty-five percent.²⁷⁰ Transfers that would increase segregation in either sending or receiving schools were not permitted, and school officials were to consider using approved integration techniques, including pairing or clustering of schools, realignment of school assignment zones, and the relocation of portable classrooms.²⁷¹

In *Omaha II*,²⁷² the Eighth Circuit Court of Appeals reviewed its mandate in light of the "segregative intent" opinions in *Pasadena* and *Washington*.²⁷³ The district court had approved a modified version of the school board's plan,²⁷⁴ and on review the court of appeals, anticipating *Columbus* and *Dayton II*, found "nothing in these opinions that would cause us to revise our earlier opinion."²⁷⁵ The Supreme Court granted certiorari²⁷⁶ and remanded for reconsideration in light of *Arlington Heights*.²⁷⁷ In *Omaha III*,²⁷⁸ the circuit court reviewed its finding of intentional segregation and concluded that "a discriminatory purpose has been a motivating factor in the School District's actions . . . because the natural and foreseeable consequence of the acts of the School District was to create and maintain segregation in five different areas."²⁷⁹ In light of the Supreme Court's instructions, the court of appeals remanded the case to the district court to determine the incremental segregation produced by the constitutional violation and to match the remedy to the violation.²⁸⁰

269. *Omaha I*, 521 F.2d at 547.

270. *Id.*

271. *Id.*

272. *United States v. School Dist. of Omaha (Omaha II)*, 541 F.2d 708, 709 (8th Cir. 1976) (en banc), *vacated*, 433 U.S. 667 (1977).

273. *See supra* notes 244-45 and accompanying text.

274. *United States v. School Dist. of Omaha*, 418 F. Supp. 22, 25 (D. Neb.), *aff'd*, 541 F.2d 708 (8th Cir. 1976).

275. *Omaha II*, 541 F.2d at 709 (citation omitted).

276. *School Dist. of Omaha v. United States*, 433 U.S. 667, 669 (1977).

277. *Id.* at 669.

278. *United States v. School Dist. of Omaha (Omaha III)*, 565 F.2d 127 (8th Cir. 1977) (en banc), *cert. denied*, 434 U.S. 1064 (1978).

279. 565 F.2d at 128 (citation omitted).

280. *Id.*

After an extensive review of the history of the litigation and of the evidence supporting the finding of a violation, the district court concluded, in an unpublished opinion, that the school district had failed to present sufficient evidence to establish that the scope of the remedy exceeded the scope of the violations.²⁸¹ With the scope of the remedy approved, the Omaha schools were successfully desegregated, and the district court declared the system unitary in September 1984.²⁸²

Another Eighth Circuit case of the period, *Booker v. Special School District No. 1*,²⁸³ raised the special issue of segregation of blacks and Native Americans in the Minneapolis public schools.²⁸⁴ In 1972, the district court found that the schools were intentionally segregated and approved a modified plan that included minority enrollment guidelines, faculty desegregation, judicial supervision of school construction, and the submission of semiannual progress reports to the court.²⁸⁵ After the Supreme Court decided *Pasadena, Dayton I*, and the "segregative intent" cases,²⁸⁶ the school board sought dissolution of the district court's injunction, citing the elimination of "incremental segregation" (separation that is facially nondiscriminatory but foreseeably results in segregation).²⁸⁷ The court of appeals refused to dissolve the order, concluding that the district court was not clearly erroneous in refusing to apply the *Dayton* and *Pasadena* standards to the Minneapolis public schools. The circuit court agreed with the district court that the line between "original" and "incremental" segregation was elusive and that the remedy of racial ratios (single minority enrollments of thirty-five percent or combined minority enrollments of forty-two percent) was not overbroad, especially when adjusted upward to thirty-nine and forty-six percent.²⁸⁸

The scope of the remedy was the principal issue in two

281. *United States v. School Dist. of Omaha*, No. 73-0-320, slip op. at 22 (D. Neb. June 26, 1979).

282. *United States v. School Dist. of Omaha*, No. 73-0-320, order at 2-3 (D. Neb. Sept. 17, 1984) (dismissing case on grounds that district achieved unitary status).

283. 585 F.2d 347 (8th Cir. 1978).

284. *Id.* at 350.

285. *Booker v. Special School Dist. No. 1*, 351 F. Supp. 799 (D. Minn. 1972). See generally U.S. COMM'N ON CIVIL RIGHTS, SCHOOL DESEGREGATION IN MINNEAPOLIS, MINNESOTA (1977) (background materials on local problems and summary of desegregation plans).

286. See *supra* notes 243-47 and accompanying text.

287. *Booker*, 585 F.2d at 352.

288. *Id.* at 353-55.

other major Eighth Circuit cases in this period.²⁸⁹ In *Morrilton School District No. 32 v. United States*,²⁹⁰ the district court required an interdistrict remedy because of state involvement in the consolidation and segregation of local school districts. Although Arkansas's consolidation policy was race-neutral on its face, state law had required separate schools for blacks and whites until the *Brown* decision in 1954.²⁹¹ As a result, students and staff were extensively segregated. The Eighth Circuit agreed with the district court that the school-district map resembled a "crazy quilt, and the resemblance results from the gerrymandering of district lines in years past in deference to the requirement of segregation."²⁹² The circuit court promptly approved the district court's consolidation of several surrounding districts,²⁹³ relying especially on *Swann* and *Milliken II*. In addition, the court prescribed deadlines of successive years for the integration of the secondary and elementary schools and provided for the election of an interim school board.²⁹⁴ In approving the plan, the court also noted that the district court's order requiring minority enrollments between thirteen percent and thirty-three percent was a discretionary gesture to eliminate discrimination and was not designed to perpetuate a par-

289. In *United States v. Missouri*, 515 F.2d 1365 (8th Cir.), *cert. denied*, 423 U.S. 951 (1975), the court of appeals considered a school-consolidation case. Kinloch School District No. 18 had been a single segregated school district until 1937, when it was separated into white and black districts. 515 F.2d at 1367. Kinloch, the resulting black district, had the lowest assessed valuation per pupil in St. Louis County, inferior buildings and equipment, a smaller library, lower teachers' salaries, a higher teacher-turnover rate, and a more limited curriculum. *Id.* To address these inequalities, the district court ordered the Ferguson School District to annex the Berkeley and Kinloch Districts. *Id.* at 1368. The disparate tax rates in the school districts—\$3.80, \$4.97, and \$5.38 per \$100 assessed value, respectively—posed an administrative problem that the district court remedied by imposing a uniform \$6.03 levy. *Id.* at 1371. The Eighth Circuit rolled back the levy to \$5.38, the highest of the three levies. *Id.* at 1373. The court cited *Swann* regarding the broad equitable authority of the federal courts in framing desegregation remedies and noted that federal constitutional guarantees supersede state policies when the two conflict. *Id.* at 1372 (citing *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971), and *Haney v. County Bd. of Educ.*, 429 F.2d 364, 368 (8th Cir. 1970)).

290. 606 F.2d 222 (8th Cir. 1979), *cert. dismissed*, 440 U.S. 1050 (1980), *cert. denied*, 444 U.S. 1071 (1980).

291. 606 F.2d at 225-26; ARK. STAT. ANN. § 80-509(c) (1947). In fact, the requirement is still technically on the books. ARK. STAT. ANN. § 80-509(c) (1980).

292. *Id.* at 226 (quoting the district court).

293. *Id.* at 230.

294. *Id.* at 231.

ticular racial ratio.²⁹⁵

In the case of a St. Louis school district, a group of black parents originally filed suit in 1972 under the fourteenth amendment, alleging racial segregation.²⁹⁶ The district court found no constitutional violation and concluded that the board of education had achieved a unitary school system in the years of 1954 to 1956 through its "neighborhood school policy."²⁹⁷ The Eighth Circuit reversed in *Adams v. United States*²⁹⁸ and noted that the St. Louis schools exemplified state-ordered segregative measures reaching back to the antebellum period.²⁹⁹

The court of appeals in *Adams* considered four remedial desegregation plans prepared by the parties' expert witnesses.³⁰⁰ The court approved a set of constitutionally permissible alternatives and remanded the case to the district court with suggestions for remedial techniques, including student exchanges with the county school districts, magnet and specialty schools, permissive intradistrict student transfers, establishment of an educational park, and compensatory or remedial programs.³⁰¹ On remand, the district court approved a plan embodying many of the remedial techniques suggested by the court of appeals.³⁰² Because of the potential involvement of suburban school districts in the litigation, the district court en-

295. *Id.* at 230-31.

296. *Liddell v. State of Missouri (Liddell VII)*, 731 F.2d 1294, 1298 (8th Cir. 1983), *cert. denied*, 105 S. Ct. 82 (1984). See generally U.S. COMM'N ON CIVIL RIGHTS, SCHOOL DESEGREGATION IN THE ST. LOUIS AND KANSAS CITY AREAS (1981) (report of Mo. Advisory Committee; general overview of local politics and history of relevant litigation).

297. *Liddell v. Board of Educ.*, 469 F. Supp. 1304, 1360-61 (E.D. Mo. 1979), *rev'd*, 620 F.2d 1277 (8th Cir. 1980).

298. 620 F.2d 1277 (8th Cir.) (en banc), *cert. denied*, 449 U.S. 826 (1980).

299. 620 F.2d at 1280-81. Separate schools for blacks and whites in St. Louis were first authorized in 1865, Act of Feb. 17, 1865, § 13, 1865 Mo. Laws 170, and incorporated into the state constitution in 1945, MO. CONST. art. IX, § 1(a) (1945). Although unusable after 1954, the authorization remained until 1976. See *Liddell*, 620 F.2d at 1280; MO. CONST. art. IX, § 1(a) (amended Aug. 3, 1976). Even after a neighborhood-school plan was implemented in 1955, after *Brown I* and *Brown II*, the schools remained racially identifiable. *Liddell*, 620 F.2d at 1281.

300. Brief descriptions of these plans appear at 620 F.2d at 1292-97.

301. *Id.* at 1295-97.

302. Once again the defendants appealed and the Eighth Circuit Court of Appeals affirmed in *Liddell v. Board of Educ. (Liddell III)*, 667 F.2d 643 (8th Cir. 1981), *cert. denied*, 454 U.S. 1081 (1982). The court also affirmed the district court's allocation of costs that required the state to pay one-half the cost of the desegregation plan. *Liddell v. Board of Educ. (Liddell V)*, 677 F.2d 626, 628 (8th Cir.), *aff'g* 491 F. Supp. 351, 353 (E.D. Mo. 1980), *cert. denied*, 459 U.S. 877 (1982).

tered an order in 1982 disclosing the interdistrict plan that would be used if the suburban districts were found to be constitutional violators.³⁰³ Before the liability hearings could be held, however, the parties reached a settlement that included the city school district and a number of suburban districts.³⁰⁴ The settlement used many of the remedial techniques approved by the Eighth Circuit in *Adams*.³⁰⁵ As primary constitutional violators, the state and city were obliged to share the costs of the plan.

Under the settlement, black schoolchildren in St. Louis have several educational options. If they already attend integrated neighborhood schools in the city, they may continue to attend these schools. If not, the students may transfer into these integrated schools if positions become available.³⁰⁶ The quality of city schools will be improved by special programs, including an improved pupil-teacher ratio, more certified teachers, improved library services, the inclusion of art, music, and physical education in the elementary curriculum, more preschool centers, and better planning and program development.³⁰⁷

Black city students may also voluntarily transfer to county schools.³⁰⁸ Approximately 2,500 students transferred in 1983-1984 and approximately 5,200 students have applied for transfer in 1984-1985.³⁰⁹ Black city students may also, however, continue to attend their all-black neighborhood schools, the quality of which will be significantly improved by remedial and compensatory programs authorized in *Milliken II*.³¹⁰ These programs include class-size reduction, remedial programs, parental involvement, and educational alternatives for black students unable to attend magnet schools.³¹¹ In addition, black students' motivational needs will be met by introducing academic role models and by establishing student committees to focus on mo-

303. *Liddell VII*, 731 F.2d at 1300.

304. *Id.*

305. *Id.*; see *supra* note 301 and accompanying text.

306. *Liddell VII*, 731 F.2d 1294, 1302-04 (1984) (specifically approving portion of Settlement Plan allowing voluntary interdistrict student transfers suggested in prior *Liddell* litigation).

307. *Id.* at 1312-13.

308. *Id.* at 1301-09.

309. Statistics gathered by the Office of the Clerk of the United States Courts of Appeals for the Eighth Circuit from St. Louis's Voluntary Interdistrict Coordinating Council.

310. *Liddell VII*, 731 F.2d at 1312-18 (citing *Milliken II*, 433 U.S. at 283).

311. 731 F.2d at 1316.

rale, attendance, and behavior issues.³¹²

As a final option, black city students may attend city magnet schools and integrative programs with white county students.³¹³ Magnet schools in the plan feature individualized teaching, low pupil-teacher ratios, and specialized programs tailored to students' interests.³¹⁴ Maximum efforts will be made to attract white county students to the magnet schools so that white students will not be drawn out of presently integrated city schools. Nearly 8000 students enrolled in these programs in 1982-1983, and 12,000 to 14,000 are expected in city magnet schools by 1987.³¹⁵

The settlement agreement has a life of five years. At the end of that period, if the participating suburban districts have met the goals of the plan, they will receive a final judgment that will satisfy their desegregation obligations.³¹⁶ Of St. Louis's 53,618 schoolchildren, 41,470 are black.³¹⁷ At the end of five years, if the plan is fully implemented, approximately 15,000 black students will be enrolled in county schools,³¹⁸ creating new social and educational opportunities for white and black student alike. Between 5000 and 7000 black students will attend city magnet schools with an equal number of white students, 10,000 to 12,000 black students are expected to attend integrated schools in the City of St. Louis, and the remaining black students will attend upgraded and enriched all-black city schools.³¹⁹

As these cases make clear, the Eighth Circuit has made considerable progress toward desegregation. Despite this progress, however, litigation continues and problems remain. If history is any guide, it may be some time before deep-seated racial tensions disappear and racial equality and desegregation in education become realities.³²⁰

312. *Id.* at 1312.

313. *Id.* at 1309-12.

314. *Id.* at 1311.

315. *Id.* at 1309-10.

316. *Id.* at 1300.

317. Statistics gathered by the Office of the Clerk of the United States Court of Appeals for the Eighth Circuit.

318. *Liddell VII*, 731 F.2d at 1302.

319. *Id.* at 1309-10 (magnet schools). The author has derived the other enrollment figures inferentially, using enrollment totals and *Liddell VII*, 731 F.2d at 1301-02, 1309-10, 1315, 1316.

320. Further comment on contemporary desegregation efforts is inappropriate in light of the pendency of several cases in the Eighth Circuit. Specifically, aspects of the *St. Louis* case are still before the district court, the *Little*

B. AFFIRMATIVE ACTION IN EMPLOYMENT

1. Eighth Circuit Cases in the Pre-*Bakke* Era

During the period before the Supreme Court decided *Regents of the University of California v. Bakke*,³²¹ the Eighth Circuit Court of Appeals considered affirmative action in a number of contexts. Some of these contexts affected employment only incidentally, as in the school desegregation cases.³²² Most of the cases, however, have arisen under statutes directed specifically at employment, such as Title VII of the 1964 Civil Rights Act.³²³

Rock case is before the District Court, which has expressed interest in a plan to consolidate area school districts, *Little Rock School Dist. v. Pulaski County Special School Dist. No. 1*, 584 F. Supp. 328, 352-53 (E.D. Ark.), *rev'd on other grounds*, 738 F.2d 82 (8th Cir. 1984), and the District Court for the Western District of Missouri has ordered the desegregation of the Kansas City schools, *Jenkins v. Missouri*, No. 77-0420, slip op. at 35-36 (W.D. Mo. Sept. 17, 1984).

321. 438 U.S. 265; *see infra* notes 400-01 and accompanying text.

322. *See infra* notes 324-37 and accompanying text.

323. Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e to 2000e-12 (1982), grants federal courts broad authority to remedy employment discrimination. Upon finding intentional discrimination, a court may enjoin the offending employment practice, "and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, . . . or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g) (1982). Two other provisions in the statute circumscribe the court's equitable authority. Section 2000e-2(h) preserves an employer's right to apply different standards for compensation or other terms and conditions of employment based on a "bona fide seniority or merit system." 42 U.S.C. § 2000e-2(h) (1982). Section 2000e-2(j) provides that nothing in Title VII

shall be interpreted to require . . . preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin . . . on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

42 U.S.C. § 2000e-2(j) (1982).

Although neither the fourteenth amendment nor 42 U.S.C. § 1981 (1982) contains similar provisions, the Eighth Circuit has evaluated affirmative action cases litigated thereunder with these provisions of Title VII in mind. *See, e.g., Warsocki v. City of Omaha*, 726 F.2d 1358, 1359-60 (8th Cir. 1984); *Setser v. Novack Inv. Co.*, 657 F.2d 962, 965-68 (8th Cir.) (en banc), *cert. denied*, 454 U.S. 1064 (1981).

a. *Affirmative Action in Employment as a Means of School Desegregation*

Although not litigated under Title VII,³²⁴ the school desegregation cases addressed affirmative action in employment. In these cases, courts confronted school systems that assigned only white teachers to white students and only black teachers to black students. Black teachers typically were paid less than their white counterparts and were forced to teach larger classes.³²⁵

Change, in many cases, came slowly. In the early school cases, the Eighth Circuit merely observed that *Brown* and Title VII of the 1964 Civil Rights Act required an integrated teaching staff.³²⁶ In *Clark v. Board of Education*,³²⁷ the court took a small step forward and required the board of education to "take accelerated and positive action to end discriminatory practices in staff assignment and recruitment."³²⁸ The court, however, stopped short of imposing a "set timetable with fixed mathematical requirements."³²⁹

In *Kelley v. Altheimer*,³³⁰ the school board, despite numerous opportunities to desegregate its school faculties, had continued to hire and assign on a racially discriminatory basis.³³¹ The court of appeals therefore directed in May 1967 that complete desegregation of the faculty be accomplished no later than the beginning of the 1969-1970 school year. When *Kemp v. Beasley* came before the court of appeals a second time,³³² the court found faculty desegregation two years behind schedule.³³³ The school board argued that affirmative remedies for faculty segregation that took into account a teacher's race constituted un-

324. The school desegregation cases arose primarily under the fourteenth amendment, with some cases also invoking 42 U.S.C. § 1983 (1982) and Title VII of the 1964 Civil Rights Act, codified at 42 U.S.C. § 2000 (1982). See, e.g., *Brown I*, 347 U.S. 438, 488 (1954); *Yarbrough v. Hulbert-West Memphis School Dist. No. 4*, 380 F.2d 962, 963 (8th Cir. 1967); *Kelley v. Altheimer*, 378 F.2d 483, 485-86 (8th Cir. 1967); *Clark v. Board of Educ.*, 369 F.2d 661, 665 (8th Cir. 1966).

325. See, e.g., *Morrilton School Dist. No. 32 v. United States*, 606 F.2d 222, 227 (8th Cir. 1979); *Kelley v. Altheimer*, 378 F.2d 483, 491 (8th Cir. 1967).

326. See, e.g., *Smith v. Board of Educ.*, 365 F.2d 770, 778-80 (8th Cir. 1966); *Kemp v. Beasley (Kemp I)*, 352 F.2d 14, 22-23 (8th Cir. 1965).

327. 369 F.2d 661 (8th Cir. 1966).

328. *Id.* at 669.

329. *Id.* at 669-70.

330. 378 F.2d 483 (8th Cir. 1967).

331. *Id.* at 491-94.

332. *Kemp v. Beasley (Kemp II)*, 389 F.2d 178 (8th Cir. 1968).

333. See *id.* at 189.

lawful "racial discrimination in reverse."³³⁴ The court rejected this argument, emphasizing that "[c]ourts will not say in one breath that public school systems may not practice segregation, and in the next that they may do nothing to eliminate it."³³⁵ It also ordered the board to submit to the district court its list of vacancies and reassignments to fulfill its constitutional obligation.³³⁶ In subsequent school employment cases, the court of appeals continued to require that faculty desegregation plans include specific affirmative steps to be taken pursuant to a time schedule, that job descriptions and hiring criteria be promulgated, and that uniform ratios of black to white faculty members be adopted.³³⁷

b. *Affirmative Action in Employment Discrimination Cases*

In employment discrimination cases in general, the Eighth Circuit Court of Appeals frequently has used nonnumerical affirmative remedies to achieve compliance with civil rights laws. Such action is not always necessary, of course. For example, if an employer is making good faith efforts to comply with Title VII,³³⁸ the court of appeals has found injunctive relief unnecessary³³⁹ and has simply remanded to the district court, which retains jurisdiction to ensure the continued implementation of an employer's own equal employment opportunity policy.³⁴⁰ Absent such signs of progress and good faith, however, the court

334. *Id.* at 187-88.

335. *Id.* (quoting *Wanner v. County School Bd.*, 357 F.2d 452, 454-55 (4th Cir. 1966)).

336. *See id.* at 191.

337. *See, e.g.*, *United States v. Hazelwood School Dist.*, 534 F.2d 805, 819-20 (8th Cir. 1976), *vacated and remanded*, 433 U.S. 301 (1977); *United States v. School Dist. of Omaha*, 421 F.2d 530, 546 (8th Cir. 1975).

338. *See supra* note 323.

339. In addition to the forms of injunctive relief discussed *infra* notes 344-98 and accompanying text, 42 U.S.C. § 2000e-5(g) (1982) authorizes reinstatement and back pay.

340. *See, e.g.*, *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421, 429 (8th Cir. 1970). In enacting the 1964 Civil Rights Act, Congress emphasized voluntary compliance, private settlements, and the elimination of unfair practices without resort to the court's injunctive powers. 433 F.2d at 429; 42 U.S.C. § 2000e-5 (1982); H.R. REP. NO. 914, 88th Cong., 2d Sess. 3, *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2391, 2393.

The Equal Employment Opportunity Commission and the employer often achieve a settlement that remedies past discriminatory practices. A consent decree between the EEOC and an employer does not necessarily moot a plaintiff employee's claims, however, and the court has ordered relief beyond such decrees when necessary. *See, e.g.*, *Reed v. Arlington Hotel Co.*, 476 F.2d 721, 725-26 (8th Cir.), *cert. denied*, 414 U.S. 854 (1973).

has found injunctive relief necessary and has used it to order employers to develop objective, nondiscriminatory hiring and promotion standards. The need for such standards arises in the frequent case in which the employer has followed a subjective hiring policy in a racially discriminatory manner.³⁴¹ The court has also ordered employers to periodically report to the Justice Department and the district court on their progress in hiring qualified black employees.³⁴² Employers are frequently ordered to maintain records, available for government inspection, explaining their reasons for selecting white applicants over available black applicants. When an employer's past recruiting practice has been discriminatory, the court has ordered affirmative minority recruiting by requiring that notices of job openings be directed to potential black applicants and to black organizations.³⁴³

*United States v. Sheet Metal Workers*³⁴⁴ is an example of the application of nonnumerical affirmative remedies in Title VII cases. The Eighth Circuit Court of Appeals required in *Sheet Metal Workers* that qualified black employees be placed on a union referral list that would insure that they were referred on the same basis as white employees. The United States Attorney General had brought suit alleging that two union locals, both of which had excluded blacks from membership before 1964, were continuing to discriminate.³⁴⁵ Both locals focused their post-1964 organizational efforts on white contractors with white employees. They also discouraged their

341. See, e.g., *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 563 & n.15, 573 (8th Cir. 1982); *Wells v. Meyer's Bakery*, 561 F.2d 1268, 1271, 1273 (8th Cir. 1977); *United States v. Hazelwood School Dist.*, 534 F.2d 805, 809, 819 (8th Cir.), *vacated and remanded on other grounds*, 433 U.S. 299, 302 (1976); *Rogers v. International Paper Co.*, 510 F.2d 1340, 1345-46 (8th Cir.), *vacated and remanded*, 423 U.S. 809 (1975); *United States v. N.L. Indus.*, 479 F.2d 354, 368, 377 (8th Cir. 1973); *Reed v. Arlington Hotel Co.*, 476 F.2d 721, 724 (8th Cir. 1973).

342. See, e.g., *Hazelwood School Dist.*, 534 F.2d at 819; *N.L. Indus.*, 479 F.2d at 378, 380-82.

This reporting requirement does not always cure the problem. For example, in *EEOC v. Contour Chair Lounge Co.*, 596 F.2d 809 (8th Cir. 1979), a consent decree required the defendant to make semiannual reports to the EEOC as to hirings and discharges, indicating names, races, sexes, job classifications, and rates of pay of persons hired or discharged. Although the defendant did not comply with this requirement over most of the life of the consent decree, it did file a report after the suit was filed indicating it had hired 11 white persons and only one black. *Id.* at 812.

343. *Hazelwood School Dist.*, 534 F.2d at 819-20; *N.L. Indus.*, 479 F.2d at 378 & n.19; *United States v. Sheet Metal Workers*, 416 F.2d 123, 139 (8th Cir. 1969).

344. 416 F.2d 123 (8th Cir. 1969).

345. *Id.* at 127-31.

members from working on jobs where black contractors or black tradesmen were employed. The locals had instituted a public relations program to inform the community that their apprenticeship training programs were nondiscriminatory but had not done the same concerning the right to membership or use of the referral systems. The referral rules perpetuated past discrimination by their emphasis on past experience within the referral system.³⁴⁶

The court of appeals held that black workers were aware of these policies and that it was unreasonable to expect them to seek to join either local or use the referral systems under those circumstances.³⁴⁷ It was therefore unnecessary and unrealistic to require a finding that individual black tradesmen had sought to use the referral systems or to join the unions but had been rejected. The court ordered the locals to modify their collective bargaining agreement to recognize the experience of black workers outside of the agreement.³⁴⁸ Those blacks with equivalent experience in the industry were to be permitted to register with the unions and placed in highest priority referral groups. The locals were also ordered to publicize that their referral systems were nondiscriminatory.³⁴⁹

Nonnumerical remedies do not, however, exhaust the affirmative means used by the Eighth Circuit to combat employment discrimination. The court of appeals has also used numerically based remedies when considering employment discrimination suits, especially if no other means exists to remedy the present effects of past discrimination. For example, in *Carter v. Gallagher*,³⁵⁰ minority employment applicants to the Minneapolis Fire Department brought suit contending that the

346. *Id.*

347. *Id.* at 132.

348. *Id.* at 133.

349. In describing the remedy, the court noted:

In requiring the modifications, we impose no quotas, we grant no preferences.

Nor do we deprive any non-Negro craftsman of bona fide seniority rights. . . . We do make it possible, however, for qualified Negroes—those who have been deprived of the opportunity to gain experience in the construction industry or to gain experience under the collective bargaining agreement—to be placed in the group where they will have an equal opportunity to be referred for work.

Id. at 133-34 (footnote omitted).

350. 452 F.2d 315 (8th Cir.)(panel and en banc opinions), *cert. denied*, 406 U.S. 950 (1971).

city was practicing illegal employment discrimination.³⁵¹ The district court found liability³⁵² and established a hiring preference or "quota" for twenty minority persons who qualified on the basis of existing or revised examinations.³⁵³ The city appealed, attacking this preference as unconstitutional discrimination against white applicants who scored higher on entrance examinations.³⁵⁴

A panel of the court of appeals struck down the hiring preference provision as unconstitutional reverse discrimination.³⁵⁵ Acknowledging that courts have broad equitable powers to fashion remedies for discrimination, the panel nonetheless concluded that section 1981 and the fourteenth amendment prohibit all employment discrimination based on race—against whites or blacks. A remedy, the court noted, cannot deprive others of a constitutionally protected right.³⁵⁶

The court of appeals, en banc, reversed the panel, stating that the district court had "the authority to order the hiring of 20 qualified minority persons."³⁵⁷ The court en banc did, however, modify the lower court's order to assure that the order was implemented without denying the constitutional rights of others. The district court's absolute preference became a qualified preference requiring that one out of every three persons hired by the fire department be a qualified minority person until at least twenty minority persons had been hired.³⁵⁸

In reversing the panel, the court en banc challenged the principles underlying the panel's "color-blind" interpretation of the fourteenth amendment. The court recognized that erasing the effects of past discrimination may conflict with the employment interest of white persons with superior test scores but deemed it more important to remedy the present effects of past discrimination by accounting for the respective numbers of an

351. The Eighth Circuit's consideration of the remedy relied heavily on precedents under Title VII. 452 F.2d at 329.

352. Judge Earl R. Larson established the city's liability for race discrimination because none of the 535 Minneapolis firefighters were black, Indian, or Mexican-American, even though blacks constituted 6.44% of the Minneapolis population in 1970. *Id.* at 323.

353. Judge Larson's decree was not reported, but it was quoted in full in the panel opinion. *See id.* at 318-22.

354. *Id.* at 324.

355. *Id.* at 324-26.

356. *Id.* at 324.

357. *Id.* at 331.

358. *Id.*

employer's black and white employees.³⁵⁹ The Supreme Court's opinion in *Swann v. Charlotte-Mecklenburg Board of Education*³⁶⁰ had reflected this view by acknowledging that a combination of the awareness of the racial composition of a school system and the use of mathematical ratios are a starting point in the process of shaping a remedy. The Eighth Circuit panel had contended that *Swann's* endorsement of ratios was applicable to school cases only. The en banc majority disagreed.

The question dividing the *Carter* court was whether race discrimination could be remedied by focusing solely on individual rights. In the school context, the Supreme Court has not focused on individual rights; on the contrary, it has held that a white student does *not* have a constitutional right to attend the neighborhood public school.³⁶¹ The focus instead has been on the right of black students, as a class, to attend a unitary, non-discriminatory school system.³⁶² The en banc majority in *Carter* held that the discrimination in employment was, like that in education, systemic. The court acknowledged the racial composition of the fire department and of the city generally.³⁶³ It concentrated on the right of black people to be employed as firefighters, free of discrimination imposed on them historically as a class.³⁶⁴ The *Carter* en banc majority also directly challenged the notion that a remedial hiring ratio necessarily results in hiring "less qualified" minority persons over more qualified whites. Qualifying examinations do not rank applicants with precision and predictive significance.³⁶⁵

359. *Id.* at 330.

360. 402 U.S. 1, 25 (1971).

361. *Green v. School Bd.*, 391 U.S. 430, 439-42 (1968).

362. *See Brown I*, 347 U.S. 483, 493-94 (1954); *Brown II*, 349 U.S. 294, 300-01 (1955).

363. *Carter*, 452 F.2d at 328 & n.2.

364. *Id.* at 329-30. A related consideration for the court was the recognition that the department's past discriminatory policies were well-known in the community, especially by minority persons. *Id.* at 331. It was thus reasonable to use hiring ratios to give minority members "some positive assurance that if qualified they will in fact be hired on more than token basis." *Id.*

365. *Id.* (citing generally Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1637-69 (1969) ("Contrary to popular belief, the likelihood that scores on any particular aptitude test will correlate significantly with performance on any particular job is very slim indeed." *Id.* at 1643.)); *see also* Duncan, *The Future of Affirmative Action: A Jurisprudential/Legal Critique*, 17 HARV. C.R.-C.L. L. REV. 503, 529-31 & n.94 (1982) (contending that the notion of "merit" is troublesome and examinations such as the Law School Admissions Test (LSAT) do not necessarily predict competence); Little, *Affirmative Action: A Measure of Inherent Transience*, 31 U.

Affirmative action in promotion often raises even more controversy than affirmative action in hiring.³⁶⁶ Such remedial adjustments to promotions often interfere with settled expectations of nonminority employees; these expectations, however, often stem from an employer's past discrimination. The Eighth Circuit has therefore ordered promotion goals and ratios when necessary to remedy discriminatory promotion policies despite possibly unsettling consequences.

For example, the court of appeals has altered seniority systems that were based on racial discrimination³⁶⁷ and has im-

FLA. L. REV. 671, 691-92 (1979) (questioning whether specialized admission tests predict success in a profession closely enough to justify their use); Poole, *Argument, On Merit*, 1 LAW & INEQUALITY 155 (1983) (arguing that the concept of merit is inherently biased and unfair).

Since this litigation, the department has been integrated at the entry level. As of July 6, 1984, there were 46 minority employees in the department, or 9.4% of the total personnel. Thirty-four of a total 237 entry-level firefighters, or 14.3%, are black, Hispanic, or American Indian. The number of minority promotions to fire captain, however, presents a different picture: 87 of the department's 88 fire captains are white. City of Minneapolis Affirmative Action Management Program, Quarterly Report (July 6, 1984).

366. See, e.g., B. SCHLEI & E. GROSSMAN, *EMPLOYMENT DISCRIMINATION* LAW 1403-04 (2d ed. 1983) (noting that few courts order promotion quotas); Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1678-79 (1982) (pointing out that affirmative action at the promotion stage has a greater potential for political and other forms of resistance by white employees than do programs to eliminate discrimination at the hiring stage); Smith, *Affirmative Action in Extremis: A Preliminary Diagnosis of the Symptoms and the Causes*, 26 WAYNE L. REV. 1337, 1352-53 & nn.38-45 (1980) (asserting that an inevitable conflict exists between affirmative action and seniority systems); Wright, *Color-Blind Theories and Color-Conscious Remedies*, 47 U. CHI. L. REV. 213, 238-40 (1980) (arguing that programs that take away vested rights as opposed to affecting only the possibility of future benefits may require a more substantial justification).

367. The court altered a company's seniority system that had been based on racially segregated work departments in *United States v. N. L. Indus.*, 479 F.2d 354, 380 (8th Cir. 1973). The court found that the company's seniority system and its method of selecting foremen was discriminatory. Only three of the company's 100 foremen were black, and they supervised only labor department employees. *Id.* at 367. A pool of 32 qualified black employees existed, and less qualified whites had been promoted to foreman. The company's department seniority system perpetuated departmental discrimination by discouraging blacks from transferring to jobs in all-white departments.

The Department of Justice requested that the first 15 foreman vacancies be filled from a list of qualified black employees. *Id.* at 377. It also requested that half of all additional foreman vacancies be filled by qualified black employees. The court rejected this remedy but revised the foreman selection system, emphasizing objective standards, and a one-black-to-one-white ratio until 15 blacks were promoted. The Court concluded that this ratio was appropriate because 25% percent of the company's production workforce, the group from

posed ratios to remedy racially discriminatory promotion practices based on testing.³⁶⁸ *Firefighters Institute for Racial Equality v. City of St. Louis*³⁶⁹ represents one of several struggles to implement nondiscriminatory tests for promotions. In *Firefighters Institute*, the United States joined a group of black firefighters in alleging racially discriminatory practices in hiring and promotions in the St. Louis Fire Department. A consent decree approved by the district court set a black hiring goal of fifty percent for entry level vacancies over a five-year period.³⁷⁰ The district court also approved the promotional exam for fire captain, however, despite a finding of disparate impact,³⁷¹ and both the United States and the black plaintiffs appealed. The Eighth Circuit found that the exam failed to test an essential characteristic for promotion to fire captain: supervisory ability.³⁷² The court of appeals remanded to the district court for the development of a valid exam.

On remand, the district court enjoined the city from promoting anyone to fire captain before the development of a valid examination or, in the alternative, required that fifty percent of the vacancies be filled by qualified blacks pending the development of a valid examination.³⁷³ It subsequently revised the order to provide that promotions be made based on a racially identified list of all firefighters with the requisite five years of experience, used in conjunction with a valid technique for test-

which foremen were selected, was black. The ratio was temporary; once implemented, no future promotions would involve racial preferences.

368. For a general discussion of discriminatory testing, see the Supreme Court's landmark decision, *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

369. 410 F. Supp. 948, 957, *amended nunc pro tunc*, 418 F. Supp. 383 (E.D. Mo. 1976), *aff'd in part, rev'd in part, and remanded in part*, 549 F.2d 506 (8th Cir.), *cert. denied*, 434 U.S. 819 (1977), *rev'd and remanded after remand*, 588 F.2d 235 (8th Cir. 1978), *cert. denied*, 443 U.S. 904 (1979), *vacated and remanded after remand*, 616 F.2d 350 (8th Cir. 1980), *cert. denied*, 452 U.S. 938 (1981).

370. *Firefighters Inst. for Racial Equality v. City of St. Louis*, 549 F.2d 506, 508 & n.1 (8th Cir. 1977).

371. The mean score for blacks was 69.72, whereas the mean for whites was 76.59. Only 25.5% of those blacks taking the exam passed, whereas 43.6% of the whites passed. *Id.* at 510 n.4.

372. *Id.* at 511-14. The court based this finding on the EEOC guidelines for validating examinations. *Id.* at 512 (citing 29 C.F.R. § 1607.5(a) (1975)).

373. *Firefighters Inst. for Racial Equality v. City of St. Louis*, 588 F.2d 235, 237-38 (8th Cir. 1978). The district court later revised its order, expressing its "deep disappointment with the intransigence of all parties and their continued unwillingness to conscientiously and industriously seek an acceptable procedure for filling the numerous vacancies existing in the position of Fire Captain." *Id.* at 238 (quoting district court order).

ing supervisory ability.³⁷⁴ One white and one black candidate would be paired from separate seniority lists, and the candidate with the highest evaluation would be promoted.³⁷⁵ The black plaintiffs opposed this measure because it failed to guarantee that any black firefighters would be promoted.

On appeal, the Eighth Circuit observed that the city had apparently decided not to appoint *anyone* to fire captain permanently until a valid nondiscriminatory exam was developed.³⁷⁶ The city, however, had made little progress in developing such an examination,³⁷⁷ and the number of black fire captains had decreased from four to one.³⁷⁸ Twelve black firefighters had qualified for promotion based on the discriminatory exam, and forty-three others had attained the prerequisite five years of service making them eligible to test for promotion during the five years since the litigation began. The court of appeals concluded that numerically based preferential treatment was necessary in order to redress the rights of the victims of discrimination.³⁷⁹ The court ordered the immediate promotion of the black firefighters who were qualified, along with, at the district court's discretion, twelve qualified white candidates.³⁸⁰

The court also required that, until a valid promotional examination was developed, assignments to acting fire captain reflect a fifty percent black ratio as far as practicable.³⁸¹ Shortly after the district court's immediately preceding order, the court noted, the city had started using firehouse seniority as the basis for selecting acting fire captains.³⁸² Unless a fair percentage of black firefighters who had suffered such past discrimination served as acting fire captains, the circuit court held, the past discrimination would be perpetuated.³⁸³

On remand, the district court directed the city to develop a valid promotional exam by January 1, 1979.³⁸⁴ The city submitted a timely validation report outlining a new examination.³⁸⁵

374. *Id.*

375. *Id.*

376. *Id.* at 240 & n.8.

377. *Id.* at 240.

378. *Id.* at 240 & n.7.

379. *Id.* at 241.

380. *Id.*

381. *Id.* at 241-42.

382. *Id.*

383. *See id.* at 242.

384. *Firefighters Inst. for Racial Equality v. City of St. Louis*, 616 F.2d 350, 353 (8th Cir. 1980), *cert. denied*, 452 U.S. 938 (1981).

385. 616 F.2d at 353.

Although the United States expressed some reservations about the proposed examination, it suggested that the city proceed with the exam to determine any disparate impact.³⁸⁶ The city accepted.³⁸⁷ After the administration of the examination, the mayor, without consulting either the plaintiffs or the city attorney's office, announced the test results and immediately appointed one new black and twenty-three new white fire captains.³⁸⁸ Concerned about the exam's validity,³⁸⁹ the United States secured a temporary restraining order in the district court blocking further appointments.³⁹⁰ The district court denied preliminary injunctive relief and vacated its restraining order.³⁹¹ It found that, although the plaintiffs had established a prima facie case that the exam had a discriminatory impact, the city had rebutted that case by establishing the validity and job-relatedness of the examination process.³⁹²

The United States and the black firefighters group appealed. The Eighth Circuit found that the plaintiffs were, contrary to the district court's finding, likely to succeed on the merits of their claim that the exam was discriminatory.³⁹³ The court, for the short term, required that a number of black firefighters be promoted to fire captain retroactively to the date of the twenty-four new appointments.³⁹⁴ For the longer term, the court directed that either the city provide further evidence that the examination was valid or develop a new and valid examination.³⁹⁵ The court ordered the immediate promotion of

386. *Id.*

387. *Id.*

388. *Id.* at 354.

389. The city had informed the United States on March 13, 1979, that the results of the multiple choice portion of the test showed a substantial difference in the mean scores of blacks and whites. *Id.* at 353-54.

390. *Id.* at 354.

391. *Id.*

392. *Id.* at 355.

393. *See id.* at 355-62.

394. *See id.* at 362. The court determined, as a practical matter, that appointing eight black fire captains in this manner would be appropriate, bringing the percentage of black fire captains to 16.6%. *See id.* at 363. It determined that the assessment center portion of the examination, which tested supervisory ability using simulation exercises, would come the closest to comporting with the EEOC validation guidelines and thus would be the fairest way to select the eight black firefighters. *See id.* The figure of 16.6% black fire captains was an important step in bringing the percentage of black fire captains closer to the percentage of black firefighters in the department. *Id.* At that time, 22% of the department's 900 uniformed personnel were black and 27% of the entry-level firefighters were black. *Id.* at 363 n.22.

395. *See id.* at 363.

thirty firefighters to vacant captain positions and the filling of the first thirty additional vacancies as soon as they occurred, using a ratio of promoting one black firefighter for each two whites promoted.³⁹⁶

The program proved to be temporary and successful. St. Louis now has a valid promotion exam for filling fire captain vacancies.³⁹⁷ As of July 1984, approximately twenty-five percent of the department's fire captains were black.³⁹⁸

2. The Supreme Court's Trilogy of *Bakke*, *Weber*, and *Fullilove*

In each term from 1978 to 1980, the Supreme Court issued a decision that addressed "reverse discrimination" challenges to affirmative action programs.³⁹⁹ In these important cases, the Supreme Court confirmed the basic principles applied by the Eighth Circuit in the *Carter* and *Firefighters Institute* decisions. All of the decisions rejected the "color-blind" interpretation of the fourteenth amendment and the 1964 Civil Rights Act advocated in *Carter*.

396. See *id.* at 364. The court's reasons for filling these vacancies so promptly were:

1) it was necessary for the efficiency of the fire service that this department be at full strength;

2) delays in promoting black firefighters to fire captain would inevitably affect their opportunity for promotion above the rank of fire captain;

3) "a field of candidates eligible for promotion" existed "because all the firefighters who completed the assessment center portion of the examination had met the department's requirement of five years' satisfactory service ('an average rating of "Adequate" or above on the most recent Service Rating') as a firefighter or fire prevention inspector" and "all of the persons who took the assessment center portion of the examination had received a passing grade in the multiple-choice portion of the examination;"

4) the city had been using firefighters to perform fire captains' duties; and

5) a new examination could be prepared, given, and graded before more than 30 additional vacancies occurred. *Id.* at 364.

397. *Firefighters Inst. for Racial Equality v. City of St. Louis*, No. 74-0C(1), slip op. at 8 (E.D. Mo. Aug. 12, 1983) (finding that examination procedure is content valid pursuant to EEOC guidelines and decisions of the Eighth Circuit).

398. Statistics gathered from the City of St. Louis Civil Rights Comm'n, July 1984, by the Office of the Clerk of the United States Court of Appeals for the Eighth Circuit. Thirty-one of the department's 94 fire captains are black. Of the 608 total nonprobationary firefighters in the department, 151 are black. *Id.*; see also *Firefighters Inst. for Racial Equality v. City of St. Louis*, No. 74-30C(1), slip op. at 5 (E.D. Mo. Aug. 12, 1983).

399. *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

In *Bakke*, the Court decided that the University of California—Davis medical school had not shown that its use of a quota or absolute preference reserving sixteen slots for minority applicants was necessary to promote a substantial state interest,⁴⁰⁰ but the Court made it clear that racial preferences are permissible if there has been a finding of past discrimination, as opposed to a sense of societal discrimination in general.⁴⁰¹ The Court in *Weber* held that Title VII does not prohibit race-conscious voluntary affirmative action plans that are developed, for example, through collective bargaining and are designed to eliminate manifest racial imbalances in traditionally segregated job categories.⁴⁰² In *Fullilove*, the Court again made it clear that a “color-blind” jurisprudence was not necessarily the way to approach questions about remedies for racial discrimination. The Court upheld Congress’s ten percent minority business set-aside of public works contracts,⁴⁰³ viewing this affirmative action program as a legitimate exercise of Congress’s power to spend for the general welfare. The Court noted that, “[a]s a threshold matter, we reject the contention that in the remedial context the Congress must act in a wholly ‘color-blind’ fashion.”⁴⁰⁴ Consequently, “[w]here federal anti-discrimination laws have been violated, an equitable remedy may in the appropriate case include a racial or ethnic factor.”⁴⁰⁵

Although there is no clear consensus of opinion in the

400. *Bakke*, 438 U.S. at 319-20.

401. See *id.* at 307-10. Justice Brennan’s concurring and dissenting opinion put it simply:

[C]laims that law must be “colorblind” or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality. . . . [W]e cannot . . . let color blindness become myopia which masks the reality that many “created equal” have been treated within our lifetimes as inferior both by the law and by their fellow citizens.

Id. at 327 (Brennan, J., concurring in the judgment in part and dissenting in part). Justice Blackmun observed:

I suspect that it would be impossible to arrange an affirmative-action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently.

Id. at 407 (Blackmun, J., separate opinion).

402. *Weber*, 443 U.S. at 208-09.

403. See *Fullilove v. Klutznick*, 448 U.S. 448, 489-92 (1980).

404. *Id.* at 482.

405. *Id.* at 483. Also noteworthy in the Chief Justice’s opinion in *Fullilove* is the candid realization that remedies for past racial discrimination inevitably involve some kind of burden on nonminority persons. Referring in this case to

Supreme Court concerning affirmative action, several general principles are evident from *Bakke*, *Weber*, and *Fullilove*. A remedy for past racial discrimination may involve racial preferences if the measure is remedial in purpose. That is, the measure must be based on a finding of some kind identifying past racial discrimination more specific than discriminatory conditions in society generally.⁴⁰⁶ The remedy should be properly tailored to address the past discriminatory practice without unnecessarily burdening nonminority persons. As a result, no absolute preferences or total exclusions of nonminority persons are permissible; the remedy should not involve the discharge of whites to replace them with blacks.⁴⁰⁷ The remedy also should be limited in time and flexible in its implementation. The remedy should not maintain a racial balance but eliminate a racial imbalance. The plan should have a discernible end.⁴⁰⁸

3. Eighth Circuit Cases in the Post-*Bakke* Era

a. *Voluntary Affirmative Action Plans*

The Eighth Circuit has heard several cases in which a disgruntled white employee or applicant has challenged an employer's voluntary affirmative action plan as unconstitutional "reverse discrimination." In *Setser v. Novack Investment Co.*,⁴⁰⁹ a white male applicant sued under section 1981, alleging that he had been refused employment due to reverse discrimination.⁴¹⁰ The district court entered final judgment for the employer, and

the minority set-aside provision of the Public Works Employment Act of 1977, 42 U.S.C. § 6705(f)(2) (1982), he wrote:

It is not a constitutional defect in this program that it may disappoint the expectation of nonminority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a "sharing of the burden" by innocent parties is not impermissible. . . . Moreover, although we may assume that the complaining parties are innocent of any discriminatory conduct, it was within congressional power to act on the assumption that in the past some nonminority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities.

Fullilove, 448 U.S. at 484-85.

406. *Id.* at 448 U.S. at 486-88; *Weber*, 443 U.S. at 198-99, 208-09; *Bakke*, 438 U.S. 307-10.

407. *Fullilove*, 448 U.S. at 484-85; *Weber*, 443 U.S. at 208; *Bakke*, 438 U.S. at 319-20.

408. *Weber*, 443 U.S. at 208-09.

409. 638 F.2d 1137, *vacated in part*, 657 F.2d 962 (8th Cir. 1981) (en banc).

410. 638 F.2d at 1139. *Setser* also alleged that he had been refused employment with Novack Investment in retaliation for his filing a discrimination charge with the EEOC. *See id.* at 1139, 1146-47.

Setser, the applicant, appealed. A panel of the Eighth Circuit held that the employer's reliance on its affirmative action plan was not an absolute bar to Setser's cause of action and remanded the case.⁴¹¹ Upon rehearing en banc, the court of appeals first clarified that section 1981 does not prohibit race-conscious affirmative action and that the standards for reviewing affirmative action plans under Title VII govern the review of plans under section 1981.⁴¹² The court then stated that a plaintiff in a reverse discrimination suit does not necessarily establish a prima facie case by satisfying the four-pronged *McDonnell Douglas* test⁴¹³ because, under *Weber*, race is a permissible consideration for an employer acting pursuant to a bona fide affirmative action plan.⁴¹⁴ The employer has the burden of producing evidence that its affirmative action program is remedial, is in response to a conspicuous racial imbalance in its workforce, and is reasonably related to the remedial purposes.⁴¹⁵ The employee then has the burden of showing that the affirmative action plan was motivated by something other than a remedial reason or that the plan unreasonably exceeds its remedial purposes.⁴¹⁶

The *Setser* opinion outlines the factors the Eighth Circuit considers in determining whether affirmative action plans are permissible under *Weber*. A plan, the *Setser* court noted, may not result in the discharge of white workers and their replacement with new black employees.⁴¹⁷ A plan should also not create an absolute bar to the advancement of white employees, nor be used longer than is necessary to achieve affirmative action goals.⁴¹⁸

411. *Id.* at 1143-46.

412. *Setser v. Novack Inv. Co.*, 657 F.2d 962, 965-67 (8th Cir. 1981) (en banc).

413. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Supreme Court set forth the plaintiff's initial burden of proof in establishing a prima facie case of racial discrimination as follows:

- (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802.

414. *Setser v. Novack Inv. Co.*, 657 F.2d at 968-69.

415. *Id.*

416. *Id.* at 969.

417. *Id.*

418. *Id.*; see also *United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979) (stating that affirmative action plan involved does not unnecessarily trammel the interests of white employees).

The Eighth Circuit Court of Appeals applied these same principles to *Valentine v. Smith*,⁴¹⁹ a case decided the same day. In *Valentine*, an applicant for employment at Arkansas State University (ASU) brought a "reverse discrimination" suit based on her rejection by the University and the hiring of a black woman. The court of appeals held that, although Valentine had demonstrated that the motivating factor in rejecting her was ASU's race-conscious choice pursuant to its affirmative action plan, this motivation did not offend the fourteenth amendment, Title VII, or section 1981.⁴²⁰ The ASU plan was justified by findings of past discrimination by a federal district court and the Department of Health, Education, and Welfare.⁴²¹ Further, the plan was substantially related to its remedial objective. ASU set a goal of raising the percentage of black faculty to five percent within four years by providing that twenty-five percent of the faculty hired between 1976 and 1979 would be black.⁴²² The *Valentine* court concluded that the plan's remedial measures did not endure longer than necessary, did not stigmatize by hiring unqualified applicants, and did not unnecessarily burden whites by barring them from faculty positions or derogating vested rights.⁴²³

A more difficult situation arises when an affirmative action plan collides with other rights provided in a collective bargaining agreement.⁴²⁴ In *Sisco v. J.S. Alberici Construction Co.*,⁴²⁵ a white male ironworker and union steward challenged his layoff in part on "reverse discrimination" grounds. The employer was working on a construction project with the St. Louis Post Office and was subject to a federal affirmative action plan that set

419. 654 F.2d 503 (8th Cir. 1981). Both cases came down July 21, 1981.

420. *Id.* at 511-12.

421. *Id.* at 509.

422. *Id.* at 510.

423. *Id.* at 510-11. In a parallel case, the court recently upheld Omaha's affirmative action plan for its fire department under the *Setser* criteria. In *Warssocki v. City of Omaha*, 726 F.2d 1358 (8th Cir. 1984), Warssocki, a white male, challenged the provision of Omaha's plan requiring that 40% of the applicants placed on a referral list be members of minority groups or women. The court of appeals affirmed the district court's dismissal of the suit, agreeing that the city both had clearly demonstrated that its affirmative action plan was a remedial response to a conspicuous racial imbalance in its workforce and had made a sufficient showing that its plan was substantially related to its remedial objective. *Id.* at 1360-61.

424. This is the issue addressed recently by the Supreme Court in *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984). See *infra* notes 525-27 and accompanying text.

425. 655 F.2d 146 (8th Cir. 1981).

goals for certain minority hours of employment in each trade.⁴²⁶ In 1975, the goal for minority ironworkers was 9.0% to 10.4%.⁴²⁷ The firm determined that it did not need four ironworkers on the project, but, to comply with the plan, it needed to retain one minority ironworker.⁴²⁸ Sisco, as the union steward, was entitled under the collective bargaining agreement to be the last one laid off.⁴²⁹ The only black ironworker and the white foreman were retained, and Sisco was transferred to other projects and later laid off.⁴³⁰ Sisco sued his employer, alleging that his discharge was racially motivated in violation of Title VII and section 1981.⁴³¹ The district court dismissed his claim, and he appealed.

Applying the standards of *Setser*, the court of appeals upheld the firm's action pursuant to the firm's affirmative action plan.⁴³² The firm showed that it had adopted the affirmative action plan in response to government pressure to remedy the racial imbalance in the ironworkers' trade, that it had reduced its workforce for nonracial reasons, and that the plan was carefully tailored to its remedial objective.⁴³³ The plan was temporary and flexibly framed in terms of goals of certain percentages of minority hours worked.⁴³⁴ The plan did not unfairly burden Sisco or other whites; he had not been replaced by a black ironworker.⁴³⁵ He was transferred to another project, and a qualified black worker with more jobsite seniority was retained in preference to Sisco and another white male.⁴³⁶

b. *Court-Imposed Affirmative Action Plans*

In addition to approving voluntary affirmative action plans, the Eighth Circuit has imposed numerically based affirmative

426. *Id.* at 147. The affirmative action plan was adopted pursuant to Executive Order No. 11246, which requires nondiscrimination in employment by government contractors and subcontractors (part II) as well as the presence of nondiscrimination provisions in federally assisted construction contracts (part III). See Exec. Order No. 11246, 3 C.F.R. 339-48 (1964-1965), reprinted in 42 U.S.C. § 2000e app. at 125-33 (1982).

427. *Sisco*, 655 F.2d at 146.

428. *Id.* at 148.

429. *Id.*

430. *Id.*

431. *Id.*

432. *Id.* at 149.

433. *Id.*

434. *Id.*

435. *Id.*

436. *Id.*

remedies when necessary to redress past discrimination.⁴³⁷ In *Paxton v. Union National Bank*,⁴³⁸ the court of appeals reversed a district court judgment, finding that black employees at the bank were not promoted to positions for which they were qualified and that, when they were promoted, they consistently received lower salary increases than comparable white employees.⁴³⁹ The defendant bank offered little in the way of explanation.⁴⁴⁰

The court of appeals directed the bank to adopt objective promotion criteria, written job descriptions, and guidelines for the use of supervisory recommendations.⁴⁴¹ It also directed the district court to give the plaintiffs monetary damages for lost promotions and to provide for their promotion to the first vacancy that occurs for which they would be qualified.⁴⁴² It noted that the district court could impose hiring goals if it determined they were necessary after all parties had been heard on the issue.⁴⁴³

In *Taylor v. Jones*,⁴⁴⁴ the Eighth Circuit approved a court-imposed numerically based affirmative remedy in a slightly different context. In *Taylor*, the employer's past discriminatory conduct was established under an individual disparate treat-

437. In *EEOC v. Contour Chair Lounge Co.*, 596 F.2d 809 (8th Cir. 1979), the court of appeals affirmed a district court's order approving and extending a consent decree that required the employer to "use its best efforts to increase its Black utilization rate by hiring one Black for each of its new White employees for the period of this agreement." *Id.* at 812. The consent decree had been based on a finding by the EEOC that blacks as a class had been discriminated against by the defendant and on negotiations between the defendant and the EEOC in light of this finding. *Id.* at 816.

438. 688 F.2d 552 (8th Cir. 1982), *rev'g* 519 F. Supp. 136 (E.D. Ark. 1981), *cert. denied*, 103 S. Ct. 1772 (1983).

439. 688 F.2d at 565-66.

440. The court observed:

In those few instances where the bank did attempt to offer specific nondiscriminatory reasons, the explanations were often inconsistent and contradictory. If a black person had more education than the white person receiving a promotion, the bank claimed that it made its selection on the basis of experience. Conversely, if a black employee had more experience than the white promoted, the bank claimed that education was the key to performing that job. And if the black employee had more experience and a better education, the bank often simply stated that the white employee was better qualified without giving a reason for the decision.

Id. at 566.

441. *Id.* at 573.

442. *Id.*

443. *Id.* at 574.

444. 653 F.2d 1193 (8th Cir. 1981).

ment theory rather than under a class action or disparate impact theory. Taylor, a black woman, had been employed with the Arkansas National Guard, first as a recruiter and then as a mailroom clerk.⁴⁴⁵ She resigned and eventually brought suit, alleging that she had been underclassified, underpaid, denied transfers and promotions, and subjected to racial epithets and slurs.⁴⁴⁶

The district court found the National Guard had intentionally discriminated against Taylor.⁴⁴⁷ It found that her demotion from recruiter to mailroom clerk was racially motivated and that the racial atmosphere existing in the Arkansas National Guard forced her resignation.⁴⁴⁸ It ordered that the plaintiff be reinstated as a recruiter or given a comparable position with back pay⁴⁴⁹ and directed the defendant to hire at least one black person for every two white persons hired until the level of black employees reached sixteen percent.⁴⁵⁰

On appeal, the Eighth Circuit upheld the finding of liability and the remedy.⁴⁵¹ The court noted that ordering the employer to hire more blacks was the most effective and perhaps the only way to eradicate the serious racism pervading the plaintiff's workplace.⁴⁵² The remedy met the other *Setser* criteria as well: it was sufficiently flexible, temporary, and not unfairly burdensome to whites.⁴⁵³

As these cases demonstrate, several consistent themes emerge from two decades of experience with affirmative remedies for employment discrimination. The Eighth Circuit Court of Appeals has, when necessary, approved or directed the use of numerically based remedies such as goals or ratios. It has not, however, approved of absolute quotas or preferences and has relied on less stringent remedies when such alternative reme-

445. *Id.* at 1196-97.

446. *Id.*

447. See Taylor v. Jones, 489 F. Supp. 498, 500, *modified*, 495 F. Supp. 1285 (W.D. Ark. 1980), *aff'd in part, rev'd in part*, 653 F.2d 1183 (8th Cir. 1981).

448. See 489 F. Supp. at 500.

449. See *id.* at 501.

450. Taylor v. Jones, 495 F. Supp. 1285, 1296 (W.D. Ark. 1980), *aff'd in part, rev'd in part*, 653 F.2d 1183 (8th Cir. 1981). This level was not unreasonable, as blacks constituted 16% of the Arkansas population and 23% of the Guard. See 495 F. Supp. at 1293.

451. See Taylor, 653 F.2d at 1198-1205.

452. See *id.* at 1204-05.

453. *Id.* at 1204. Although the court emphasized these factors in analyzing the remedy, it did not specifically cite *Setser*, which had been decided just a month before.

dies are adequate. There are inevitably cases where the interests of the victims of past discrimination will conflict with the interests of those who have benefited from past discriminatory practices. In such instances the Eighth Circuit has consistently given priority to the interests of the victims.

4. The Success of Affirmative Action

At the same time courts were using affirmative action as a civil rights tool, the executive and legislative branches initiated several affirmative action programs of their own. In 1967, the Office of Federal Contract Compliance stopped relying on ineffective nondiscrimination policy statements and began to use numerical employment goals, timetables, and ratios to remedy and prevent employment discrimination.⁴⁵⁴ After these initiatives withstood repeated challenges in the courts,⁴⁵⁵ the opponents of affirmative action turned to Congress. During the 1972 debates over comprehensive amendments to Title VII, these opponents proposed several amendments to limit the contract-compliance program and to eliminate goals and timetables.⁴⁵⁶ The amendments were rejected,⁴⁵⁷ and Congress ultimately passed legislation that in fact extended affirmative action to the

454. See, e.g., CITIZENS' COMM'N, *supra* note 60, at 43-48 (examples of more effective plans). The Office of Federal Contract Compliance was established in 1965 pursuant to Executive Order No. 11246. See Exec. Order No. 11246, 3 C.F.R. 339-48 (1964-1965), *reprinted in* 42 U.S.C. § 2000e app. at 125-33 (1982).

455. See, e.g., *Rosetti Contracting Co. v. Brennan*, 508 F.2d 1039 (7th Cir. 1975); *Association of Gen. Contractors of Mass., Inc. v. Altschuler*, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974); *Northeast Constr. Co. v. Romney*, 485 F.2d 752 (D.C. Cir. 1973); *Southern Ill. Builders Ass'n v. Ogilvie*, 471 F.2d 680 (7th Cir. 1972); *Contractors Ass'n of E. Pa. v. Secretary of Labor*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971); *Joyce v. McCrane*, 320 F. Supp. 1284 (D.N.J. 1970).

456. See, e.g., 118 CONG. REC. 1662 (1972) (amendment offered by Sen. Ervin prohibiting federally required "discrimination in reverse" through percentages, goals, ranges, etc.); see also CITIZENS' COMM'N, *supra* note 60, at 51-52 (discussing this and other proposed amendments).

457. See, e.g., 118 CONG. REC. 1676 (defeat of Ervin amendment). Instead, Congress approved an amendment that explicitly approved the actions of the OFCCP in ordering minority employment goals and timetables, Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 13, 86 Stat. 103, 113 (codified at 42 U.S.C. § 2000e-17 (1982)), and retained the statutory language in Title VII under which courts had ordered affirmative relief, *compare* Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, § 706(g), 78 Stat. 241, 259 (codified as amended at 42 U.S.C. § 2000e-5(g) (1982)) ("the court may . . . order such affirmative action as may be appropriate") *with* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4, 86 Stat. 103, 104 (codified at 42 U.S.C. § 2000e-5(g) (1982)) (identical language). See also CITIZENS' COMM'N, *supra* note 60, at 52 & n.116 (describing congressional action).

federal government itself⁴⁵⁸ and that prohibited discrimination against the handicapped, disabled veterans, and Vietnam era veterans.⁴⁵⁹

The 1972 amendments to Title VII of the Civil Rights Act of 1964 also gave the Equal Employment Opportunity Commission the power to bring suit against those practicing racial discrimination.⁴⁶⁰ The EEOC and the Justice Department thereafter sought affirmative action remedies in the courts and entered into a number of consent decrees aimed at opening employment opportunities for blacks.⁴⁶¹ During the 1970's, the U.S. Commission on Civil Rights released studies approving affirmative action and documenting employment gains for blacks in industries adopting affirmative action.⁴⁶² Congress again approved affirmative action in the Public Works Employment Act of 1977, which required that at least ten percent of the funds

458. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 11, 86 Stat. 103, 111-12 (codified at 42 U.S.C. § 2000e-16(b) (1982)).

459. See Rehabilitation Act of 1973, Pub. L. 93-112, tit. V, § 501, 87 Stat. 355, 390-91 (codified as amended at 29 U.S.C. §§ 791, 793 (1982)); Vietnam Era Veterans' Readjustment Assistance Acts of 1972, Pub. L. No. 92-540, tit. V, § 503, 86 Stat. 1074, 1097-98 (codified as amended at 38 U.S.C. § 2012(a) (1982)); Vietnam Era Veterans' Readjustment Assistance Act of 1974, Pub. L. No. 93-508, tit. IV, § 402, 88 Stat. 1578, 1593 (codified at 38 U.S.C. § 2012(a) (1982)).

For a history of preferential policies for veterans in public employment, see LIBRARY OF CONGRESS REPORT FOR HOUSE COMM. ON VETERANS' AFFAIRS, 84TH CONG., 1ST SESS., THE PROVISION OF FEDERAL BENEFITS FOR VETERANS 258-65 (Comm. Print No. 171, 1955). The Veterans' Preference Act of 1944, ch. 287, 58 Stat. 387, 387-88 (codified as amended at 5 U.S.C. §§ 2108, 3309, 3310 (1982)), gives a 10% bonus on federal civil service examinations to disabled veterans and a 5% bonus to other veterans and specifies that for certain jobs (for example, building guard, elevator operator) no nonveteran is to be considered unless no veterans are available. This is sometimes referred to as "super-preference."

460. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 5, 86 Stat. 103, 107 (codified at 42 U.S.C. § 2000e-6(c) to -6(e) (1982)).

461. See, e.g., CITIZENS' COMM'N, *supra* note 60, at 59-61.

462. In 1973, the bipartisan U.S. Commission on Civil Rights published its "Statement on Affirmative Action for Equal Employment Opportunities," which indicates:

The necessity for goals and timetables arose out of a long and painful experience in which lip service was paid by employers who then did little to correct the situation. It also arose out of the realization that *procedures* for assuring equal employment opportunity can accomplish little unless they are tied closely to results.

CITIZENS' COMM'N, *supra* note 60, at 57-58 (emphasis in original) (quoting statement). A 1978 Commission report, "Social Indicators of Equality for Minorities and Women," reflected the gains made by minority groups from 1960 to 1976. See CITIZENS' COMM'N, *supra* note 60, at 122.

granted be expended for minority businesses,⁴⁶³ and in section 310 of the Civil Service Reform Act of 1978, which established a minority recruitment program for federal employment.⁴⁶⁴

Affirmative action programs have achieved the opening of jobs for blacks at other-than-menial levels and the creation of an appreciable black middle class.⁴⁶⁵ The percentage of black families in the middle class increased from only twelve percent of all black families in 1960 to thirty percent by 1980.⁴⁶⁶ The proportion of black professional, technical, and craft workers grew from eleven percent of all such workers in 1960 to twenty-one percent in 1980.⁴⁶⁷ Black police officers and firefighters grew from less than three percent in 1960 to nearly nine percent by 1980.⁴⁶⁸ By 1981, "the ratio of black undergraduate enrollment to black population for the first time [became] virtually the same as the ratio of white undergraduates to white population."⁴⁶⁹

463. Public Works Employment Act of 1977, Pub. L. No. 95-28, tit. I, § 103, 91 Stat. 116, 116-17 (codified as amended at 42 U.S.C. § 6705(f)(2) (1982)).

464. Civil Service Reform Act of 1978, Pub. L. No. 95-454, tit. III, § 310, 92 Stat. 1111, 1152 (codified at 5 U.S.C. § 7201 (1982)).

465. NATIONAL URBAN LEAGUE, STATE OF BLACK AMERICA 1983, ii-iii (1983). In 1984, a comprehensive study of affirmative action concluded: "While neither a panacea nor a substitute for economic growth, education, job training and ambition, affirmative action has made significant contributions to improved occupational status for many minorities and women, a closing of the gap attributable to discrimination." CITIZENS' COMM'N, *supra* note 60, at 122.

Many critics of affirmative action have argued that affirmative action's role in increasing the number of black families in the middle class is evidence that affirmative action helps the wrong people. The opposite view is that increasing the number of middle-class blacks is a worthy goal because the "black middle-class . . . is . . . a bastion of strength and a source of motivation within Black America." NATIONAL URBAN LEAGUE, *supra*, at ii-iii. In 1982, black middle-class families constituted only 30% of all black families, whereas white middle class families constituted 56% of white families. *Id.* at iii.

466. NATIONAL URBAN LEAGUE, *supra* note 465, at iii.

467. Rustin, Book Review, ATLANTIC, Oct. 1984, at 122 (reviewing A. PINKNEY, *THE MYTH OF BLACK PROGRESS* (1984)).

468. Compare 1 BUREAU OF THE CENSUS, 1960 CENSUS OF POPULATION, CHARACTERISTICS OF THE POPULATION, pt. 1, U.S. Summary, at I-545 (table 205) (In 1960, of 276,976 police, sheriffs and marshalls, only 9391, or 3.4%, were black. Of 138,694 firefighters, only 2616, or 1.9%, were black.) with BUREAU OF THE CENSUS, 1980 CENSUS OF POPULATION, CHARACTERISTICS OF THE POPULATION 1-101 (table 125) (In 1980, of 583,398 police and firefighters, 46,771, or 8.7%, were black.) In both 1960 and 1980, adult blacks constituted approximately ten percent of the total United States population. *Id.* at ch. B, 1-22 (table 40). "Affirmative action efforts . . . have particularly targeted police and fire departments and construction trades in part because of their especially poor records in employing minorities and women." CITIZENS' COMM'N, *supra* note 60, at 127.

469. 1983 Hearings, *supra* note 172, at 431 (statement of William T. Cole-

Two studies released in 1983 concluded that blacks made "greater gains in employment at those establishments contracting with the federal government—and thus subject to the OFCCP affirmative action requirements—than at non-contractor companies."⁴⁷⁰ Major corporations, including AT&T, IBM, Sears & Roebuck, and Levi Strauss, reported significant employment gains for minorities under affirmative action programs.⁴⁷¹ Perhaps of even greater importance is a 1983 survey on affirmative action. In it, a number of major corporations reported that affirmative action had helped break down racial stereotypes, improved employee morale, streamlined personnel policies, and, at some companies, even expanded business.⁴⁷² A concerted effort by the courts and administrative agencies to achieve affirmative action goals has contributed to these successes. Affirmative action programs have begun to achieve the goal of equal opportunities for all.

III. REEXAMINATION AND RETREAT—1981 TO 1985

A. SCHOOL DESEGREGATION

From 1954 until 1982, the executive branch generally supported the decisions of the Supreme Court and the courts of appeals calling for desegregation.⁴⁷³ The Department of Justice joined black plaintiffs as a party⁴⁷⁴ and as *amicus curiae*⁴⁷⁵ in

man, Jr., chairman, NAACP Legal Defense and Educational Fund, Inc., dated June 11, 1981).

470. CITIZENS' COMM'N, *supra* note 60, at 123 (unpublished OFCCP study); *id.* at 124-25 (study submitted to Department of Labor by Professor Jonathan Leonard of the University of California at Berkeley entitled "The Impact of Affirmative Action").

471. *Id.* at 126-29.

472. *Id.* at 130, 140-46. Some companies, however, pointed out that government administrators of affirmative action programs sometimes place form over substance by being overly concerned with procedural detail. *Id.* at 137-38. This is a legitimate concern, and measures should be taken to improve the administration of affirmative action. This is not, however, a reason for abolishing affirmative action.

473. See U.S. COMM'N ON CIVIL RIGHTS, TWENTY YEARS AFTER *BROWN* 15-29 (1977) [hereinafter cited as TWENTY YEARS AFTER *BROWN*].

474. See, e.g., *Liddell v. Board of Educ.*, 677 F.2d 626 (8th Cir.), *cert. denied*, 459 U.S. 877 (1982); *United States v. School Dist. of Omaha*, 521 F.2d 530 (8th Cir.), *cert. denied*, 423 U.S. 946 (1975). Beginning in the early 1970's, the Justice Department initiated "statewide" school desegregation litigation in Georgia, Texas, Arkansas, Mississippi, and South Carolina. Because of this statewide approach, more districts were desegregated in this period than in any other. Norman, *The Strange Career of the Civil Rights Division's Commitment to Brown*, 93 YALE L.J. 983, 987 & n.17 (1984).

475. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971);

suing to desegregate the elementary and secondary schools and in requesting that involuntary busing be used to achieve integration. In addition, the Department of Health, Education, and Welfare developed effective guidelines for desegregation,⁴⁷⁶ and the Civil Rights Commission consistently supported a wide range of remedies.⁴⁷⁷

Until 1981, the United States Congress also supported school desegregation. Title IV of the Civil Rights Act of 1964 provided technical assistance for schools seeking to develop or implement desegregation plans⁴⁷⁸ and authorized the Department of Justice to initiate or join in litigation to desegregate offending school districts.⁴⁷⁹ Title VI of that Act allowed the executive to terminate federal aid to school districts that continued to operate segregated schools.⁴⁸⁰ In 1972, Congress adopted the Emergency School Aid Act⁴⁸¹ as Title VII of the Education Amendments of 1972.⁴⁸² By 1981, \$512 million was available for this program.⁴⁸³

With a new administration in 1980 came new policies. The Department of Justice stated that it would no longer ask for or support desegregation decrees that called for involuntary busing to achieve desegregation.⁴⁸⁴ The President, the Vice Presi-

Cooper v. Aaron, 358 U.S. 1 (1958); *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

476. TWENTY YEARS AFTER *BROWN*, *supra* note 473, at 34-35.

477. *Id.* at 173-74.

478. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. IV, § 403, 78 Stat. 241, 247 (codified at 42 U.S.C. § 2000c-2 (1982)).

479. *Id.* at § 407, 78 Stat. at 248 (codified as amended at 42 U.S.C. § 2000c-6 (1982)).

480. *See id.* at tit. VI, §§ 602-605, 78 Stat. at 252-53 (codified at 42 U.S.C. §§ 2000d to 2000d-4 (1982)); TWENTY YEARS AFTER *BROWN*, *supra* note 473, at 34. In 1964, 98% of all black children in 11 southern states still attended all-black schools. Title VI changed this. By 1972, fewer than 9% of the black children in these states remained in all-black schools. CIVIL RIGHTS LEADERSHIP CONFERENCE FUND, AN OATH BETRAYED: THE REAGAN ADMINISTRATION'S CIVIL RIGHTS ENFORCEMENT RECORD IN EDUCATION iii (1983).

481. Pub. L. No. 92-318, tit. VII, 86 Stat. 235, 354 (codified as amended at 20 U.S.C. §§ 1601-1619 (1976)), *repealed by* Pub. L. No. 95-561, tit. VI, § 601(b)(2), 92 Stat. 2143, 2268 (effective 1979).

482. Pub. L. No. 92-318, 86 Stat. 235 (codified as amended at scattered sections of U.S.C.).

483. *To Reinstate the Emergency School Aid Act: Hearings on H.R. 2207 Before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor*, 98th Cong., 1st Sess. 45 (1983), (Statement of Senator Daniel Patrick Moynihan) [hereinafter cited as *Hearings on H.R. 2207*].

484. *Court-Ordered School Busing: Hearings on S. 528, S. 1005, S. 1147, S. 1647, S. 1743, and S. 1760, Before the Subcomm. on Separation of Powers of the*

dent, and the Secretary of Education concurred with this policy. In 1982, the Department of Justice supported the constitutionality of a state initiative that would have nullified the effect of a voluntary desegregation plan in Seattle, Washington. The

*Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 592-93 (testimony of William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, Department of Justice) [hereinafter cited as *Hearings on Court-Ordered School Busing*]. Assistant Attorney General Reynolds stated:*

[T]he Department will henceforth, on a finding by a court of de jure racial segregation, seek a desegregation remedy that emphasizes the following three components, rather than court-ordered busing: one, removal of all State-enforced racial barriers to open access to public schools; two, insurance that all students—white, black, Hispanic, or of any other ethnic origin—are provided equal opportunities to obtain an education of comparable quality; and, three, eradication to the fullest extent practicable of the remaining vestiges of the prior dual systems.

... [T]he Department will thoroughly investigate the background of every racially identifiable school in a district to determine whether the racial segregation is de jure or de facto.

In deciding to initiate litigation, we will not make use of the *Keyes* presumption but will define the violation precisely and seek to limit the remedy only to those schools in which racial imbalance is the product of intentionally segregative acts of State officials.

All aspects of practicability, such as disruption to the education process, community acceptance, and student safety, will be weighed in designing a desegregation remedy.

... [S]ome desegregation approaches that seem to hold promise for success include voluntary student transfer programs, magnet schools, enhanced curriculum requirements, faculty incentives, in-service training programs for teachers and administrators, school closings in systems with excess capacity and new construction in systems that are overcrowded, and modest adjustments to attendance zones.

... We do not contemplate routinely reopening decrees that have proved effective in practice.

... On the other hand, some school districts may have been successful in their efforts to dismantle the dual systems of an earlier age. Others might be able to demonstrate that circumstances within the system have changed to such a degree that continued adherence to a forced busing remedy would serve no desegregative purpose.

... There is another dimension to the administration's current school desegregation policy that deserves mention. Apart from the issue of unconstitutional pupil assignments, experience has taught that identifiably black schools sometimes receive inferior educational attention.

Whatever the ultimate racial composition in the classroom, the constitutional guarantee of equal educational opportunity prohibits school officials from intentionally depriving any student, on the basis of race, color, or ethnic origin, of an equal opportunity to receive an education comparable in quality to that being received by other students in the school district.

Id. at 592-93.

Supreme Court subsequently held that the initiative violated the equal protection clause, despite the administration's support for the measure.⁴⁸⁵ The Department of Justice also filed a brief in the twenty-eight-year-old Nashville, Tennessee, case with the United States Supreme Court, joining the effort of the school board to limit busing that had been approved by the Sixth Circuit.⁴⁸⁶

With urging from the Administration, the Congress in 1981 folded the Emergency School Aid Program into the Block Grant Program for Elementary and Secondary Schools,⁴⁸⁷ resulting in a dramatic cut in federal funds available to assist in desegregation.⁴⁸⁸ Each house of Congress has from time to time voted against "forced busing" to achieve racial balance in schools. In addition, with the support of the Justice Department, legislation was introduced in both houses of Congress to restrict the power of federal courts to require busing. The legislation passed in the Senate but failed in the House.⁴⁸⁹

485. See Memorandum for the United States at 5-6, *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982).

486. Brief for the United States as Amicus Curiae in Support of Petitioners (on petition for writ of certiorari from United States Supreme Court), *Kelly v. Metropolitan County Bd. of Educ.*, 687 F.2d 814 (6th Cir. 1982), *cert. denied*, 103 S. Ct. 834 (1983).

487. Education Consolidation and Improvement Act of 1981, Pub. L. No. 97-35, ch. 2, 95 Stat. 463, 469-80 (codified at scattered sections of 20 U.S.C.).

488. *Hearings on H.R. 2207*, *supra* note 483, at 44-45. St. Louis, Missouri, and Kansas City, Missouri, lost \$7 million and \$3.2 million in aid respectively as a result of this change. *Id.* at 115, 116.

489. The restriction was contained in an amendment to S. 951, a bill authorizing appropriations for the Department of Education for fiscal year 1982. The amendment was based on legislation entitled, "The Neighborhood School Act of 1982." It limited the extent to which federal courts may order the transportation of schoolchildren to schools other than those nearest their home, and it provided that the Department of Justice shall not bring or maintain an action to require the transportation of students other than to the school nearest the student's home, except students requiring special education because of a handicap. *Limitations on Court-Ordered Busing—Neighborhood School Act: Hearings on S. 951 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 124-70 (1982) [hereinafter cited as *House Hearings on S. 951*]. The Justice Department generally supported those sections of the bill limiting the jurisdiction of lower federal courts and argued that they were constitutional. It objected to the limitations on its authority as being unnecessary. *Id.* at 121-28 (letter from Attorney General William French Smith). The bill was opposed by three former United States Attorneys General: Elliot Richardson, *id.* at 74-80, Benjamin R. Civiletti, *id.* at 80-85, and Nicholas deB. Katzenbach, *id.* at 85-86, and by David R. Brink, president of the American Bar Association, *id.* at 94-104. All questioned the act's constitutionality and opposed it on policy grounds.

A close analysis of this antibusing movement shows that it is premised on faulty reasoning and inconclusive facts. Although public opinion polls suggest that both blacks and whites oppose involuntary busing of students to achieve desegregation,⁴⁹⁰ the question is typically framed as whether the respondent favors or opposes busing, in general, to achieve racial balance. When the parents of children who are bused for desegregation are polled, their views are far more positive about busing.⁴⁹¹ Moreover, there is general agreement that involuntary busing to achieve the integration of public schools in the rural South is in the public interest. Before desegregation, rural communities often had two small schools, one black and one white, and two separate busing systems, one black and one white, with the buses for each system going down the same roads. Most districts now have unitary schools and transportation systems. United States District Judge James B. McMillan aptly observed: "The bus was the vehicle by which schools were originally segregated. . . . If you had not had the school bus, the segregated school system could not have been built."⁴⁹²

Although busing is expensive, fifty-five percent of all public school students in the United States are regularly bused to and from school. Students are bused because many states have found that it is less expensive and more efficient to build consolidated schools than to maintain smaller schools in every rural township or community. Less than seven percent of students who are bused (and less than three percent of all public school students) are bused to achieve desegregation, and less than two-tenths of one percent of the money spent for public elementary and secondary education is spent on busing students to achieve integration.⁴⁹³

The allegations that involuntary busing is unsafe and that it endangers the health of children by keeping them on the highways for long hours is unsupported by evidence. The median travel time for students who are bused is less than fifteen minutes, and only fifteen percent of bused children travel more than thirty minutes.⁴⁹⁴ Busing to achieve integration is every bit as safe as busing to achieve economy and efficiency. In

490. *House Hearings on S. 951, supra* note 489, at 31.

491. H.R. REP. NO. 12, 97th Cong., 2d Sess. 3 (1982) [hereinafter cited as *House Report on Desegregation*].

492. *Hearings on Court-Ordered School Busing, supra* note 484, at 514 (testimony of Judge James B. McMillan).

493. *House Hearings on S. 951, supra* note 489, at 172; see *supra* note 234.

494. *House Hearings on S. 951, supra* note 489, at 172.

either case, children will spend the same time each day riding the bus. Moreover, it is safer for children to ride to school on a bus than it is to walk.⁴⁹⁵

Many contend that the money used to bus students to achieve desegregation should be used to improve the quality of education in the school system. This is an appealing argument, because the quality of schools needs improvement. Unfortunately, school systems that have had decades to improve black schools have failed to do so. Moreover, review of budgetary data confirms that less money was spent on all-black schools than on those that had majority white student populations.⁴⁹⁶ Most importantly, spending additional money to improve the quality of black education may meet as much resistance as busing. No unit of government is willing to assume the responsibility to raise the additional funds required. On the federal level, the present Department of Justice believes that enhanced quality is a good idea but believes that state and local governments should bear the financial burden.⁴⁹⁷ State governments

495. *Hearings on Court-Ordered School Busing, supra* note 484, at 515.

496. See H. BOND, *supra* note 9, at 152-56 (noting that from 1871 to 1933, at least two former slave states, Alabama and North Carolina, spent two to six times as much on white schools as on black schools).

497. Assistant Attorney General Reynolds testified before the House Judiciary Committee:

Mr. Edwards. . . . We want to go back for a moment to desegregation plans. You state, Mr. Reynolds, that your desegregation plans are an approach—I am using your own words now—that:

Emphasize the voluntary desegregation tools with particular attention to upgrading the educational environment in those areas of the school system that have received less than adequate attention by State and local authorities.

Correct?

Mr. Reynolds. That is correct.

Mr. Edwards. Now, tell us how you are going to achieve this upgrading. Have you commissioned studies on this? Are you going to put Federal money into State and local schools? Is that your recommendation to President Reagan?

Mr. Reynolds. Well, the exact manner in which the particular remedial package will evolve in any particular case I guess will depend in large part on the particular case. We are working with the Department of Education now in that particular area, studying the whole question of disparity of education and the kind of considerations that one takes into account and what would be the effective means of effectuating a remedy.

I would expect that State and local funds would certainly be a large element of that particular package, rather than Federal funding.

Authorization Request for the Civil Rights Div. of the Dept. of Justice: Hearings Before the Subcomm. on Civil & Constitutional Rights of the House Comm. on the Judiciary, 97th Cong., 2d Sess. 312 (1982) (exchange between Rep. Edwards and Asst. Atty. Gen. William Bradford Reynolds).

argue that they should not be required to spend substantial state funds to integrate local schools but should be allowed to concentrate their "limited" funds on state-wide educational programs.⁴⁹⁸ Local boards of education justifiably argue that they lack the necessary money because of stringent limitations on their ability to raise taxes and because white citizens are unwilling to vote funds to improve black schools.⁴⁹⁹

Some black parents also urge the improvement of black schools in preference to the integration of school systems.⁵⁰⁰ To them, control of the schools appears to be perhaps a more important goal than desegregation. They argue that remedies that strive to achieve racial balance should be abandoned because progress under *Brown* has been slow and because all-black schools promote racial pride.⁵⁰¹ Their argument is also suspiciously appealing, however, to white separatists who wish to overturn the *Brown* decision.

Certainly parental involvement, power, and control over the education of their children is as important to black parents as it is to white parents. But, as the historical analysis of this Article has shown, black empowerment does not occur through segregation. Democracy and equality of opportunity can only exist in an integrated society.

Still others argue that busing has led to increased racial isolation. There is no factual basis for this argument. Many more children are attending integrated schools today than attended them before courts approved busing as a necessary desegregative tool. There are, to be sure, some white parents who are so opposed to having their children attend a school with a significant black population that they will send their children to private schools or move from the city to a white suburban district. But white flight occurs regardless of whether the city has a significant black population. Two such examples can be found in Minnesota: the populations of St. Paul and Minneapolis, both over ninety percent white, have de-

498. Brief for the State of Missouri at pp. 14-15, *Liddell VII*.

499. With the Supreme Court's denial of certiorari in the St. Louis school case, however, the State of Missouri is now funding a substantial portion of the desegregation plan. See *Liddell v. State of Missouri*, 731 F.2d 1294, 1323 n.21 (8th Cir.), cert. denied, 105 S. Ct. 82 (1984). In the last 24 years, St. Louis voters defeated 13 bond issues. 731 F.2d at 1318.

500. See Brief for the North St. Louis Parents and Citizens for Quality Education *passim*, *Liddell VII*.

501. See Bell, *A Reassessment of Racial Remedies*, 62 PHI DELTA KAPPAN 177, 177-79 (1980).

clined by more than thirty percent in the last twenty years.⁵⁰² White flight also occurs in cities with large black populations, and it occurs long before busing to achieve school integration is seriously considered,⁵⁰³ as it did in Chicago, Illinois.⁵⁰⁴ More parents may flee when faced with a plan that calls for their children to attend largely black schools outside of their neighborhoods, but it cannot be said with confidence that a large part of white flight is attributable to desegregation.

What is certain is that courts cannot be faithful to the Constitution yet refuse to desegregate schools simply because some white parents object to their children either attending school with black children or being bused out of their neighborhoods to a school with a significant black population.⁵⁰⁵ The Eighth Circuit has, where possible, tailored desegregation plans to preserve already integrated neighborhood schools.⁵⁰⁶ Such considerations, however, cannot outweigh the dictates of the Constitution.

Opponents of busing argue that court-ordered busing has failed to improve the test scores of black students in integrated schools. They contend that busing therefore has not worked. Supporters dispute both this premise and its conclusion. Supporters and opponents alike have developed reams of statistics to support their respective views. A review of the studies indicates that the test scores of slightly over half of the black students *do* improve, particularly for students who enter integrated schools at an early age. The test scores of white students attending these schools are not adversely affected.⁵⁰⁷

502. Compare BUREAU OF THE CENSUS, COUNTY AND CITY DATA BOOK 730 (1983) with BUREAU OF THE CENSUS, COUNTY AND CITY DATA BOOK 388 (1956). Population declined in St. Paul from 311,349 to 270,230 and in Minneapolis from 521,718 to 370,951 between 1950 and 1980.

503. *House Report on Desegregation*, *supra* note 491, at 16-17.

504. Compare BUREAU OF THE CENSUS, COUNTY AND CITY DATA BOOK 700 (1983) (Chicago population makeup) with BUREAU OF THE CENSUS, COUNTY AND CITY DATA BOOK 372 (1956) (same). From 1950 to 1980, Chicago's total population declined from 3,620,962 to 3,005,072, and its nonwhite population grew from 14.1% to 49.67% of the general population. This trend had already begun before desegregation remedies were common; by 1960, the total population had declined to 3,550,404 and nonwhite population had risen to 23.6%. See BUREAU OF THE CENSUS, COUNTY AND CITY DATA BOOK 484 (1967).

505. See *supra* text accompanying notes 187-205.

506. See, e.g., *Adams v. United States*, 620 F.2d 1277, 1296 (8th Cir.) (en banc), *cert. denied*, 449 U.S. 826 (1980); *United States v. School Dist. of Omaha*, 521 F.2d 530, 546-47 (8th Cir. 1975); *Clark v. Board of Educ.*, 449 F.2d 439, 499 (8th Cir. 1971) (en banc).

507. *House Report on Desegregation*, *supra* note 491, at 10-13.

Students who attend integrated schools are also more likely to attend integrated colleges and thereafter to find jobs with companies that employ both black and white workers.⁵⁰⁸ Indeed, students who attend integrated elementary and secondary schools and who go directly into the work force are more likely to obtain jobs, because they have a greater perception of control over their own lives, than those who have attended a segregated school for most of their lives.⁵⁰⁹ The graduates of integrated schools are also more likely to find jobs with firms that employ both black and white workers.⁵¹⁰

As a very recent summary of studies by the Center for Social Organization of Schools, Johns Hopkins University, notes:

An old argument, which has recently resurfaced, suggests that separate-but-equal is as good for the society as integrated-and-equal. Where the schools are concerned, at least, that argument is wrong.

.....

The perpetuation of segregation from childhood into adulthood might not be economically and socially harmful in a society in which minority-owned institutions provided ample opportunities for economic and social success. But U.S. society does not provide such opportunities. Therefore, segregation is harmful, because most minority-group members must find their ways into desegregated institutions if they are to achieve success as adults.⁵¹¹

B. AFFIRMATIVE ACTION IN EMPLOYMENT

The current retreat in desegregation policy is not limited to education. Since January of 1981, several factors have also limited the scope of affirmative action in the employment field. Implementation of comprehensive revisions to the Contract Compliance Program prepared by the Carter Administration has been suspended.⁵¹² In addition, proposed revisions of existing rules would relieve seventy-five percent of all contractors (those employing less than one hundred persons) from the requirement of preparing written affirmative action plans and relieve others from routine compliance reviews.⁵¹³ To date,

508. *Id.* at 13-14 (quoting testimony of Dr. James McPartland).

509. *Id.* at 14 (quoting testimony of Dr. McPartland).

510. *Id.* at 13-14 (quoting testimony of Dr. McPartland).

511. Braddock, Crain & McPartland, *A Long-Term View of School Desegregation: Some Recent Studies of Graduates as Adults*, PHI DELTA KAPPAN, Dec. 1984, at 259, 262-63.

512. CITIZENS' COMM'N, *supra* note 60, at 90; *see also* 47 Fed. Reg. 17,770 (Apr. 23, 1982) (proposing new changes for the program); 46 Fed. Reg. 42,968 (Aug. 25, 1981) (same).

513. 1983 *Hearings*, *supra* note 172, at 4-7 (statement of Robert B. Collyer, Deputy Under Secretary for Employment Standards, U.S. Dept. of Labor);

however, the OFCCP continues to insist that employers establish numerical goals and timetables for bringing blacks and other minorities into the workforce.⁵¹⁴

The Labor Department has decided that it will no longer seek pro rata backpay in discrimination actions but instead will require identification of the injured employees or applicants before back pay may be awarded.⁵¹⁵ It also plans to limit the period for which it will seek backpay to two years.⁵¹⁶ For the first time since the early 1960's, the department will permit some contractors to monitor their own compliance.⁵¹⁷ It has also limited the ability of investigators to make on-site compliance reviews.⁵¹⁸ The net result of these actions has been to significantly reduce the back and front pay awarded to successful claimants.⁵¹⁹

The Department of Justice has also substantially changed its policies on employment discrimination. It has announced that it will no longer support or accept prospective hiring or promotion goals or ratios that may benefit individuals who are not identifiable victims of discrimination.⁵²⁰ The department

CITIZENS' COMM'N, *supra* note 60, at 91 & n.235 (citing OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, PRELIMINARY REGULATORY IMPACT ANALYSIS ON PROPOSED OFCCP REGULATIONS 21-22 (1981)).

514. 1983 Hearings, *supra* note 172, at 32.

515. CITIZENS' COMM'N, *supra* note 60, at 93 n.241 (citing OFCCP Order 760a1 (Mar. 10, 1983)); 1983 Hearings, *supra* note 172, at 5, 59, 65.

516. CITIZENS' COMM'N, *supra* note 60, at 93 n.241 (citing OFCCP Order 760a1 at 13 (Mar. 10, 1983)).

517. 1983 Hearings, *supra* note 172, at 7, 24 (statements of Robert B. Collyer).

518. CITIZENS' COMM'N, *supra* note 60, at 93-94 n.244 (citing letter from Robert B. Collyer to Subcomm. on Labor, Health, and Human Services, Education and Related Agencies of the House Comm. on Appropriations, Mar. 17, 1983).

519. In fiscal year 1980, 476 employees classified as minorities received \$959,000 in backpay; in fiscal year 1981, 872 minority employees received \$948,000 in backpay; and in fiscal year 1982, 26 minority employees received \$74,000 in backpay. In 1980, five firms were disbarred; in 1982, none were. 1983 Hearings, *supra* note 172, at 45.

520. CITIZENS' COMM'N, *supra* note 60, at 99; *Oversight Hearings on Equal Employment Opportunity and Affirmative Action, Part 1: Hearings Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 97th Cong., 1st Sess. 134 (1981) [hereinafter cited 1981 Hearings].

The Department defined its new policy as follows: "[O]ur approach will emphasize a three-pronged remedial formula consisting of: One, specific affirmative relief for identifiable victims of discrimination; two, increased recruitment efforts aimed at the group previously disadvantaged; and three, colorblind as well as sex-neutral nondiscriminatory future hiring and promo-

has also sought reconsideration of goal or quota relief in judicial proceedings⁵²¹ and has refused to submit goals and timetables to the EEOC as part of its own internal affirmative action plan.⁵²²

The newly constituted United States Commission on Civil Rights has followed the lead of the Justice Department in rejecting numerically-based remedies. In its January 16, 1984, statement on quotas regarding the Detroit Police Department, it stated that ratio relief

benefits nonvictims as well as victims of past illegal discrimination . . . in derogation of the rights of innocent third parties, solely because of their race. Such racial preferences merely constitute another

tion practices." *Id.* at 138-39. The Justice Department explained in greater detail:

The Department is firm in its resolve to seek, in suits under title VII and similar statutes, affirmative remedies such as backpay, retroactive seniority, reinstatement, and hiring and promotional priorities, to insure that *any individual* suffering employment discrimination on account of race or sex be placed in the position that he or she would have attained in the absence of such discrimination.

In some circumstances, the granting of such relief will serve to advance individual victims into seniority positions, or onto career ladders, in preference to incumbent white or male employees shown to have been improperly favored. Similarly, appropriate relief should and will be sought for those qualified individuals shown to have been discouraged from seeking positions because of past practices of unlawful discrimination on the part of the employer.

[T]he Department will continue to seek injunctive relief directing the employer to make employment decisions on a nondiscriminatory race-neutral and sex-neutral basis. To insure that the injunction is followed, we will require as part of the remedy that the employer make special efforts to reach minority or female workers through comprehensive use of employment recruitment techniques, such as media advertising and visiting high school and college campuses.

Where appropriate, we will seek percentage *recruitment goals* for monitoring purposes. Such recruitment goals will serve as a triggering mechanism for Department inquiry into whether the employer has complied with the injunctive command to end its discriminatory practices. These recruitment goals will be related to the percentage of minority or female applicants that might be expected to result under a nondiscriminatory employment policy, after job-related factors, such as age, education and work experience among various applicants are taken into account. When combined with fair and nondiscriminatory selection procedures, they should be sufficient to correct the effects of past discriminatory practices.

Id. at 138 (emphasis added).

521. See, e.g., *Williams v. City of New Orleans*, 729 F.2d 1554, 1557 (5th Cir. 1984); *Bratton v. City of Detroit*, 712 F.2d 222, 223 n.1, *vacating, remanding, denying reh'g, and denying reh'g en banc*, 704 F.2d 878 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 703 (1984).

522. *Wash. Post*, Jan. 19, 1984, at D1, col. 6 & D10, col. 1.

form of unjustified discrimination, create a new class of victims, and, when used in public employment, offend the Constitutional principle of equal protection of the law for all citizens.⁵²³

The EEOC, to this point, has resisted the attempts of the Departments of Justice and Labor to reverse current affirmative action policies. It has continued to endorse affirmative action remedies and to seek affirmative action relief, including hiring goals, in its own enforcement policies. The Commission's effectiveness has been adversely affected, however, by staff and budget cuts.⁵²⁴

Changes have come from the judicial branch as well. In June 1984 the Supreme Court held in *Firefighters Local Union No. 1784 v. Stotts*⁵²⁵ that a district court could not enforce or modify a Title VII consent decree by altering a city fire department's seniority system for determining which employees must be laid off due to budgetary shortfalls.⁵²⁶ Significantly, the Court noted that a trial court has the authority to award competitive seniority or to otherwise disregard a seniority system only when individual members of the plaintiff class prove that they were "actual victims of the discriminatory practice."⁵²⁷

The precise impact of the *Stotts* decision on the legal stand-

523. CITIZENS' COMM'N, *supra* note 60, at 119 (quoting U.S. Comm'n on Civil Rights, Jan. 4, 1984, Statement at 1).

524. CITIZENS' COMM'N, *supra* note 60, at 97-98.

525. 104 S. Ct. 2576 (1984), *rev'g* 679 F.2d 541 (6th Cir. 1982).

526. A 1980 consent decree had settled a Title VII class action suit concerning hiring and promotions in the Memphis Fire Department and established goals and timetables. The decree did not contain an admission of past discrimination by the city. It did not provide for layoffs, nor did it award any competitive or compensatory seniority to minority employees. *See id.* at 2581.

In May 1984, the city of Memphis laid off some nonessential personnel, based on its "last hired, first fired" rule. The district court enjoined the city from applying its seniority policy insofar as it would reduce the number of black employees. The Court of Appeals for the Sixth Circuit affirmed. *Stotts v. Memphis Fire Dep't*, 679 F.2d 541 (6th Cir. 1982), *rev'd* 104 S. Ct. 2576 (1984).

The Supreme Court held that the district court's injunction was erroneous and reversed, finding that the injunction did not merely enforce the consent decree because the decree did not provide, as the injunction had, for displacing whites with seniority over blacks. *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576, 2585-90 (1984). Moreover, the injunction was not a proper modification of the decree. The injunction conflicted with § 703(h) of Title VII, codified at 42 U.S.C. § 2000e-e(h) (1982), which permits an employer to use a bona fide seniority system so long as there is no proof of intent to discriminate. The district court itself found that the city's layoff plan was not adopted with a discriminatory purpose or intent. The Court held that the district court did not have the authority to override the department's seniority policy by virtue of its remedial powers under Title VII. *See Stotts*, 104 S. Ct. at 2590.

527. *Stotts*, 104 S. Ct. at 2586-88.

ing of affirmative action is unclear. Shortly after the Supreme Court decided *Stotts*, the United States Court of Appeals for the District of Columbia Circuit held that class-wide relief is permissible under Title VII, stating that "[i]f effective relief for the victims of discrimination necessarily entails the risk that a few nonvictims might also benefit from the relief, then the employer, as a proven discriminator, must bear that risk."⁵²⁸ Although the court found promotion goals and timetables inappropriate in that particular case, it approved class-wide goals and timetables in principle. The court observed that "[e]very federal Court of Appeals in this nation has approved remedial use of goals and timetables without requiring that each and every potentially eligible person be shown to have been a victim of discrimination."⁵²⁹ Several other circuits have similarly distinguished *Stotts* when reviewing affirmative action plans.⁵³⁰

In addition, several weeks after *Stotts*, a federal district court in the Eastern District of Michigan held that police department layoffs by the city of Detroit pursuant to its seniority system violated the city's affirmative action obligation under the fourteenth amendment, *Stotts* notwithstanding.⁵³¹ The district court emphasized that *Stotts* involved Title VII and its provision protecting bona fide seniority systems, whereas the case before the district court involved the fourteenth amendment, which has no such provision. Further, the court noted, there was no admission of liability for past discrimination in *Stotts*,

528. *Segar v. Smith*, 738 F.2d 1249, 1291 (D.C. Cir. 1984).

529. *Id.* at 1293 & n.40 (citing *Thompson v. Sawyer*, 678 F.2d 257, 294 (D.C. Cir. 1982); *Chisholm v. U.S. Postal Service*, 665 F.2d 482 (4th Cir. 1981); *United States v. City of Chicago*, 663 F.2d 1354 (7th Cir. 1981); *Association Against Discrimination in Employment, Inc. v. City of Bridgeport*, 647 F.2d 256 (2d Cir.), *cert. denied*, 455 U.S. 988 (1981); *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918 (10th Cir. 1979); *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978); *United States v. International Union of Elevator Constructors, Local 5*, 538 F.2d 1012 (3d Cir. 1976); *Boston Chapter, NAACP, Inc. v. Beecher*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *United States v. N.L. Indus., Inc.*, 479 F.2d 354 (8th Cir. 1973); *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); *United States v. International Brotherhood of Electrical Workers, Local 38*, 428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970)).

530. *See, e.g.*, *Van Aken v. Young*, No. 82-1570 (6th Cir. Dec. 13, 1984); *Boston Chapter, NAACP, Inc. v. Beecher*, No. 81-1642 (1st Cir. Dec. 7, 1984); *Wygant v. Jackson Bd. of Educ.*, 746 F.2d 1152, 1157-58 (6th Cir. 1984); *Kromnick v. School Dist. of Philadelphia*, 739 F.2d 894, 911 (3d Cir. 1984), *cert. denied*, 53 U.S.L.W. 3483 (1985).

531. *NAACP v. Detroit Police Officers Ass'n*, 53 U.S.L.W. 2065 (E.D. Mich. July 25, 1984).

whereas the city of Detroit's liability had already been adjudicated. In contrast, however, several other federal district courts have vacated and remanded consent decrees providing layoff protection to minority employees.⁵³²

Experience in this circuit indicates that the changes in administrative policies since 1981 will significantly slow the efforts to bring more qualified blacks into the work force and will retard the promotion of those already employed. The decision of the Department of Justice to forgo the use of hiring or promotion goals or ratios where past discrimination has been shown will have, perhaps, the greatest impact on the achievement of equal employment opportunities for blacks. This will be particularly true if the Department successfully intervenes in private actions where goal or ratio relief is sought.

532. *E.g.*, *Vulcan Pioneers, Inc. v. New Jersey Dept. of Civil Service*, 588 F. Supp. 732 (D. N.J. 1984); *United States v. City of Cincinnati*, 35 FAIR EMPLOYMENT PRAC. CASES 676 (S.D. Ohio July 3, 1984); *see also* *Boston Firefighters Union v. Boston Chapter NAACP, Inc.*, 104 S. Ct. 3576 (1984) (mem.) (Blackmun, J., dissenting from grant of certiorari, vacation of judgment, and remand).

The new Civil Rights Commission has issued a statement, with two Commissioners dissenting, approving the *Stotts* decision. Statement of the United States Comm'n on Civil Rights concerning *Firefighters v. Stotts* (July 11, 1984). The statement reversed the Commission's previous position concerning layoffs and affirmative action:

The Commission disagrees with the reasoning that would allow rigid adherence to the policy of layoffs by seniority . . . when such a policy has disparate effect on minorities or women and freezes past discrimination. Such a policy must not be allowed to stand in the way of the entire thrust of this Nation's efforts to improve equal employment opportunity for all Americans

U.S. COMM'N ON CIVIL RIGHTS, LAST HIRED, FIRST FIRED: LAYOFFS AND CIVIL RIGHTS 61-62 (1977). The new Commission praised the Supreme Court's decision, saying it "not only preserved the validity of bona fide seniority systems but also vindicated the important, general principle that rights inhere in individuals, not in groups." Statement of the United States Comm'n on Civil Rights concerning *Firefighters v. Stotts* at 1 (July 11, 1984). Commissioners Ramirez and Berry issued a strong dissent, stating:

Civil rights laws were not passed to give civil rights protection to all Americans, as the majority of this Commission seems to believe. Instead, they were passed out of a recognition that some Americans already had protection because they belonged to a favored group; and others, including blacks, Hispanics, and women of all races did not because they belonged to disfavored groups. If we are ever to achieve . . . real equality of opportunity . . . we must not deny our history and present condition substituting illusion for reality.

Statement of Commissioners Ramirez and Berry on the *Hishon* and *Stotts* Decisions 1-2 (undated) (emphasis in original).

CONCLUSION

The black citizens of this circuit have survived 146 years of slavery, four years of civil war, nine years of reconstruction, and eighty years of separate and unequal treatment. They have lived in segregated neighborhoods, educated their children in poorly financed segregated schools, and found jobs whenever and wherever they could. In 1954, the Supreme Court recognized that blacks could not achieve equality in such a separate society. Thereafter, six presidents and both houses of Congress have joined the Court in a firm, consistent effort to bring equality of opportunity to blacks in education and employment.

The lessons of the 1950's and 1960's confirmed the need for affirmative action. Governmental institutions met the challenge and, despite hostile public opinion, developed techniques, including busing, to desegregate public schools, and used timetables, goals, and ratios to integrate public and private workplaces. As a result, many black children now receive a better education, and black Americans now work in nearly every occupation, trade, and profession.

Now, as after Reconstruction, reaction has set in and opponents seek to end the affirmative action and desegregation that promote an integrated society. Some of these reactionaries rely on abstract, "neutral" concepts such as color blindness and individual merit. Others cite the costs and administrative burdens of desegregation, and still others appeal to the fears and apprehensions of those who feel threatened by the emergence of blacks into the mainstream of American society. None of these positions is true to the American constitutional ideals or to America's historical experience.

To break the cycle of repression, America must renew its commitment to full equality for all citizens. Victims of racial injustice cannot be shunted aside for another generation while the country debates the practical limitations of desegregation and affirmative action. Equality of opportunity must be established in the nation's schools, where children learn together and where today's equal educational opportunity can assure tomorrow's equal occupational opportunity.

Even more importantly, America must realize that purging the taint of racism requires more than color blindness and race neutrality in a free market. Color-blind remedies are also blind to the historical fact that the law sanctioned racial oppression for centuries. Because blacks suffered and whites prospered as classes, any realistic remedy must also be class-based. Without

these realizations, America must be prepared to endure the turbulent discord that has disrupted the country in the past and presently disrupts other separatist societies of the world. South Africa, Northern Ireland, and Lebanon provide vivid reminders that inequality of opportunity, violence, and bloodshed are the inevitable products of a separatist society. America must reject out of hand any policies that tend to separate the races.

If this country maintains its commitment to equal opportunity, a time will come when the need for affirmative action will disappear. This time will come when blacks and whites have substantial equality in wages, employment rates, housing conditions and opportunities, admissions to colleges and professional schools, and membership in trade organizations and unions; when minority groups are substantially represented in corporate board rooms, banks, the guiding bodies of the major political parties, Congress, and state legislatures. This time will come when there is racial parity in the positions where basic economic and political decisions are made.